

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



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

Applicant	'BF'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/13762024
Decision date	4 August 2026
Catchwords	FREEDOM OF INFORMATION – Whether documents contain irrelevant matter – Whether disclosure could 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 is it contrary to the public interest to release the conditionally exempt documents – Freedom of Information Act 1982 ss. 22, 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 internal review decision of 26 June 2024.

Background

2. The Nursing and Midwifery Board of Australia (the Board) has responsibilities relating to the regulation of nurses and midwives. Ahpra provides administrative assistance and support to the Board in exercising its functions.
3. The Applicant is a registered nurse who was the subject of a notification made to Ahpra and the Board by their employer (the hospital).
4. The Board decided to take immediate action against the Applicant by imposing conditions on their registration.
5. Following investigation, the Board ended the immediate action and decided to take no further action in relation to the notification.

6. The Applicant made a request to Ahpra for access to certain documents. Following consultation with Ahpra, the Applicant requested:
 1. Video viewing record of [body worn camera] from Security Officer 1
 2. Video viewing record of [body worn camera] from Security Officer 2
 3. Patient records for [date] a. Entry from [the Applicant]
 4. E-mail from [witness] to supervisors reporting the incident
 5. [Incident management] report
 6. Notification summary from [notifier]... including the precise time that the notification was made to Ahpra
 7. Witness statement [name] [recorded by Ahpra]
 8. Practitioner's response [to the notification]
 9. Investigation Procedure letter
 10. Discipline Procedure outcome letter
 11. Practitioner's response to [the immediate action decision]
 12. [Workplace policy]
 13. Training record for [the Applicant]
 14. Practitioner reflections and insight
 15. Any correspondence or emails, which the Ahpra investigator obtained in the course of the investigation, (approx. [date] to [date])... either from or to: [the hospital] administration; medical or nursing staff employees; security staff employees; which elucidate information about the material facts, or which provide statements from those members of staff who were involved in or witnessed the originating incident
 16. The Decision and Actions document which includes the names and qualifications of the Board members and the reasons for the decision.
7. In its decision letter dated 29 April 2024, Ahpra identified 16 documents that fell within the scope of the Applicant's request. Ahpra decided to:
 - release 8 documents in full
 - exempt 2 documents in part under ss. 47E(d) and 47F
 - exempt 6 documents in full under ss. 47E(d) and 47F.
8. The schedule of documents in **Annexure 1** sets out Ahpra's decision in relation to each document.
9. On 27 May 2024, the Applicant requested an internal review of Ahpra's decision.
10. In its internal review decision letter dated 26 June 2024, Ahpra affirmed its decision.
11. On 25 August 2024, the Applicant sought a review of Ahpra's internal review decision under s. 54L.

Scope of the review

12. The issues I have decided in this review are:

- whether Ahpra reasonably interpreted the scope of the Applicant's request
- whether the information that Ahpra found to be irrelevant in document 16 is irrelevant (s. 22(1)(a)(ii))
- whether the documents that Ahpra found to be exempt under s. 47E(d) are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest
- whether the documents that Ahpra found to be exempt under s. 47F are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest.

13. Following enquiries made during this review, Ahpra agreed to provide the Applicant with an opportunity to view Documents 1 and 2 (body worn camera footage) at its premises on an administrative access basis (that is, outside the processes in the FOI Act). Ahpra maintained its decision that the documents are exempt from release in full under the FOI Act.

14. After viewing Documents 1 and 2, the Applicant maintained their request for access to copies of the documents. Accordingly, I have considered whether these documents are exempt under ss. 47E(d) and 47F.

15. Ahpra also submitted during the review that it no longer maintains that parts of Document 15, which was comprised of 44 documents between Ahpra and the hospital, are exempt under the FOI Act. Ahpra agreed to release parts of Document 15 that had already been provided to the Applicant or consisted of correspondence between the Applicant and the hospital.

16. Given the above, I have excluded from my review an assessment of the parts of Document 15 that Ahpra no longer maintains are exempt and has released to the Applicant.

17. Where I have found that one exemption applies to a document, I have not considered whether any additional exemptions apply.

18. 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

19. The Applicant and Ahpra were invited to make written submissions about this review. I have considered all communications and submissions received from the Applicant and Ahpra.

