

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



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

Applicant	'BD'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/07982024
Decision date	5 May 2026
Catchwords	FREEDOM OF INFORMATION – 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 – Whether including matter in the reasons for decision would cause that document to be an exempt document by virtue of ss. 47E(d) and/or 47F – Freedom of Information Act 1982 ss. 26(2), 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 13 May 2024.

Background

2. The National Health Practitioner Boards (the National Boards) have responsibilities relating to the regulation of health practitioners. Ahpra provides administrative assistance and support to the National Boards in exercising their functions.
3. The Applicant is a health practitioner. They received a written information request from Ahpra under Schedule 5 of the *Health Practitioner Regulation National Law Act 2009* (as it applies in each State and Territory) (the National Law) (Schedule 5 Notice) in relation to an investigation of a notification.
4. The Schedule 5 Notice stated that Ahpra was conducting an investigation into the Applicant's performance. However, this was an error. Ahpra was seeking information from the Applicant in relation to a notification about another health practitioner who was under investigation.

5. The Applicant subsequently made an administrative complaint to Ahpra about being incorrectly advised they were under investigation.
6. On 11 April 2024, the Applicant made the following request to Ahpra for access to documents:
 1. *Details of all AHPRA investigators and officers working on AHPRA matter [number], including but not limited to:*
 - *Names and roles of individuals involved.*
 - *Any logs or records of actions taken by these individuals in relation to the case.*
 2. *Evidence relied upon in the investigation of case number [number], specifically:*
 - *Any correspondence, notes, or documents identifying me as a third party of interest who may be able to assist AHPRA with the investigation*
 - *Documents detailing the rationale for initially associating me with this case and the subsequent process undertaken to correct this error.*
 3. *Documents that detail the procedures followed once the error was identified, including any internal review or feedback provided to the notifications team and the involved officers.*
 4. *The names of the AHPRA officers responsible for the issuance of the Schedule 5 Notice incorrectly associating me with case number [number], along with details of any corrective actions taken against or instructions provided to them following this incident.*
 5. *All communications, including emails, letters, and memos, related to the identification and subsequent correction of the administrative error involving my mistaken identification in relation to case number [number].*
 6. *Documents that detail the procedures followed once the error was identified, including any internal reviews or feedback provided to the notifications team and the involved officers.*
 7. *Details of any corrective actions taken against or instructions provided to them following this incident.*
 8. *Any policies, guidelines, or training materials updated or implemented as a result of this incident to prevent similar errors in future.*
7. In its decision dated 13 May 2024, Ahpra identified 2 documents that fell within the scope of the Applicant's request and released these documents in full. Ahpra's decision letter did not contain information either confirming or denying the existence of any further documents relevant to the Applicant's request under s. 26(2). To the extent that any documents may exist, Ahpra determined these documents were exempt in full under ss. 47E(d) and 47F.
8. The Applicant did not seek an internal review of Ahpra's decision.
9. On 12 June 2024, the Applicant sought a review of Ahpra's decision under s. 54L.

Scope of the review

10. The issues to be decided in this review are:
 - whether documents within the scope of the request would be exempt under s. 47E(d) and if so, whether giving the Applicant access to conditionally exempt documents at this time would, on balance, be contrary to the public interest
 - whether documents within the scope of the request would be exempt under s. 47F and if so, whether giving the Applicant access to conditionally exempt documents at this time would, on balance, be contrary to the public interest
 - whether including in the decision notice matter in response to the request under s. 26(2) would cause the reasons for the decision to be an exempt document.
11. During the review, Ahpra confirmed that it applied s. 26(2) to items 1 and 2 of the Applicant's request (as set out in [6] above), and also to item 3 to the extent that any documents within the scope of item 3 relate to the notification.
12. Ahpra confirmed that it did not apply s. 26(2) to items 4, 5, 6, 7 and 8 of the Applicant's request. It identified 2 documents within the scope of this part of the Applicant's request and released them in full. Ahpra further advised that no additional documents relevant to this aspect of the request exist.
13. In relation to item 4 of the Applicant's request, Ahpra stated that the request does not seek documents but instead seeks the identity of the Ahpra officer(s) responsible for issuing the Schedule 5 Notice. Ahpra noted that this information is already known to the Applicant, as the Schedule 5 Notice they received was signed by the officer who issued it.
14. In a review of an access refusal decision, Ahpra bears the onus of establishing that its decision is justified or that I should give a decision adverse to the Applicant.¹ However, it is open to me to obtain any information from any person, make any inquiries that I consider appropriate, and change the basis on which the decision is made.²
15. The Applicant and Ahpra were invited to make written submissions about the review. I have considered all relevant communications and submissions received from both the Applicant and Ahpra.
16. I have had regard to the object of the FOI Act, which is to give the Australian community access to information held by the Government, by requiring agencies to publish that information and by providing for a right of access to documents.³

