

'AI' and Australian Health Practitioner Regulation Agency (Ahpra)



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

Applicant	'AI'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/01272022
Decision date	23 November 2022
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 it is contrary to the public interest to release conditionally exempt documents – Freedom of Information Act 1982 s. 47E(d)

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

Decision

1. Under s. 55K I affirm Ahpra's internal review decision of 1 February 2022.

Background

2. The Applicant made a notification to Ahpra and the Medical Board of Australia (the Medical Board) about a medical practitioner (the Practitioner).
3. The Medical Board decided to take no further action in relation to the notification.
4. The Applicant made a request to Ahpra for access to:
[the Practitioner]'s response to [the Applicant]'s [notification] dated [date] and being document ID [document reference number].
5. In its decision letter dated 17 December 2021, Ahpra identified one document that fell within the scope of the Applicant's request. Ahpra decided to exempt the document in full under ss. 47E(d) and 47F.
6. On 4 January 2022, the Applicant requested an internal review of Ahpra's decision. In its internal review decision letter dated 1 February 2022 Ahpra affirmed its original decision.
7. On 5 February 2022, the Applicant sought a review of Ahpra's decision under s. 54L.

Scope of the review

8. The issues I have decided in this review are:
 - whether the document that Ahpra found to be exempt under s. 47E(d) is conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest
 - whether the document that Ahpra found to be exempt under s. 47F is conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest.
9. Where I have found one exemption ground applies to the document, I have not considered whether any additional exemptions ought to also apply.
10. In a review of an access refusal decision, Ahpra bears the onus of establishing that its decision is justified or that I should give a decision adverse to the Applicant.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
11. The Applicant and Ahpra were invited to make a written submission as part of this review. I have considered all relevant communications and submissions received from the Applicant and Ahpra.
12. I have had regard to the object of the FOI Act, which is to give the Australian community access to information held by the Government by requiring agencies to publish that information and by providing for a right of access to documents.³

Review of the exemptions

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

13. Ahpra found the Practitioner's response to the Applicant's notification about the Practitioner (the document) to be conditionally exempt in full under s. 47E(d).
14. 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.⁴
15. 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.⁵
16. The FOI Guidelines further explain that 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'.⁶ The word 'substantial', taken in the context of substantial loss or damage, has been

¹ s. 55D(1).

² ss. 55 and 55K.

³ s. 3(1).

⁴ s. 47E(d).

⁵ FOI Guidelines [6.101] - [6.103].

⁶ FOI Guidelines [5.20].

interpreted as ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.⁷

17. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.⁸

Ahpra’s operations

18. Under the Health Practitioner Regulation National Law as in force in all states and territories of Australia (the National Law), Ahpra and the Medical Board accept and manage notifications about registered medical practitioners.⁹
19. During the notifications process, Ahpra supports the Medical Board by collecting and assessing relevant information. In general, Ahpra provides this information to the Medical Board and the Medical Board decides whether to take regulatory action in relation to the notification.
20. Under the National Law, all ‘protected information’ must be treated confidentially, subject to specific exceptions.¹⁰ ‘Protected information’ means any information that comes to a person’s knowledge in the course of, or because of, the person exercising functions under the National Law. This includes when handling notifications.¹¹

Ahpra’s submission

21. Ahpra said in its original decision:

... the information ... [Ahpra] have found to be conditionally exempt from disclosure under section 47E(d) consists of:

- information comprising the submissions of [the Practitioner], in the context of responding to the issues raised in [the Applicant]’s notification
- information relating to [the Practitioner]’s personal affairs, such as personal employment, training and biographical information and other information of a personal nature.

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

- Information provided to Ahpra and the National Boards is provided 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* (Cwlth) (the Privacy Act). Practitioner submissions are provided to Ahpra and the National Boards in the context of responding to the issues raised in a notification. Submissions are 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 investigation into the matters raised.

⁷ FOI Guidelines [5.20].

⁸ FOI Guidelines [5.21].