20. I have had regard to the object of the FOI Act, which is to give the Australian community access to information held by the Government, by requiring agencies to publish that information and by providing for a right of access to documents.³

¹ s. 55D(1)

² ss. 55 and 55K.

³ s. 3(1).

Interpretation of the request

21. In item 16 of the Applicant's FOI request to Ahpra, they sought access to:

The Decision and Actions document which includes the names and qualifications of the Board members and the reasons for the decision.

22. Ahpra identified 1 document relevant to this aspect of the request, being the Board's Decisions and Actions paper recording the decision to take no further action in relation to the notification. Ahpra released this document to the Applicant with irrelevant information removed under s. 22.

23. During the internal review process, and again during this review, the Applicant submitted that an earlier Decisions and Actions paper of the Board's Immediate Action Committee (IAC) should have also been identified by Ahpra as falling within the scope of item 16 of the Applicant's request.

24. During the review, Ahpra submitted that:

...Ahpra understood the wording of [item 16 of the Applicant's request] to mean the decisions and actions paper recording the National Boards' decision in relation to notification [number]. In [their] application for internal review, and [their] application for external merits review, the Applicant acknowledged that [they] sought information about National Board members present at the final meeting of the National Board for notification [number]...

We submit that the Applicant's interest has been for the record of the determinative decision made on [date], and [their] interest in the Decisions and Actions of the Immediate Action Committee appears to have come following the release of document 16 (Decisions and Actions). It is Ahpra's view that up until this time, we had a shared understanding with the Applicant about the scope of [their] request. The Applicant is aware that the notification was considered by the National Board more than once by virtue of [their] involvement in the show cause period.

Had the Applicant intended to request any and all records of decisions made by the National Board in relation to the notification, including decisions made with Immediate Action, [they] may have requested 'Document recording reasons for suspension' or 'Any record of a National Board decision for [notification number]' or 'All documents recording National Board decisions for [notification number]'. As such, we consider that the Applicant's additional request for 'any Decisions and Actions papers of the Immediate Action Committee of the [the Board]' is out of the scope request...The Applicant is welcome to make a further FOI request for any relevant documents if [they] wish.

25. The Office of the Australian Information Commissioner's FOI Guidelines (FOI Guidelines) explain that the starting point for determining the scope of an FOI request is the wording of the request itself.⁴ A request should be interpreted as extending to any document that might reasonably be taken to be included within the description used by the applicant.⁵ Requests should also be interpreted fairly and not in a narrow or pedantic manner.⁶

⁴ FOI Guidelines, [3.52].

⁵ Ibid.

⁶ Ibid, [3.54].

26. In considering the scope of item 16, I have had regard to the wording of the request, including the Applicant's references to a singular document described as 'the Decision and Actions document' and 'the decision'. While not determinative, this supports Ahpra's view that at the time of making the request, the Applicant was seeking access to a specific document, rather than all records of decisions made by the Board or the IAC.
27. I also accept Ahpra's submission that the Applicant appears to have only sought to identify and obtain access to the IAC's Decisions and Actions paper after receiving the Board's final Decisions and Actions paper, which referenced that document.
28. Further, in both the internal review application and the application for review made to my office, the Applicant described item 16 as seeking the names of the Board members who participated in the meeting at which the final decision was made. In particular, in their internal review application, the Applicant stated:
- The request for internal review, for release of more information, affects all of the following items:
- ...
10. Decisions and Actions Release, Section 22 Irrelevant information removed
- ...
- Item 10.
- I require to know the qualifications of the board members who participated in the decision made on [date of the Board's final decision]. The request for this information was made in the original FOI request when I requested the names of the board members.
29. Having regard to the wording of item 16 and the matters set out above, I am satisfied that Ahpra reasonably interpreted item 16 as referring to the final Board Decision and Actions paper where the Board decided to take no further action, rather than earlier decisions of the IAC during the notification process. I am therefore not satisfied that the earlier IAC Decisions and Actions papers fell within the scope of item 16 of the Applicant's request.
30. It remains open to the Applicant to make a new FOI request to Ahpra for those documents, framed in more specific terms.