Review of the exemptions

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

17. In its decision dated 13 May 2024, Ahpra found that documents within the scope of the Applicant's request, if they existed, would be exempt in full under s. 47E(d). As noted above, under s. 26(2) Ahpra

¹ s. 55D(1).

² ss. 55 and 55K.

³ s. 3(1).

neither confirmed nor denied the existence of documents relevant to the request, on the basis that such information would cause a document to be exempt.

18. 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 Ahpra and the National Boards.
19. The Office of the Australian Information Commissioner's FOI Guidelines (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.⁴
20. 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.⁵
21. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.⁶

Ahpra's operations

22. Under the National Law, the National Boards oversee the receipt, assessment and investigation of notifications about persons who are or were registered as health practitioners under the National Law.⁷
23. During the notification process, Ahpra supports the National Boards by collecting and assessing relevant information. Ahpra provides this information to the relevant National Board and the National Board is the regulatory decision-maker.
24. Under the National Law, all 'protected information' must be treated confidentially, subject to specific exceptions.⁸ '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.⁹ This includes when handling notifications.

Ahpra's submissions

25. Ahpra said in its decision dated 13 May 2024:

... [the Applicant was] issued with a Schedule 5 notice to produce information for [a notification]. This notice was not issued in respect of an investigation about [the Applicant], and [the Applicant] is not a party to the notification. As such, documents containing information relating to the management of a notification by Ahpra case officers, and an individual's interactions with Ahpra would, in this instance, be conditionally exempt from release under section 47E(d) of the FOI Act. The disclosure of that information would, or could reasonably be 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 reasons:

⁴ FOI Guidelines, [6.90].

⁵ Ibid, [6.18].

⁶ Ibid, [6.92].

⁷ For more information about the National Boards' functions refer to s. 35 of the National Law.

⁸ National Law, s. 216.

⁹ Ibid, s. 214 (definition of 'protected information').

- 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.’¹⁰
- 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 considered protected information within the meaning of section 214 of the National Law. It is an offence to disclose protected information unless an exception applies.¹¹
- If information was released under the FOI Act in the absence of authority or consent of the relevant parties, this would likely have a significant adverse impact on the future flow of information from members of the public, practitioners and third parties. Pertinently, this may inhibit individuals from expressing freely and providing complete and frank information out of concern that their personal information may be subject to disclosure under the FOI Act in circumstances where they had reasonably expected that the statutory confidentiality provisions would apply. In particular, practitioners would be discouraged from engaging in meaningful cooperation and sharing of information to assist with investigations and enquiries by agencies like the National Boards. This in turn would prejudice the integrity of investigations;
- It is integral for the efficient management of Ahpra and the National Boards’ functions that they can continue to meet an individual’s expectation of confidentiality over the protected information held by Ahpra and the National Boards. This maintenance of confidentiality is critical to ensuring that the National Registration and Accreditation Scheme is administered in an efficient and effective way; and
- As it is a core function of Ahpra under the National Law to regulate health professionals, damage to Ahpra’s ability to properly and efficiently conduct such regulation would have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

On this basis, [Ahpra considers] that confirming or denying the existence or non-existence of documents requested could reasonably be expected to adversely affect the operations of Ahpra and the National Boards. [Ahpra finds] this adverse effect to be serious and not insubstantial. [Ahpra] therefore [finds] that information of the type requested, in the present circumstances, is conditionally exempt under section 47E(d) of the FOI Act.

