‘AJ’ and Australian Health Practitioner Regulation Agency (Ahpra)

National Health Practitioner Privacy Commissioner

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

Applicant	‘AJ’
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/09832021
Decision date	20 January 2023
Catchwords	FREEDOM OF INFORMATION – Whether documents contain deliberative matter prepared for a deliberative purpose – Whether it is contrary to the public interest to release conditionally exempt documents – Whether disclosure would endanger the life or safety of a person – Freedom of Information Act 1982 ss. 47C and 37(1)(c)

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 vary Ahpra’s decision of 23 September 2021.
2. I substitute my decision that the six documents that Ahpra found to be exempt under ss. 47C and 47E(d) (and contends are also partially exempt under s. 37(1)(c)) are exempt under s. 47C and partially exempt under s. 37(1)(c).

Background

3. The Health Practitioner Regulation National Law (the National Law) establishes the National Boards as the responsible entities for the regulation of 16 health professions. Ahpra provides administrative assistance and support to the National Boards in exercising their functions. Section 35 of the National Law outlines that the functions of the National Boards include developing and approving standards, codes and guidelines for the professions.[1]

[1] Health Practitioner Regulation National Law, s. 35.

4. The Applicant made a request to Ahpra for access to certain documents in relation to Ahpra and the National Boards' published position statement, "Registered health practitioners and students and COVID-19 vaccination" (the Position Statement). Following consultation with Ahpra, the Applicant clarified their request to:

   … all emails between AHPRA board members and… the Pharmacy board for the time period 1st Feb 2021 to 10th March 2021

   - *email addresses and names of non-board members may be redacted*
   - *personal details outside the scope of this request are not required*
   - *duplicates are not required*
   - *board members should include the executive board and managers listed at Australian Health Practitioner Regulation Agency - Ahpra Senior Managers*
   - *the Agency Management committee as per your email, in addition to any other members of AHPRA or its affiliates that contributed in whole or part to the statement released in whole or part released on 9th March 2021 titled "Registered health practitioners and students and COVID-19 vaccination – AHPRA position statement".*

5. Ahpra identified six documents that fell within the scope of the Applicant's request in its decision letter dated 23 September 2021. Ahpra decided to exempt the six documents in full under ss. 47C and 47E(d).

6. On 9 November 2021 the Applicant sought a review of Ahpra's decision under s. 54L.

Scope of the review

7. Ahpra decided the six documents are exempt in full under ss. 47C and 47E(d). During the review, Ahpra submitted that s. 37(1)(c) also applies to the names and contact details of Ahpra officers and members of the Pharmacy Board of Australia (the Pharmacy Board) found in the six documents.

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

   - whether the documents that Ahpra found to be exempt under s. 47C are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest
   - whether the documents that Ahpra contends to be exempt under s. 37(1)(c) are exempt under that provision.

9. In a review of an access refusal decision, Ahpra bears the onus of establishing that its decision is justified.[2] 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.[3]

10. 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.

[2] s. 55D(1).

[3] ss. 55 and 55K.

11. 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.[4]

Review of the exemptions

Section 47C: Documents subject to deliberative processes

12. Ahpra found the six documents to be exempt in full under s. 47C.

13. A document is conditionally exempt under s. 47C if its disclosure would disclose deliberative matter in the nature of, or relating to, either:

    - an opinion, advice or recommendation that has been obtained, prepared or recorded
    - a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister.[5]

14. The term 'deliberative matter' is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.[6]

15. The main requirements of this conditional exemption are that:

    - the document contains or relates to 'deliberative matter'[7]
    - the document was prepared for a 'deliberative purpose'[8]
    - the document contains material that is not 'purely factual' or non-deliberative[9]
    - it would be contrary to the public interest to give access at the time of the decision.[10]

16. In the Administrative Appeals Tribunal decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information*) [2015] AATA 945, Deputy President Forgie explained that:

> …the meanings of the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.[11]

The Applicant's submissions

17. The Applicant submits:

> …the reason for the request is that Ahpra, whether independently or under undue (and potentially unlawful) influence of the Pharmacy Board, unilaterally created an edict which contravenes the

[4] s. 3(1).