Review of the exemptions

Section 22: Deleting irrelevant content from a document

31. Ahpra found certain information in Document 16 to be irrelevant to the Applicant's request. As explained above, Document 16 is the Board's Decisions and Actions paper from a Board meeting that considered the notification about the Applicant. Ahpra released an edited copy of this document to the Applicant with irrelevant information removed.
32. 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'.⁷

⁷ s. 22.

33. 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.⁸
34. The 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.⁹ Consideration should be given to consulting with the applicant before deciding to edit a document to delete irrelevant content.¹⁰

Finding

35. I have examined an unedited copy of Document 16. I found that the information Ahpra decided was irrelevant is the names of Board members who did not attend the Board meeting where the notification about the Applicant was considered.
36. As these Board members did not contribute to the decision that was made about the notification concerning the Applicant, I am satisfied that this information is irrelevant to the Applicant's request.
37. As such, I am satisfied that this information would not reasonably be regarded as falling within the scope of the Applicant's request.

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

38. Ahpra found Documents 1, 2, 3, 5, 7 and 15 to be conditionally exempt in full, and documents 4 and 6 to be conditionally exempt in part, under s. 47E(d). I have considered the application of s. 47F to Documents 1 and 2 below and will therefore not also consider the application of s. 47E(d) to these documents here.
39. As I have outlined at paragraphs [15] and [16] above, Ahpra no longer maintains that Document 15 is exempt in full and has released parts of that document to the Applicant. Accordingly, those released parts are not considered in this review.
40. 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.¹¹
41. 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.¹²
42. 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.¹³
43. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.¹⁴

⁸ *FM and Department of Foreign Affairs and Trade* [2015] AICmr 31, [15].

⁹ FOI Guidelines, [3.52].

¹⁰ *Ibid*, [3.84].

¹¹ s. 47E(d).

¹² FOI Guidelines, [6.90].

¹³ *Ibid*, [6.18].

Ahpra's operations

44. Under the *Health Practitioner Regulation National Law 2009* (as it applies in each State and Territory) (the National Law), the Board oversees the receipt, assessment and investigation of notifications about persons who are or were registered as nurses and midwives under the National Law.¹⁵
45. During the notification process, Ahpra supports the Board by collecting and assessing relevant information, which it provides to the Board. The Board is the regulatory decision-maker.
46. Under the National Law, all 'protected information' must be treated confidentially, subject to specific exceptions.¹⁶ '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.¹⁷ This includes when handling notifications.

Ahpra's submissions

47. Ahpra stated in its internal review decision dated 26 June 2024:

The information in the FOI documents that [Ahpra has] found to be conditionally exempt from disclosure under section 47E(d) consist of information comprising of correspondence with [the hospital], including the notifier and witnesses. The information includes their personal information such as contact details, their observations and opinion. The information also contains personal information of the third-party patient. This information was received or recorded during Ahpra's management of the notification.

[Ahpra is] satisfied that disclosure of the exempt information in the document 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 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',¹⁸
- 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;¹⁹

¹⁴ Ibid, [6.92].

¹⁵ For more information about the Board's functions, see s. 35 of the National Law.

¹⁶ National Law, s. 216.

¹⁷ Ibid, s. 214 (definition of 'protected information').

¹⁸ *Meschino and Centrelink* [2002] AATA 627 [23] (Meschino).

¹⁹ National Law, s. 216.

- Notifiers correspond with Ahpra in the context of communicating their concerns raised in a notification. Correspondence is provided on the understanding that the material would be used by Ahpra and the Board in certain contexts only and for the purposes of assisting the assessment of 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.”*²⁰

- If the relevant documents were released under the FOI Act, without the express consent of the relevant parties, it would likely have a significant adverse impact on the future flow of information from notifiers, witnesses, and other parties. Pertinently, this may inhibit individuals from expressing freely and providing complete and frank information out of concern that their communications may be subject to disclosure under the FOI Act. This would reduce the effectiveness of notifier participation in the regulatory process and in turn make the assessment of notifications less effective, slower and more costly; and
- As it is a core function of Ahpra under the National Law to provide assistance to the National Boards in overseeing assessment and investigation of notifications, damage to Ahpra’s ability to do this would have substantial adverse effect on the proper and efficient conduct of the agency.