The Applicant’s submissions

26. The Applicant provided the following submission:

... the information I have requested is non-controversial in nature. The request primarily seeks clarity on administrative processes, identification of responsible officers, and any corrective actions taken. None of these elements should reasonably interfere with AHPRA’s functions or cause substantial harm...

¹⁰ *Meschino and Centrelink* [2002] AATA 627 [23].

¹¹ National Law, s. 216.

AHPRA has stated that it takes steps to prevent similar errors, but has not provided any substantive details about these measures. The requested documents would clarify:

- How the error occurred.
- What internal reviews or corrective actions were taken.
- Whether process improvements were made to prevent recurrence...

This information is directly relevant to assessing AHPRA's accountability and ensuring similar errors do not impact others...

AHPRA has invoked Sections 47E(d) and 47F to neither confirm nor deny the existence of the requested documents. However, these exemptions should not apply in this case...

AHPRA's position relies on a broad assertion that disclosure would affect the efficiency of its operations by discouraging future cooperation from practitioners and third parties. However, AHPRA has not:

- Provided any evidence that similar disclosures in the past have led to a decline in cooperation.
- Explained how confirming the existence of these documents would substantially impact operations.
- Considered the public interest in ensuring Schedule 5 Notices are issued correctly, particularly given the legal obligations imposed on recipients.

It is important to note that Schedule 5 Notices are enforceable by law, meaning that individuals are compelled to provide information regardless of their willingness. The claim that disclosure would deter cooperation is therefore not directly applicable in this context...

Application of certain operations of agencies exemption

27. I have considered whether documents within the scope of the Applicant's request, if they existed, would be exempt under s. 47E(d).
28. In the Applicant's request, they sought access to documents relating to the management of a notification about another health practitioner. The identity of that practitioner is not known to the Applicant and the Applicant is not a party to the notification.
29. Notifiers, practitioners, Ahpra officers and other third parties must be willing to provide information necessary to facilitate Ahpra and National Boards' assessment and investigation of notifications. This allows the relevant National Board to determine whether regulatory action is required to manage any risks posed by the health practitioner's health, conduct or performance.
30. As outlined in my previous decisions where I have considered the application of s. 47E(d),¹² 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 affirmed the ACNC's decision to exempt

¹² The Commissioner's decisions are published on her office's website: www.nhpo.gov.au/foi-review-decisions. See 'AA', 'AC', 'AD', 'AE', 'AF', 'AG', 'AI', 'JH', 'MS', 'AM', 'AN', 'AO', 'AP', 'AQ', 'AR', 'AS', 'AT', 'AU', 'AV', 'AZ', 'BA', 'BB' and 'BC'.

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.¹³

31. 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 a National Board in relation to a notification will be treated confidentially. If Ahpra discloses information of the type requested by the Applicant, a reasonable person could conclude that information prepared for a National Board in the future may not be treated confidentially. This in turn could reasonably be expected to affect how effectively Ahpra and the National Boards can carry out their functions, as the information they are able to access may be less readily provided or more difficult to obtain.
32. 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.¹⁴ 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...¹⁵
33. Taking all relevant factors into consideration, I am satisfied that disclosing information of the type requested by the Applicant, if it existed, could reasonably be expected to affect the future flow of information from notifiers, practitioners, Ahpra officers, and other third parties to Ahpra and the National Boards. Ahpra and the National Boards rely on candid communication from these parties to carry out their role in ensuring public safety.
34. In addition, the National Law imposes a duty of confidentiality in relation to protected information. I consider that release of the type of information requested by the Applicant, if it existed, could

¹³ Mahony, [22].

¹⁴ Spragg, [35] and [75].

¹⁵ Ibid, [78].

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

35. I consider that disclosure would prejudice the integrity and robustness of regulatory processes and thereby have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the National Boards.
36. Accordingly, I am satisfied that the documents requested by the Applicant, if they existed, would be conditionally exempt in full under s. 47E(d).
37. I am now required to consider whether it would be contrary to the public interest to give the Applicant access to the conditionally exempt material at this time.

Section 11A(5): The public interest test

38. 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.
39. In *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of Information)* [2019] AICmr 29 (6 June 2019) (Seven Network), 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.¹⁶

Factors favouring disclosure

40. 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.¹⁷
41. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.¹⁸
42. 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's activities

¹⁶ Seven Network, [47].