⁹ For more information about the Board’s functions see [s. 35 of the National Law](#).

¹⁰ National Law, s.216.

¹¹ National Law, s.214 (definition of ‘protected information’).

- If the documents were released under the FOI Act, without the express consent of the relevant parties, this would likely have a significant adverse impact on the future flow of information from those 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 practitioner submissions and in turn make the investigation of notifications less effective, slower and more costly.
- It is integral for the efficient management of [notifications] that Ahpra can continue to meet an individual practitioner’s expectation of confidentiality over the communications and documents comprising their submissions, which are provided to Ahpra to assist in its investigation. This maintenance of confidentiality is critical to ensuring that investigations are carried out both efficiently and effectively. In *Spragg v Australian Health Practitioner Regulation Agency* at [78], the tribunal remarked that:

“the proper and efficient conduct of the operations of the agency are assisted by the circumstance that information provided to it by a registered health practitioner under compulsion is protected information and its disclosure is prohibited. The agencies operations are advanced when a registered health practitioner is forthright and frank in providing information when required. The Tribunal finds that the prospects of a forthright and frank answer are considerably enhanced in circumstances where the practitioner has confidence that the information provided is protected information.”¹²

[Ahpra] note [the National Health Practitioner Privacy Commissioner (the Commissioner)] considered these issues in several of its recent review decisions¹³. In these review decisions, the Commissioner noted the strict confidentiality obligations imposed by section 216 of the National Law and commented on the reasonable expectation that information provided to Ahpra or the Board in the course of exercising its investigative functions will be treated confidentially. The nature of the document sought under the current FOI application cannot be distinguished in substance from those considered by the Tribunal in *Spragg*.

- 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.

The Applicant’s submissions

22. The Applicants submits that:

It is ... unreasonable to assume that disclosure would have a substantial adverse impact on the operation of the relevant agency... the role [of Ahpra] is to make assessments and investigate, that is,

¹² *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103, [78].

¹³ ‘AD’ and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2021]; ‘AC’ and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2021]; ‘AA’ and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2020]; ‘MS’ and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2020]; ‘JH’ and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2020].

to thoroughly search for facts, especially those that are hidden or need to be sorted out in a complex situation and consider all the information about a situation and make a judgment. The mere fact that a practitioner may not be entirely candid would not have a substantial adverse impact on an assessment if that assessment was conducted fully and properly. An assessment or investigation implies (and requires) an iterative back-and-forth testing of information, that is, one that allows the parties in the assessment or investigation (with the assistance of the investigator) to test the facts being alleged by the other party. If anything, the disclosure of information facilitates an assessment or investigation, it does not have (as required for the exemption to apply) “a substantial adverse effect” on it. A lack of candour by the Practitioner may well be exposed by giving the [notifier] the opportunity to reply to the Practitioner’s version of events...the question arises as to how agencies know whether a Practitioner is being candid or not when the [notifier] is unable to respond to what the Practitioner has alleged..... the personal privacy exemption is designed to prevent the unreasonable invasion of third parties’ privacy. In this case, [the Practitioner] is not a third party in the traditional sense, he is a party to this matter... many details of the Practitioner’s personal employment, training and biographical information are publicly available (in relation to his employment and training, should be also available) ... the inconsistency is that if [the Practitioner] was being open and honest in his recollection of the facts, why would [they] object to that being provided to [the Applicant’s] wife and [the Applicant]. The “confidentiality” protection afforded by [NHPO] promotes, not prevents, Practitioners from making untrue or misleading statements, because Practitioners know they are protected from [notifiers] scrutinising a Practitioner’s statements and providing a counter-factual narrative ... as the substantial portions of [the Practitioner’s] response should relate to either [the Applicant’s] wife or [the Applicant], such personal information should be provided as a matter of right. It would not be unreasonable for such parts to be released ... any joint information would most likely involve the three main participants. [The Practitioner], [the Applicant’s] wife and [the Applicant]. It is difficult to envisage how this information is so complex that it cannot suitably be redacted where appropriate especially as this is [the Applicant’s wife] first consultation with [the Practitioner]. [The Applicant’s] wife’s consent should obviate any material concerns ...