The Applicant’s submissions

48. In their review application, the Applicant submitted:

...The conditionally exempted documents hold information about me, the applicant. The information is required because it provides information about the notification to Ahpra, including the grounds for the notification, and because those documents are relevant to the administration of justice and may be required as evidence for a future legal action...

I disagree with the reasons for failing to release the information requested. Neither the original decision or the internal review have given adequate consideration to case law; relevant sections of the FOI Act; the public interest factors in releasing the information; or properly considered the characterisation of the request and the reasons for the application; or provided adequate reasoning for refusing to release the requested documentation by:

1. Failing to consider that there has been no opposition to the release of the requested documentation from any of the employees of [the hospital], whether it was provided in confidence or not, and which has not been asserted by Ahpra...
7. Failing to explain why the information, (particularly item 8) if released, would ‘likely have a significant adverse impact on the future flow of information from notifiers, witnesses, and other parties’ in circumstances where the applicant has given an undertaking that the release

²⁰ *YJI v Australian Health Practitioner Regulation Agency* [2023] VCAT 206 at [66].

of the information will be kept strictly confidential and out of the public domain, thereby mitigating against the concern for the 'future flow' of information to the regulator.

8. Failing to cite an occasion where prior disclosures of conditionally exempted information have negatively affected the function of Ahpra...

1. In *Victoria Police v Marke* (2008) VSCA the Court emphasized the importance of transparency and interpreted the FOI Act in a manner which is consistent with its purpose, which is to promote openness and transparency in government agencies. The exemptions should be 'narrowly construed' (paras 95 & 96) to avoid undermining the purpose of the FOI Act. In particular there should be no assumption that obtaining access to a document is disclosure to the 'world at large' (ibid para 37)...

In my previous applications for access to the exempt information I indicated that I intend to utilise the information requested for a distinct purpose, which is consistent with Maxwell J decision in *Victoria Police v Marke*, to '...confine its use to the resolution of a discrete task ... which are consistent with the objects of the FOI Act' (ibid para 88).

The conditionally exempted documents are relevant to me and I have stated in my previous applications that I will not disseminate the information to the public space but use it only for my own purpose...

There is a nexus between the notification to Ahpra which was made by my employer and the reasons for the request to access to documentation. It concerns information about me and my nurses registration...

It is a failure of both procedural fairness in the process leading up to the notification if the affected practitioner cannot obtain all of the information relevant to the notification, as in my case, and it is a second failure of procedural fairness where the information requested is denied in an FOI application when there is no other avenue open to a practitioner other than to exercise the right to access the information under FOI legislation...

Disclosure of information which will be used in a confidential legal process can be protected from becoming public, and cannot affect the future functioning of Ahpra if the information is kept confidential for a specific purpose. The risk of the assumed predicted effect can be avoided by ensuring that the release of information is held in the strictest confidence for a specific purpose and only used for that purpose, in this case to obtain evidence relevant to the prosecution of a future legal action...

49. During the review, the Applicant submitted:

...The Court of Appeal in *Victoria Police v Marke* [2008] VSCA 218 held that exemptions must be narrowly construed (95)– (96) and assessed in the actual circumstances of the applicant, not on abstract assumptions (97)...

The information concerns:

- my colleagues,
- senior [the hospital] staff,
- Ahpra officers, and
- individuals whose identities and roles are already known to me...

Section 22 requires agencies to provide access to documents with exempt matter deleted where reasonably practicable. This is a mandatory obligation, not a discretionary option...

The decision in 'AS' [2025] NHPPC at [25]–[27] demonstrates that:

- you inspect documents,
- you separate exempt from non exempt material, and
- you consider partial release.

You also recognised at [42]–[45] that factual information and information relating to the applicant can be released.