[5] s. 47C(1).

[6] *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr71, [38].

[7] Ibid.

[8] Ibid.

[9] s. 47C(2).

[10] s. 11A(5).

[11] *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945, [39].

duty of all Australian doctors to speak freely in relation to the introduction of a new drug which has now clearly shown safety signals of concern, recognised by the [Therapeutic Goods Administration]. It is possible that the silencing of doctors in this way has resulted in unnecessary deaths as a result of this edict.

18. The Applicant further submits:

> …it is glaringly obvious that the genesis of the unlawful (9th March) edict by Ahpra is absolutely relevant to the public interest. The Freedom of Information Act is specifically intended to allow the Australian public the right to investigate wrongdoing and hold public officials to account. It specifically is there to not allow public officials to hide their wrongdoing and by extension not allow those who wish to hide their wrongdoing to facilitate it.
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> …Since my original complaint a number of verified and verifiable reports have emerged of complaints of fraud and improper conduct relating to the procurement, design and validation of Covid-19 vaccines, and in particular the Pfzier vaccine. In addition there have been recent declarations that the related mandates are unlawful and a number of court cases are currently in process all the way to the [H]igh [C]ourt of Australia…There can also be no defence from [the Commissioner] – irrespective of the science behind whether the covid vaccines are "effective" or "not effective" that fulfilling such a request goes against the public interest given that every single Australian who wanted or was coerced to receive a covid vaccine has now had one.

Ahpra's submissions

19. Ahpra said in its decision:

> …[The six documents] comprise of preliminary consultation and deliberations between Ahpra and the National Boards involved in the process of developing the position statement, "Registered health practitioners and students and COVID-19 vaccination". [The six documents] contain feedback from key stakeholders and their comments on in-progress drafts of the statement with the aim of testing and approving the document for publication. [Ahpra is] of the view that this information is clearly deliberative and was utilised by Ahpra and the National Boards in the course of their deliberative processes and for the purposes of refining the position statement and determining the course of its subsequent publication.
>
> The deliberative material…identified does not contain operational information (as defined in s. 8A) or purely factual material. It does not include reports of scientific or technical experts, reports of a prescribed body or organisation, or the record or reasons for a final decision given in the exercise of a power or adjudicative function.
>
> To the extent that the information may be of a factual nature, such information is an integral part of the deliberative content and purpose of [the six documents] or is otherwise so embedded in or intertwined with the deliberative content such that it is impracticable to separate it.

20. During the review, Ahpra further submitted:

> At the heart of the matter is the effect that the release of deliberative information would have on the deliberative process itself. It is immaterial, in [Ahpra's] view, whether the information contained within a deliberative document is assessed as being benign in nature or similar to the content ultimately made public through the release of the position statement. In fact, in this case, the information within the [six] documents is largely limited to editorial feedback on [the] draft

position statements and reflects, to a large extent, the content of the final published position statement. What is important is the effect that release would have on the deliberative process itself.

People participating in deliberative processes must be free to raise and discuss issues openly, frankly and honestly. If a deliberative participant believes that their views and the issues they raise may be published to the world at large then this is likely to influence [the] way they approach decision-making. For example, a person may [be] less likely to raise issues for discussion in circumstances where they may attract personal criticism from a section of the public even where a debate about the issue is in the public interest. This, [Ahpra] suggest[s], is the core of the public policy underpinning the existence of the deliberate materials conditional exemption itself.

In [Ahpra's] view, the publication of the documents under the [FOI Act] would have the same effect on the conduct of policy deliberations under the National Law as a direction that the deliberative process must be held in a forum open to the public.

In the present circumstance, it is unlikely that National Boards would consult or liaise with each other using email or other informal means about future deliberative matters if the detail of the deliberations would later be accessible under the FOI Act. This would add unnecessary cost and expense to deliberative processes by encouraging decision-makers to approach such deliberations with greater formality.