Application of the certain operations of agencies exemption

23. I have considered whether the document is conditionally exempt in full under s. 47E(d).
24. After inspecting the relevant document, I am of the view that the document was provided to Ahpra while Ahpra was undertaking its functions under the National Law, namely to:
 - assess the Applicant’s notification about the Practitioner’s performance
 - provide information to the Medical Board to support the Medical Board’s decision-making.
25. Practitioners must be willing to provide information necessary to facilitate Ahpra and the Medical Board’s assessment and investigation of a notification. This allows the Medical Board to determine whether regulatory action is required to manage any risks posed by the relevant medical practitioner’s health, conduct or performance.
26. As outlined in my decisions of ‘AA’ ‘AC’, ‘AD’, ‘AE’, ‘AF’, ‘AG’, ‘JH’ and ‘MS’¹⁴, 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

¹⁴ <https://www.nhpo.gov.au/foi-review-decisions>.

request was for access to all documents relevant to investigations conducted by the Australian Charities and Not-for-profits Commission (ACNC) into concerns relating to a particular building fund. The Australian Information Commissioner affirmed the ACNC's decision to exempt documents falling within the scope of the request. In discussing whether s. 47E(d) applied in that case, the Australian Information Commissioner stated:

The fact that s. 150-25 of the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) protects information provided to or obtained by the ACNC under the ACNC Act from disclosure, leads me to be satisfied that the ACNC, as it contends, relies on sensitive information being provided to it on a voluntary basis and on the understanding that the information will not be disclosed to third parties. As the ACNC explained in its reasons for decision..., I accept that the rationale for this secrecy provision is to establish a regulatory regime where the ACNC can discharge its regulatory functions in an environment of trust and engagement with the not-for-profit sector.¹⁵

27. It is my view that similarities can be drawn between provisions of the ACNC Act and the confidentiality provisions in the National Law. Section 216 of the National Law creates a reasonable expectation that information provided to Ahpra or the Medical Board in relation to a notification will be treated confidentially. If Ahpra discloses the document requested by the Applicant, a reasonable person could conclude that information prepared for the Medical Board in the future may not be treated confidentially. This in turn could reasonably be expected to affect how effectively Ahpra and the Medical Board can carry out their functions, as the information they are able to access may be less readily provided or more difficult to obtain.

28. 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.¹⁶ In making their 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...¹⁷

29. Taking all relevant factors into consideration, I am satisfied that disclosing the document could reasonably be expected to affect the future flow of information from practitioners to Ahpra and the

¹⁵ *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019), [22].

¹⁶ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [35], [75].

¹⁷ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [78].

Medical Board. Ahpra and the Medical Board rely on candid communication from practitioners to carry out their role in ensuring public safety.

30. In addition, the National Law imposes a duty of confidentiality in relation to protected information. I consider that release of the document could reasonably be expected to reduce practitioner confidence in Ahpra's ability to maintain the confidentiality of protected information.
31. I consider that disclosure of the document would prejudice the integrity and robustness of the notifications process and thereby have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the Medical Board.
32. Accordingly, I am satisfied that the document is conditionally exempt under s. 47E(d).
33. 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

34. 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.¹⁸
35. 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.¹⁹

Factors favouring disclosure

36. The FOI Act provides public interest factors to be considered, including that disclosure would:
 - promote the objects of the FOI Act (including all the matters set out in ss. 3 and 3A)
 - inform debate on a matter of public importance
 - promote effective oversight of public expenditure
 - allow a person access to his or her personal information.²⁰
37. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.²¹
38. In forming its decision, Ahpra considered the following factors in favour of disclosure:

¹⁸ s. 11A(5).

¹⁹ *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].

²⁰ s. 11B(3).

²¹ FOI Guidelines [6.19].