Application of certain operations of agencies exemption

50. I have considered whether the Documents 3, 4, 5, 6, 7 and 15 are conditionally exempt in full or in part under s. 47E(d).
51. After inspecting these documents, it is my view that they were provided to, or created by, Ahpra while undertaking its functions under the National Law, namely to:
- assess the notification about the Applicant
 - provide information to the Board to support the Board's decision-making in relation to the notification.
52. The information Ahpra exempted in the relevant documents consists of correspondence between Ahpra and the hospital, including the notifier and witnesses, during the course of managing the notification. The documents include a third-party patient's medical records and body worn camera footage depicting the Applicant, staff at the hospital, and a patient receiving treatment.
53. Notifiers, witnesses and other third parties, such as employers and health services, must be willing to provide information necessary to facilitate Ahpra and the Board's assessment or investigation of a notification. This information is relied on by the Board to determine whether regulatory action is required to manage any risks posed by the relevant health practitioner's health, conduct or performance.
54. As outlined in my previous decisions where I have considered the application of s. 47E(d),²¹ 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 Commissioner affirmed the ACNC's decision to exempt documents falling within the scope of the request. In discussing whether s. 47E(d) applied in that case, the 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

²¹ The Commissioner's decisions are published on her office's website: <https://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', 'AZ', 'BA', 'BB', 'BC', 'BD' and 'BE'.

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.²²

55. 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 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 Board in the future may not be treated confidentially. This in turn could reasonably be expected to affect how effectively Ahpra and the Board can carry out their functions, as the information they are able to access may be less readily provided or more difficult to obtain.
56. 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.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...²⁴
57. Taking all relevant factors into consideration, I am satisfied that the disclosure of the exempt information could reasonably be expected to affect the future flow of information to Ahpra and the Board. Ahpra and the Board rely on candid communication from relevant parties to carry out their role in ensuring public safety.
58. In addition, the National Law imposes a duty of confidentiality in relation to protected information. I consider that release of the exempt information could reasonably be expected to reduce the confidence of relevant parties in Ahpra's ability to maintain the confidentiality of protected information.
59. 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 Board.
60. During the review, the Applicant submitted that they would be willing to provide an undertaking that any documents released to them would be kept confidential and out of the public domain. However, as noted by the Administrative Appeals Tribunal in *Meschino and Centrelink* [2002] AATA 627 (Meschino),

²² Mahony, [22].

²³ Spragg, [35] and [75].

²⁴ Ibid, [78].

access under the FOI Act is effectively disclosure to the world at large and is not conditional on the identity or intentions of the applicant.²⁵

61. Accordingly, I am satisfied that Documents 3, 5 and 7 are conditionally exempt in full, and that Documents 4, 6 and 15 are conditionally exempt in part under s. 47E(d).
62. 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

63. 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.
64. 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.²⁶

Factors favouring disclosure

65. 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.²⁷
66. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.²⁸
67. 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.²⁹ Public scrutiny of documents relevant to deliberations of Ahpra and the National Boards may improve the quality of advice and decision-making processes

²⁵ Meschino, [23].

²⁶ *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].

²⁷ s. 11B(3).

²⁸ FOI Guidelines, [6.231].

²⁹ 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 processes of Ahpra and the Board)
- allowing a person to access their personal information, or information relating to matters that otherwise concern them.

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

...the applicant's interest in understanding the basis of a notification...

...The public interest in ensuring proper processes for consumer protection do not prevail over the administration of justice in circumstances where the information will be used for a discrete and legitimate purpose and can be kept confidential to avoid release to the world at large.

69. I agree that disclosure of the exempt information 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 Board.

70. 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 conditionally exempt information.

Factors against disclosure

71. 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 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. There is a strong public interest in ensuring proper processes for consumer protection,³⁰ and that only suitable practitioners in various fields of the health profession are able to provide services to the public³¹
- 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 third parties in the future, thereby making the assessment and investigation of notifications more difficult.

72. 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.

73. 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

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

³¹ *Hanes v Ahpra* [2013] VCAT 1270 [67] quoting *Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

protecting the public in terms of regulating the provision of medical services. I consider this to be a persuasive point.

Balancing the public interest factors

74. 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).
75. In particular, I consider that releasing the exempt material 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.
76. The factors against disclosure include the public interest in protecting and maintaining the integrity of Ahpra and the 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 Board being able to carry out their statutory functions as efficiently and effectively as possible.
77. The proper and efficient management and investigation of health practitioners is an integral function of Ahpra and the 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 because of the disclosure of exempt information under the FOI Act.
78. Based on the available information, I am satisfied that the public interest factors against disclosure outweigh those in favour of disclosure.
79. 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

80. I am satisfied that Documents 3, 5 and 7 are exempt in full, and Documents 4, 6 and 15 are exempt in part, under s. 47E(d).