It is difficult to see how the release of the [six] documents would aid participation in democracy or inform a public disclosure about public policy. The views expressed by individual participants in a deliberative process (or whether they expressed any contrary view at all) do not aid the public discussion about the merits of the position statement itself. Members of the public have been informed about how National Boards interpret the Codes of Conduct by the position statement and are free to express their views about the merits of that position by participating in the Australian political system.

[Ahpra] would like to draw the [National Health Practitioner Privacy] Commissioner's attention to the recent case of *BKXP and Department of Foreign Affairs and Trade* [2022] AATA 423 (2 March 2022) (*BKXP*) in which, at paragraph 27, Deputy President Rayment stated:

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

The circumstances of *BKXP* is analogous, to the extent to which they relate to the application of s. 47C of the FOI Act to that of Ahpra and National Boards. The documents in question are subject to a statutory secrecy provision (see ss. 214 and 216 of the National Law) and reflect the advice of their author or authors are they contributed to the deliberative process.

Finally, [Ahpra] submit[s] that a departure from the reasoning contained in *BKXP* and reflected within Ahpra's original access decision would be a significant FOI precedent and would have a broad impact on the application of the FOI Act within all agencies who fall within its ambit.

Application of the deliberative processes' exemption

21. After inspecting the six documents, I am of the view that they contain preliminary consultation and deliberations between Ahpra and the Pharmacy Board relating to the development of the Position Statement for final publication. I am also of the view that the documents contain feedback from key stakeholders and their comments on drafts of the Position Statement with the aim of testing and approving the Position Statement for final publication.

22. I accept Ahpra's submissions that the six documents were progressively amended, supplemented and refined as they passed through the drafting process and each draft is a recommendation by its authors intended to be submitted to others in due course for their consideration.

23. I am therefore satisfied that disclosure of the documents would disclose deliberative matter in the form of opinion, advice, recommendation, consultation, and deliberation in relation to the functions of Ahpra and the National Boards.

24. While I am of the view that the documents contain deliberative matter, I am also of the view that they contain information that is non-deliberative in nature, such as the names and contact details of Ahpra officers and key stakeholders involved in the drafting and publication of the Position Statement. However, I consider the non-deliberative matter to be an integral part of the deliberative process for which the documents were prepared.

25. In coming to this view, I considered the Australian Information Commissioner's reflection on non-deliberative matter in *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72 (30 July 2014):

> …Some of the material that has not been released is factual in nature. However, …it is factual material that is either an integral part of the deliberative process content of the [document] or is embedded in or intertwined with that content and is impractical to excise. As such, it qualifies for conditional exemption under s 47C…[12]

26. In line with the Australian Information Commissioner's reflection, I consider that the confidentiality attached to the deliberative matter in the documents extends to the non-deliberative matter that is an integral part of Ahpra and the National Boards' deliberations.

27. Accordingly, I am satisfied that the six documents are conditionally exempt in full under s. 47C.

28. 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

29. 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.[13]

[12] *Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72 (30 July 2014), [27].

[13] s. 11A(5).

30. 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.[14]

Factors favouring disclosure

31. 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.[15]
32. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.[16]
33. In forming its decision, Ahpra considered 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[17]
    - public scrutiny of documents relevant to deliberations of Ahpra and the National Boards may improve the quality of advice and decision-making processes
    - facilitating access to information to members of the public allows them to be satisfied that proper processes have been followed by the agency
    - revealing information that informed a decision-making process.
34. I agree that disclosure of the documents 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 National Boards.
35. 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

36. Ahpra put forward the following factors against disclosure:

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

[15] s. 11B(3).

[16] FOI Guidelines [6.19].

[17] s. 3(2)(b).