¹⁷ s. 11B(3).

¹⁸ FOI Guidelines, [6.231].

- facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency.

43. The Applicant submitted the following factors in favour of disclosure:

... Given that AHPRA has acknowledged [there] was an administrative error [in the Schedule 5 notice], there is a strong public interest in understanding how these errors are addressed and prevented...

A decision to uphold AHPRA's position may contribute to broader concerns regarding regulatory transparency, particularly among health professionals who rely on fair and consistent regulatory oversight. Ensuring that errors are properly reviewed and corrective measures are taken is fundamental to maintaining confidence in the system...

44. While I agree that there are public interest factors that favour disclosure, 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

45. Ahpra put forward the following factors against disclosure:

- The public interest in protecting and maintaining the integrity of Ahpra's processes. Ahpra's ability to register suitably qualified health practitioners is integral to the protection of the public.¹⁹ There is a strong public interest in ensuring proper processes for consumer protection, and that only suitable practitioners in various fields of the health profession are able to provide services to the public.²⁰
- The public interest in Ahpra and the National Boards 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 health practitioners in the future for regulatory purposes. This would have a significant adverse impact on the integrity and robustness of Ahpra's regulatory processes, and the ability of Ahpra and the National Boards to carry out their functions and duties in an effective manner.

46. 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 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.

47. 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.

¹⁹ *Ah Teo v Pacific Media Group* [2016] VSC 626 [30].

²⁰ *Hanes v Ahpra* [2013] VCAT 1270 [67] quoting *Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

Balancing the public interest factors for and against disclosure

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. In particular, I consider that disclosure of the documents requested, if they existed, 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
 - allowing a person to access their personal information or information relating to matters that otherwise concern them.
50. The factors against disclosure include the public interest in protecting and maintaining the integrity of Ahpra and the National Boards' 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 National Boards being able to carry out their statutory functions as efficiently and effectively as possible.
51. The proper and efficient management and investigation of health practitioners is an integral function of Ahpra and the National Boards 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 type of information requested by the Applicant.
52. Based on the available information, it is my view that that the public interest factors against disclosure outweigh those in favour of disclosure.
53. I am satisfied that giving the Applicant access to the conditionally exempt information, if it existed, at this time would, on balance, be contrary to the public interest.

Section 47F: Documents affecting personal privacy

54. Ahpra found that the documents within the scope of the Applicant's request, if they existed, would be exempt in full under s. 47F.
55. I have found that these documents, if they existed, would be exempt under s. 47E(d). I will therefore not consider whether they would also be exempt under s. 47F.

Section 26(2): Not providing information which would confirm or deny the existence of documents

56. Ahpra stated in its reasons for decision that, if the documents requested by the Applicant existed, they would be conditionally exempt in full under ss. 47E(d) and 47F. Relying on s. 26(2), Ahpra neither confirmed nor denied the existence of any documents within scope, on the basis that doing so would itself disclose exempt information.
57. Section 26(1) requires a decision-maker who has made a decision refusing to grant access to a document in accordance with a request to give notice in writing of the decision to the applicant,

setting out certain matters. Section 26(2) states that a notice under s. 26 is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

58. In some respects, s. 26(2) is similar to s. 25(2). Section 25(2) allows an agency or minister to give an applicant notice in writing that does not confirm or deny the existence of a document but instead tells the applicant that, if it existed, such a document would be exempt. In these circumstances, the agency or minister does not have to search for or conduct an inquiry into the nature of the document being sought. Rather, s. 25(2) requires only an assessment of whether a document of the kind requested is, or would be, an exempt document under ss. 33 (documents affecting national security, defence or international relations), 37(1) (documents affecting enforcement of law and protection of public safety) or 45A (Parliamentary Budget Office documents).²¹
59. Here, Ahpra has relied on s. 26(2) in conjunction with ss. 47E(d) and 47F.
60. Section 47E(d) provides that a document is conditionally exempt 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.
61. Section 47F provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased person).