Section 47F: Documents affecting personal privacy

81. Ahpra found documents 1, 2, 3, 5, 7 and 15 to be conditionally exempt in full, and documents 4 and 6 to be conditionally exempt in part, under s. 47F.
82. I have found documents 3 to 7 and 15 to be exempt in full or in part under s. 47E(d). I will therefore not consider whether these documents are also exempt under s. 47F.
83. Documents 1 and 2 are body worn camera video footage files that depict the Applicant and other individuals, including health practitioners, security officers and a patient, in the context of providing

medical treatment and care in a hospital. The documents were provided to Ahpra by the hospital during Ahpra's investigation of the notification about the Applicant.

84. A document is conditionally exempt under s. 47F if its disclosure would involve the unreasonable disclosure of personal information of any person (included a deceased person).³²
85. The main requirements of this conditional exemption are that:
- a document contains 'personal information'
 - disclosure in response to the applicant's FOI request would be unreasonable³³
 - it would be contrary to the public interest to release the material at the time of the decision.³⁴
86. 'Personal information' has the same meaning as in the *Privacy Act 1988* (Cwlth), which provides that:
- ...personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:
- (a) whether the information is true or not; and
- (b) whether the information or opinion is recorded in material form or not.³⁵

87. The FOI Guidelines explain:

The information needs to be 'about' an individual – there must be a connection between the information and the person. This is a question of fact and depends on the context and circumstances. Some information is clearly about an individual – for example, name, date of birth, occupation details and medical records. A person's signature, home address, email address, telephone number, bank account details and employment details will also generally constitute personal information. Other information may be personal information if it reveals a fact or opinion about the person in a way that is not too tenuous or remote.³⁶

Joint personal information

88. The FOI Guidelines state that where it is not possible to separate an applicant's personal information from a third party's personal information, the exemption may be claimed if it is unreasonable to release the information.³⁷
89. Whether it is unreasonable to release the information may depend on the relationship between the individuals.

Unreasonable disclosure of personal information

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

³² s. 47F.

³³ s. 47F(1)

³⁴ s. 11A(5).

³⁵ FOI Act, s. 4(1) (definition of 'personal information'); Privacy Act, s. 6.

³⁶ FOI Guidelines, [6.131].

³⁷ Ibid, [6.144].

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

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

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information
- any submission an applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information
- whether disclosure of the information might advance the public interest in government transparency and integrity
- that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.³⁸

92. The FOI Guidelines explain that the test of 'unreasonableness' under s. 47F 'implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals'.³⁹

Ahpra's submissions

93. In its internal review decision, Ahpra found that Documents 1 and 2 contain the personal information of the notifier, witnesses and a third party patient.

94. Ahpra also stated in its internal review decision:

[Ahpra is] satisfied from [its] own enquiries that the exempted personal information is not well known or publicly available. Ahpra obtained this information in the course of conducting its regulatory functions under the National Law and in respect of the notification that was raised about [the Applicant]. There is an expectation, reinforced by the confidentiality provisions of section 216 of the National Law, that the personal information provided would be used by Ahpra and the Board within this context only and only in a manner consistent with the Privacy Act and Australian Privacy Principles.

[Ahpra has] also considered section 47F(3) of the FOI Act which provides that a document cannot be conditionally exempt where it contains only information about you (the applicant). [Ahpra has] not found the information to be conditionally exempt on this basis. Where documents contain joint-personal information, [Ahpra has] considered whether or not it would be possible to exempt the conditionally exempt material and release the remainder. In the present circumstances, the

³⁸ FOI Guidelines, [6.138].

³⁹ FOI Guidelines, [6.133].

information is so interconnected and intertwined with the personal information of the others that this would not be possible or would otherwise not be possible without rendering the information meaningless.