- the public interest in protecting and maintaining the integrity of Ahpra and the National Boards' consultation and development processes regarding media releases and position statements for the professions. There is a strong public interest in ensuring proper processes for consumer protection,[18] and that only suitable practitioners in various fields of the health profession are able to provide services to the public[19]
- the public interest in Ahpra and the National Boards being able to carry out their statutory functions as efficiently and effectively as possible
- the public interest in Ahpra and the National Boards being able to maintain confidence with key stakeholders that individual contributions to the developmental process of communications will not be disclosed without their consent. Disclosure of such documents under the FOI Act could reasonably be expected to prejudice the conduct of future consultations by discouraging key stakeholders, the National Boards and Ahpra staff from keeping complete records of their correspondences and discussions[20] or being more circumspect in their preliminary feedback and recommendations that are expressed because of public scrutiny.[21] As a consequence, this would have an adverse effect on the quality of information and feedback generated and obtained in these processes, and on the conduct of robust and informed consultations relevant to the development of media releases and positions statements
- that disclosure would, or could reasonably be expected to, negatively affect the established processes of Ahpra and the National Boards in carrying out consultations relevant to the development and approval of media releases and position statements regarding the health professions. This in turn could amount to a real possibility of prejudice to the conduct of the development of like communication in the future.

Balancing the public interest factors

37. I acknowledge that the COVID-19 pandemic and COVID-19 vaccinations are high-profile issues and matters of public importance.

38. In their submissions, the Applicant argued that it is in the public interest to release the documents due to concerns about fraud and improper conduct regarding the procurement, design and validation of COVID-19 vaccines. I consider these arguments to be irrelevant because Ahpra and the National Boards were not responsible for the procurement, design or validation of COVID-19 vaccines. The documents therefore do not relate to these matters. Rather, the role of Ahpra and the National Boards in this context was to develop and approve codes and guidelines that provide guidance to registered health practitioners.[22]

39. I do, however, agree that disclosure of the exempt information would serve the public interest in that it would provide greater transparency in relation to the role and functions of Ahpra and the National Boards in its response to the COVID-19 pandemic.

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

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

[20] *Hanes v Ahpra* [2013] VCAT 1270, [30].

[21] *Hassan v Ahpra* [2014] QCAT 414, [26].

[22] Health Practitioner Regulation National Law, s. 35(1)(c)(iii).

40. On balance, I accept Ahpra's submissions that disclosure of the documents could reasonably be expected to:

    - impact on the integrity of Ahpra and the National Boards' processes
    - affect the efficient and effective operations of Ahpra and the National Boards
    - prejudice Ahpra and the National Boards' ability to obtain similar information in the future.

41. I am satisfied that disclosure of the relevant material could reasonably be expected to impact on the integrity of Ahpra and the National Boards' processes in relation to the consultation and development of media releases and position statements regarding the health professions.

42. The National Law creates a reasonable expectation of confidentiality regarding the communications and documents relevant to Ahpra and the National Boards in exercising their functions under the National Law. Under the National Law, all 'protected information' must be treated confidentially, subject to specific exceptions.[23] '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. The National Law specifies that developing and approving codes and guidelines is a function of the National Boards,[24] and the confidentiality provision in the National Law therefore extends to Ahpra and the National Boards' processes in exercising this function.

43. On this basis, I accept that disclosure of documents relevant to developing and approving codes and guidelines, including position statements, could reasonably be expected to impact on the integrity of this process.

44. Further, I am satisfied that disclosure of the six documents could reasonably be expected to affect the efficient and effective operations of Ahpra and the National Boards. If draft position statements were accessible under the FOI Act, I agree that it is unlikely Ahpra and the National Boards would consult or liaise with each other using email or other informal means about future deliberative matters. Disclosure of the six documents could also be reasonably expected to impact on who is involved in future deliberations. In coming to this view, I have considered the following observations of Deputy President Rayment in *BKXP*:

    > … Releasing drafts in these proceedings could affect not only the past, but also the future. DFAT may be obliged to change its processes radically if the drafts are made available in this case. For example, junior officers who do initial leg-work may no longer be able to be involved and more senior and specialised officers may need to be involved in the early stages, with a consequent disturbance to their schedules.

45. I do not accept Ahpra's view, however, that it is immaterial whether the information contained within a deliberative document is "benign" in nature when weighing the public interest factors. The information within the six documents is largely limited to editorial feedback on the draft Position Statement and I believe this is a relevant consideration.

46. However, on balance, I do agree that a change in the basis of the consultation and development of media releases and position statements by Ahpra and the National Boards, so that decision-makers consult and deliberate with each other with greater formality, would likely be disruptive, and that

[23] Health Practitioner Regulation National Law, s. 216.