Application of s. 26(2)

62. I have considered whether s. 26(2) applies here so as not to require Ahpra's decision notice to reference the documents sought by the Applicant on the basis that this would cause the decision notice to be an exempt document. While Ahpra relied on s. 26(2) in conjunction with ss. 47E(d) and 47F, my analysis here is limited to the application of s. 26(2) in conjunction with s. 47E(d).
63. In *TFS Manufacturing Pty Limited and Department of Health* [2016] AICmr 73 (31 October 2016), the Australian Information Commissioner considered the application of s. 26(2). In that case, the request related to a range of documents and the Department of Health made a decision giving access to some documents in full and in part. However, with respect to some of the documents sought, being correspondence between the Therapeutic Goods Administration (TGA) and six named individuals, the Department of Health found that, pursuant to s. 26(2), it did not have to disclose the existence of any such documents. As a result, one of the issues to be decided by the Commissioner was whether including any findings in relation to that part of the request would cause the reasons for decision to be an exempt document. The Commissioner noted how the Department of Health provided extensive confidential submissions addressing this matter, which were taken into account, along with the following:
 - the post market regulatory function of the TGA relies on information from a number of sources provided on a voluntary and confidential basis
 - there are particular sensitivities surrounding correspondence with the TGA as the decision-maker in relation to the registration of goods on the Australian Register of Therapeutic Goods
 - if individuals were aware that any communications they might have with the TGA might be disclosed then individuals may be less forthcoming and willing to report matters to the TGA for

²¹ FOI Guidelines, [3.104] and [3.105].

fear their privacy would not be protected or they may be subject to pressure or harassment from the sponsors of relevant goods

- the small pool of individuals identified by the applicant in terms of the FOI request.
64. The Australian Information Commissioner accepted that, in some circumstances, if individuals were aware that their identities or personal information could be disclosed in connection with particular subject matter through the FOI process, they may be reluctant to provide information to the TGA in the future. The Commissioner was satisfied that, in the particular circumstances of that case, further information with respect to the existence of any documents responsive to that part of the request could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the TGA's operations under s. 47E(d) and, further, that it would be contrary to the public interest to provide details of whether the individuals have had correspondence with the TGA.
65. The Australian Information Commissioner also considered the application of s. 26(2) in Mahony. I have provided a summary of the facts of that matter at [30] and noted that similarities can be drawn between provisions of the ACNC Act and the confidentiality provisions in the National Law.
66. In that case, the ACNC found that, pursuant to s. 26(2), it did not have to disclose the existence of some documents requested by the Applicant. As a result, one of the issues to be decided by the Australian Information Commissioner was whether including any findings in relation to that part of the request would cause the reasons for decision to be an exempt document.
67. In reaching a decision, the Australian Information Commissioner noted that, having regard to the context and scope of the FOI request, the nature of the ACNC's regulatory functions, and the secrecy provisions in the ACNC Act, disclosure of information on the existence of documents requested by the applicant in the reasons for decision would have the effect of revealing whether or not the building fund had been investigated by the ACNC, and that this information is protected by the secrecy provisions in the ACNC Act.
68. The Australian Information Commissioner was satisfied that disclosure of information on the existence of documents could reasonably be expected to have a substantial adverse effect on the ACNC's operations in carrying out its regulatory functions in relation to the investigation of not-for-profit entities. As a result, the Commissioner determined that the ACNC was not required to confirm whether documents requested by the applicant existed in accordance with s. 26(2). As I outlined at [31], it is my view that similarities can be drawn between provisions of the ACNC Act and the confidentiality provisions in the National Law.
69. I am satisfied that disclosure of information on the existence of documents requested by the Applicant in the reasons for decision would have the effect of revealing information about the management of a notification about another health practitioner, and that this information is protected by the confidentiality provisions in the National Law.
70. I consider that disclosure of information on the existence of documents would prejudice the integrity and robustness of regulatory processes and could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the National Boards.
71. I am therefore satisfied that s. 26(2) applies here to the extent that confirming or denying the existence of documents requested by the Applicant in Ahpra's decision letter would cause that letter to become exempt under s. 47E(d).

Conclusion

72. I affirm Ahpra's decision of 13 May 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.²²

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.²³

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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²² s. 57A.

²³ s. 60(3).

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