95. During the review, Ahpra further submitted:

In relation to the documents 1 and 2, we note that this is bodyworn camera footage which was provided to Ahpra by [the hospital]. The footage is unredacted and depicts [the Applicant], the patient and other individuals employed by [the hospital]. Access to documents under the FOI Act must be considered on the basis that they may be seen by anybody.⁴⁰ Release of these documents would disclose personal information of persons other than [the Applicant] without their consent and in circumstances where they were either receiving treatment as a patient or working in their capacity as a health practitioner or security officer. Given the sensitivity of this information and the context in which it was generated, it would be entirely unreasonable to provide this footage to [the Applicant] through the FOI Act noting that it would be without restriction as to use. Should [the Applicant] require access to these documents, [they] should consider other avenues, such as a request to [their] employer or through subpoena, which would impose adequate safeguards.

The Applicant's submissions

96. Paragraphs [48] and [49] are relevant here.

97. During the review, the Applicant provided the following submissions relevant to Documents 1 and 2 and s. 47F:

...Body worn video cameras which recorded the events were relied on for the notification. I was previously provided with the opportunity to see one of the videos after my union became involved, but not the other. It's not clear to me which [body worn camera] video I have seen. The body worn camera videos demonstrate my actions were not unreasonable in the circumstances and that my practise did not place the patient at risk or break the law.

....

I disagree with the reasons for failing to release the information requested. Neither the original decision or the internal review have given adequate consideration to case law; relevant sections of the FOI Act; the public interest factors in releasing the information; or properly considered the characterisation of the request and the reasons for the application; or provided adequate reasoning for refusing to release the requested documentation, by:

1. Failing to consider that there has been no opposition to the release of the requested documentation from any of the employees of [the hospital], whether it was provided in confidence or not, and which has not been asserted by Ahpra.
2. Failing to consider to what extent the personal information about third parties is already known to me.
3. Failing to cite any detriment or invasion of privacy that may occur to any person when no one has objected to release of the information and the nature of the personal information.

⁴⁰ *Meschino and Centrelink* [2002] AATA 627 [23].

4. Failing to consider the relationship, and the distinction between, the personal information and other exempted and relevant information in the requested documents.
5. Failing to explain why the information...from [the hospital], including the notifier and witnesses, is not distinguished from their personal information, when their personal information is not required and which can be redacted if necessary.
6. Failing to adequately explain why disclosure of the information which affects the applicant is unreasonable in the circumstances considering points 1 to 5 above.

...

For the grounds in...s 47F to apply, the predicted effect needs to be reasonably expected to occur. There must be more than merely an assumption or allegation that damage may occur if the documents were to be released or that privacy would be infringed.

In this case the identity of the persons involved are either known to me and/or are associated with the incident, the notification, or in the investigation of the notification. They include my colleagues, senior management at [the hospital] and Ahpra staff. All of these people are public servants either known to me or are identified by name in documents and correspondence and their role or purpose of their employment is known. They were performing their usual public duties.

I was previously informed by [the Ahpra decision-maker] in a telephone call that none of the third parties, including employees of the [the hospital], has objected to the release of documentation in my FOI application.

...

To reiterate:

- The personal information that I have requested cannot become public in circumstances where I have given an undertaking to prevent its release into the public domain.
- A narrower interpretation of the exemptions should apply, so that the documents which have been requested, and which provide the facts should be released rather than entire documents being exempted.
- Any future legal action that may occur will keep all information absolutely confidential in a legitimate legal process.
- The application seeks the information to know the information acquired in the investigation and information such as times and dates and decision making information which is requested, not people's personal details.
- The personal information can be anonymised or redacted if it includes personal information, or information which does not concern the applicant's personal information.
- Accessing the [body worn camera] videos [Documents 1 and 2] can be done via secure online access or via a legal practitioner. The patient's face can be obscured to maintain anonymity.
- Any future legal action against my employer will be conducted in the utmost confidentiality with a legal practitioner who is bound by confidentiality.

- As a registered nurse I give a professional undertaking to keep the utmost confidentiality of the information sought, as a complainant in a legal action, and not to use or divulge that information for any reason other than that described.