[24] Health Practitioner Regulation National Law, s. 35(1)(c)(iii).

would be contrary to the public interest. This in turn, would negatively impact Ahpra and the National Boards' ability to consult and develop media releases and position statements with key stakeholders, Ahpra officers and National Board members in the future, and would adversely affect the efficient and effective operations of Ahpra and the National Boards.

47. I am also satisfied that the relevant material involves a flow of information from key stakeholders, Ahpra officers and National Board members and that disclosure of the material could reasonably be expected to prejudice their ability to obtain similar information in the future. I accept that the work of those who prepared the draft Position Statement was done on the basis that it would only be considered by those involved in the consultation and development of the Position Statement. Ahpra submitted that if it had been otherwise, these individuals may have been hesitant to frankly state their views.

48. The issue of frankness and candour, and how it relates to s. 47C and the public interest, has been considered by the former Australian Information Commissioner in *"GI" and Department of Prime Minister and Cabinet* [2015] AICmr 51:

> … a more recent decision of the Administrative Appeals Tribunal, *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 has held that 'A frankness and candour claim, made in circumstances where there is no (other) factor against access… cannot be a factor against access when applying the public interest test'.[25] I read that as a comment only that a confidentiality or candour claim carries no weight by itself but must be related to some particular practice, process, policy or program in government.[26]

49. The FOI Guidelines consider that frankness and candour in relation to the s. 47C conditional exemption may have some application as one public interest factor against disclosure in combination with other factors, and possibly as the sole factor where the public interest is clearly heavily weighted against disclosure of a document of a minister, or a document that would affect the effective and efficient functioning of government.[27]

50. I accept that, although I give it less weight than the other factors, disclosure may inhibit the frankness and candour of key stakeholders, Ahpra officers and National Board members in their provision of similar advice relevant to the development of media releases and position statements in the future. This could in turn prejudice the development of similar communications in the future.

51. Taking into consideration all relevant factors, I consider that the public interest factors against disclosure outweigh the public interest factors favouring disclosure.

52. Accordingly, 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

53. I am satisfied that the six documents are exempt in full under s. 47C.

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[25] *'GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51 at [52].

[26] *'GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51 at [20].

[27] FOI Guidelines [6.82].

Section 37(1)(c): Documents affecting law enforcement and public safety

54. During the review, Ahpra submitted that the names and contact details of Ahpra officers and members of the Pharmacy Board should be exempt under s. 37(1)(c). Identifying information about Ahpra officers and members of the Pharmacy Board are found in all six documents.

55. Section 37(1)(c) provides that a document is exempt from release if its disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person.

56. The Office of the Australian Information Commissioner's FOI Guidelines (FOI Guidelines) explain:

> Under s 37(1)(c) a document is exempt if its disclosure would, or could reasonably be expected to, make a person a potential target of violence by another individual or group. That is, whether release of the documents could be expected to create the risk, not whether the documents reflect an existing credible threat. This exemption requires a reasonable apprehension of danger which will turn on the facts of each particular case. For example, the disclosure of the name of an officer connected with an investigation about threats made by the applicant will not be sufficient.[28] A reasonable apprehension does not mean the risk has to be substantial, but evidence is necessary. For instance, intemperate language and previous bad behaviour, without more, does not necessarily support a reasonable apprehension.

Ahpra's submissions

57. Ahpra submitted:

> During…the review…, Ahpra brought the [National Health Practitioner Privacy] Commissioner's attention to a [T]witter thread published to [the Applicant's] account in which a member of the public made calls to 'storm the Ahpra office' or words to that effect. The administrator of the page made no effort to discourage followers from publishing such material or making such inappropriate comment. In Ahpra's view this post demonstrates that there is a public safety risk associated with granting access to the documents to the world at large. [The Applicant] did not take any steps to mitigate the apparent risk and there is nothing to suggest that the administrator of the Twitter page would act differently in the future.
>
> Ahpra respectfully submits that [s. 37(1)(c)] should be applied to exempt the names and contact details of any Ahpra staff or Board members whose identifying information is contained within the [six documents]…

Application of the law enforcement and public safety exemption

58. I am of the view that disclosure of the names and contact details of Ahpra officers and members of the Pharmacy Board could reasonably be expected to put those individuals' emotional and physical safety at risk.