- promoting the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of the Government’s activities²²
 - public scrutiny of Ahpra and the National Boards deliberations may improve the quality of advice provided in those processes
 - facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency
 - revealing information that informed a decision-making process
 - allowing a person to access their personal information, or information relating to matters that otherwise concern them.
39. I agree that disclosure of the document would promote the objects of the FOI Act and reveal information that informed a decision-making process, which may in turn improve the quality of advice and decision-making processes of Ahpra and the Medical Board.
40. While I agree there are public interest factors that favour disclosure of the document, 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

41. Ahpra put forward the following factors against disclosure:
- the public interest in protecting and maintaining the integrity of Ahpra’s investigative processes. Ahpra’s ability to receive, assess and investigate notifications in respect of the health, performance and/or conduct of registered health practitioners is integral to the maintenance and enforcement of the National Law. There is a strong public interest in ensuring proper processes for consumer protection,²³ and that only suitable practitioners in various fields of the health profession are able to provide services to the public²⁴
 - 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
 - the prejudice to an individual’s right to privacy, particularly where the information is not well known, or publicly available and in circumstances where they understood their personal information would be confidential. The personal privacy exemption is designed to prevent the unreasonable invasion of a third party’s privacy.²⁵ I consider that the prejudice to the protection of an individual’s right to privacy is a factor that weighs heavily against disclosure in this case
 - it is in the public interest, and vital to the functions of Ahpra in assessing notifications, that respondents to notifications are able to freely express in confidence the matters they believe, in good faith, are relevant to the fair assessment of the notification at hand without fear of reprisals

²² s. 3(2)(b).

²³ *Ah Teo v Pacific Media Group* [2016] VSC 626, [30].

²⁴ *Hanes v Ahpra* [2013] VCAT 1270, [67] quoting *Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

²⁵ *Re Veale and Town of Bassendean* [1994] WAICmr 4.

of collateral litigation or concern that the information provided will be used to their detriment in other forums. Their inability to be open and honest will in turn have an adverse effect on the proper and efficient conduct of the operations of Ahpra and the National Boards.²⁶

42. I also considered the Victorian Civil and Administrative Tribunal's decision in *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013). In that case, 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 in ensuring its ability to investigate notifications is not hampered by the disclosure of confidential information, or the use of information for purposes extraneous to Ahpra's functions.

Balancing the public interest factors

43. The proper and efficient assessment and investigation of notifications is an integral function of Ahpra and the Medical Board under the National Law. It would be contrary to the public interest if these processes (and by extension, the Medical Board's core function to ensure the protection of the health and safety of the public) were prejudiced as a result of the disclosure of the document under the FOI Act. In addition, the prejudice to the protection of the Practitioner's privacy is a factor that weighs heavily against disclosure.
44. Based on the available information, I am satisfied that the public interest factors against disclosure outweigh those in favour of disclosure.
45. I am satisfied that giving the Applicant access to the conditionally exempt material at this time would, on balance, be contrary to the public interest.

Finding

46. I am satisfied that the document is exempt under s. 47E(d).

Section 47F: Documents affecting personal privacy

47. Ahpra also found the document to be conditionally exempt under s. 47F.
48. I found the document to be exempt in full under s. 47E(d). I will therefore not consider whether the document is also exempt under s. 47F.

Conclusion

49. Under s. 55K I affirm Ahpra's internal review decision of 1 February 2022.

Richelle McCausland

National Health Practitioner Privacy Commissioner

²⁶ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017); *'MS' and the Australian Health Practitioner Regulation Agency (Freedom of Information)* [2020]; *'JH' and the Australian Health Practitioner Regulation Agency (Freedom of Information)* [2020].

Review rights

If a review party is not satisfied with the Commissioner's review decision, the party may apply to the relevant tribunal to have the decision reviewed. This application must be made within 28 days after the party receives the Commissioner's decision.²⁷

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.²⁸

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:

- within 28 days after a review party receives the Commissioner's review decision
- within further time that the Supreme Court or another appropriate court allows
- 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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²⁷ s. 57A.

²⁸ s. 60(3).