Application of the personal privacy conditional exemption

98. Having viewed Documents 1 and 2, I am satisfied that the body worn camera footage contains the personal information of the Applicant and other individuals, including their faces, voices and information about their interactions.
99. In considering whether disclosure of this personal information would be unreasonable, I have had regard to the sensitive nature of the personal information contained in the footage and the circumstances in which it was recorded, within a hospital environment while a patient was receiving medical care and treatment.
100. I have also had regard to the fact that the footage was provided to Ahpra by the hospital for the specific purpose of assisting the investigation of the notification about the Applicant, in circumstances where the individuals depicted in the footage would reasonably expect the information to be handled confidentially. There is also no evidence before me that any third party consented to disclosure of their personal information.
101. I accept Ahpra's submission that the nature of disclosure under the FOI Act is a relevant consideration. As I have outlined above at paragraph [60], citing Meschino, access granted under the FOI Act is effectively disclosure to the world at large. If the documents were released under the FOI Act, Ahpra would lose control over how the sensitive personal information contained in the footage is later used or shared.
102. While the Applicant was present during the events recorded in the footage, I am satisfied that the personal information contained in the footage is not otherwise well-known or publicly available.
103. For these reasons, I am of the view that disclosure of the identified personal information in the footage would be unreasonable in these circumstances.
104. Accordingly, I am satisfied that Documents 1 and 2 are conditionally exempt under s. 47F.
105. Having found Documents 1 and 2 to be conditionally exempt in full under s. 47F, I have also considered whether edited copies of the footage could be provided to the Applicant under s. 22. However, I am not satisfied that this would be reasonably practicable.
106. The recordings contain third party personal information in both audio and visual form throughout the footage, with the Applicant's personal information closely intertwined with that of third parties. Removing that information would require extensive pixelation and muting throughout the footage. In my view, the resulting footage would be heavily edited, difficult to follow and of limited meaningful value to the Applicant.
107. 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

Factors favouring disclosure

108.Regarding the public interest factors for disclosure, I note the factors described at paragraphs [65] to [68] above in relation to the application of s. 47E(d).

109.I agree with the public interest factors identified by Ahpra and the Applicant.

110.While I agree there are public interest factors that favour disclosure of Documents 1 and 2, these factors must be balanced against any public interest factors opposing disclosure when determining whether access should be given to a conditionally exempt document.

Factors against disclosure

111.Regarding the public interest factors against disclosure, I note the factors described at paragraphs [71] to [73] above in relation to the application of s. 47E(d).

112.Ahpra also identified the following factor against disclosure that relates specifically to s. 47F:

[Disclosure would cause] ... prejudice to an individual's right to privacy, particularly where the information is not well known, or publicly available and in circumstances where there is an expectation, reinforced by statute, that their personal information would be confidential. The personal privacy exemption is designed to prevent the unreasonable invasion of a third party's privacy.

113.I accept that the prejudice to the protection of an individual's privacy is a factor that weighs heavily against disclosure.

Balancing the public interest factors

114.In balancing the public interest in this case, I have considered the nature of the conditionally exempt information in Documents 1 and 2, the circumstances in which it was provided to Ahpra and the submissions from Ahpra and the Applicant.

115.In these circumstances, I find that greater weight should be given to the public interest factors against disclosure. As such, I find that disclosure at this time would be contrary to the public interest.

Finding

116.Accordingly, I am satisfied that Documents 1 and 2 are exempt in full under s. 47F.

Conclusion

117.Under s. 55K, I affirm Ahpra's internal review decision of 26 June 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.⁴¹

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.⁴²

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.

⁴¹ s. 57A.

⁴² s. 60(3).

Annexure A: Schedule of documents

Document number	Document description	Ahpra's decision	NHPPC's decision
1	Body worn camera video	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47F
2	Body worn camera video	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47F
3	Patient records	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47E(d)
4	Email from witness to supervisors	Exempt in part ss. 47E(d) and 47F	Exempt in part s. 47E(d)
5	Incident management report completed by [the hospital]	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47E(d)
6	Notification summary	Exempt in part ss. 47E(d) and 47F	Exempt in part s. 47E(d)
7	Signed witness statement	Exempt in full ss. 47E(d) and 47F	Exempt in full s. 47E(d)
15	Correspondence with [the hospital] (44 documents)	Exempt in full ss. 47E(d) and 47F	Exempt in part s. 47E(d)
16	Decisions and Actions paper	Release s. 22 irrelevant information removed	Release s. 22 irrelevant information removed

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