59. In coming to this view, I considered the Australian Information Commissioner's decision in *'I' and Australian National University* [2012] AICmr 12 (26 April 2012) (*'I'*).[29] In that case, the Information Commissioner expressed a balanced view of the considerations required to establish whether a real

[28] *Re Boehm and Department of Industry Technology and Commerce* [1985] AATA 60.

[29] *'I' and Australian National University* [2012] AICmr 12 (26 April 2012).

and objective apprehension of risk exists. The Information Commissioner discussed the following factors:

- any history of violence or other threats to personal safety
- whether interactions are insulting or threatening
- the link between release of information and the possibility of future threats to physical safety.

60. In that case, the Information Commissioner decided that documents containing abuse were not exempt under s 37(1)(c) for the reason that there was no evidence in that case that disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person.

61. However, distinct from the circumstances in '*I*' where the relevant documents contained abuse, in the present case there is evidence that the Ahpra officers and members of the Pharmacy Board identified in the six documents could be the potential targets of violence.

62. I am satisfied that there is a history of threats to personal safety and there is a link between the release of information and the possibility of future threats to physical safety. This is because the Applicant published on their Twitter account the letter sent to them from Ahpra regarding Ahpra's FOI decision. This resulted in a member of the public commenting "we should start storming the [Ahpra] office" and another member of the public commenting "Easily done". I agree with Ahpra that the Applicant did not take any steps to mitigate the apparent risk or discourage followers from publishing the threat or making further inappropriate comments. Given this, there is a public safety risk associated with granting the Applicant, and the world at large, access to the names and contact details of Ahpra officers and members of the Pharmacy Board found within the six documents.

63. I have also taken into consideration *Department of Agriculture and Rural Affairs v Binnie* [1989] VicRp 73; [1989] VR 836 (9 December 1988). In that case, the Full Court of the Supreme Court of Victoria considered the corresponding 'public safety' provision in the Victorian *Freedom of Information Act 1982* when evidence was produced that one of several institutions where animal experiments were conducted had received a bomb threat. It was held that the relevant documents regarding animal experiments should be released subject to the deletion of the names and signatures of the individual experimenters and the names of all institutions and the departments within them. In reaching this decision, Justice Marks (with whom the other members of the Court agreed) explained:

> The risk to be guarded against is of an experimenter being placed under threat, that is, in a position where he or she might or might not be physically harmed.[30]

64. In exploring the nature of the risk to the individual experimenters, Justice Marks found:

> It is not necessary to show that the risk … is from the [FOI applicant] himself but rather from anyone should the information become generally known.[31]

65. As such, I agree with Ahpra that disclosure of the names and contact details of Ahpra officers and members of the Pharmacy Board contained within the six documents could reasonably be expected to put those individuals' emotional and physical safety at risk.

[30] *Department of Agriculture and Rural Affairs v Binnie* [1989] VicRp 73; [1989] VR 836 (9 December 1988).

[31] *Department of Agriculture and Rural Affairs v Binnie* [1989] VicRp 73; [1989] VR 836 (9 December 1988).

Finding

66. I am satisfied that the names and contact details of Ahpra officers and members of the Pharmacy Board are exempt under s. 37(1)(c).

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

67. Ahpra found the six documents to be conditionally exempt in full under s. 47E(d).

68. I found the six documents to be conditionally exempt in full under s. 47C and exempt in part under s. 37(1)(c). I will therefore not consider whether the six documents are also exempt under s. 47E(d).

Conclusion

69. Under s. 55K I vary Ahpra's decision of 23 September 2021.

70. I substitute my decision that the six documents that Ahpra found to be exempt under ss. 47C and 47E(d) (and contends are also partially exempt under s. 37(1)(c)) are exempt under s. 47C and partially exempt under s. 37(1)(c).

Richelle McCausland
National Health Practitioner Privacy Commissioner

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.[32]

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.[33]

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.

[32] s. 57A.

[33] s. 60(3).

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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