

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



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

Applicant	'AL'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/16302023
Decision date	22 April 2024
Catchwords	FREEDOM OF INFORMATION – Whether a document is subject to legal professional privilege – Whether a legal adviser-client relationship exists – Whether a document contains operational information – Freedom of Information Act 1982 s. 42

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

## Decision

1. Under s. 55K, I affirm Ahpra's decision of 9 October 2023.

## Background

2. The Paramedicine Board of Australia (the Paramedicine Board) has responsibilities relating to the regulation of paramedics. Ahpra provides administrative assistance and support to the Paramedicine Board in exercising its functions.
3. Paramedics must meet the Paramedicine Board's registration standards, including the English Language Skills Registration Standard (ELS Standard), to be registered to practise in Australia.
4. In 2019 the Applicant made an application to Ahpra to be registered with the Paramedicine Board.
5. On 23 September 2019 the Paramedicine Board considered the Applicant's application for registration, but deferred making a decision. The Paramedicine Board decided to seek legal advice in relation to the assessment of the Applicant's request for special consideration regarding the requirements of the ELS Standard due to the Applicant having dyslexia.
6. On 16 December 2019 the Paramedicine Board considered the legal advice and decided to grant the Applicant general registration subject to conditions requiring a period of supervised practice.

7. On 19 July 2023 the Applicant made a request to Ahpra for access to:
- ‘All records of, or formal statements that provide recommendation or information for the reasons for or formed part of the reason for, the final decision given by the Board in the exercise of their powers regarding [the Applicant’s] (2019) application for registration with the Paramedicine Board of Australia.
- This includes all documentation containing information and recommendations that assisted the Board in performing or exercising their power making decision which affected [the Applicant’s] application for registration and that of future applicants with dyslexia.
- In Summary [sic], I am requesting all documents that contain information and/or recommendation regarding the Board's questions "can flexibility be provided under the Registration Standard: English Language Skills Standard, as all records with information and recommendation as to why flexibility could not be provided are considered part of the statements of the reason for the board's final decision given in the exercise of their powers.’
8. In its decision letter dated 17 August 2023 Ahpra identified two documents that fell within the scope of the Applicant’s request:
- the Agenda paper for the Paramedicine Board’s consideration of the Applicant’s registration application, dated 16 December 2019
  - attachments to the Agenda paper for the Paramedicine Board’s consideration of the Applicant’s registration application, dated 16 December 2019.
9. Ahpra decided to release the Agenda paper to the Applicant in full. Ahpra found the attachments to the Agenda paper to be exempt from release in part under s. 42.
10. On 8 September 2023 the Applicant requested an internal review of Ahpra’s decision.
11. In its internal review decision letter dated 9 October 2023 Ahpra affirmed its original decision.
12. On 22 October 2023 the Applicant sought a review of Ahpra’s internal review decision under s. 54L.

## Scope of the review

13. The issue I have decided in this review is whether the document that Ahpra found to be exempt in part under s. 42 is exempt in part under that provision.
14. In a review of an access refusal decision, Ahpra bears the onus of establishing that its decision is justified or that I should give a decision adverse to the Applicant.<sup>1</sup> However, it is open to me to obtain any information from any person, make any inquiries that I consider appropriate, and change the basis on which the decision is made.<sup>2</sup>
15. The Applicant and Ahpra were invited to make a written submission about this review of Ahpra’s internal review decision. I have considered all relevant communications and submissions received from the Applicant and Ahpra.

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

<sup>2</sup> ss.55 and 55K.

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

## Review of the exemption applied to the document

### Section 42: Document subject to legal professional privilege

17. Ahpra found the attachments to the Agenda paper to be exempt in part under s. 42 to the extent the document would disclose information subject to legal professional privilege.
18. A document is exempt under s. 42 if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege,<sup>4</sup> and that privilege has not been waived by the party claiming it.<sup>5</sup>
19. The FOI Act does not define 'legal professional privilege'. Common law concepts of legal professional privilege provide guidance on what should be considered by decision-makers. At common law, determining whether a document is privileged requires consideration of whether:
- there is a legal adviser-client relationship
  - the communication was for the dominant purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
  - the advice given is independent
  - the advice given is confidential.<sup>6</sup>
20. As explained in the FOI Guidelines, the underlying policy basis for legal professional privilege is to promote the full and frank disclosure of information between a lawyer and a client to benefit the effective administration of justice.
21. The FOI Act makes it clear, however, that a document will not be exempt under s. 42 if the information is operational information of the agency.<sup>7</sup> 'Operational information' is information held by an agency to assist it in performing or exercising its functions or powers in making decisions or recommendations affecting members of the public, including for example, the agency's rules, guidelines, practices and precedents.<sup>8</sup>

### The Applicant's submissions

22. In their review application, the Applicant submitted:

On the 23rd of September [2019] the Paramedicine Board of Australia deferred deciding on [the Applicant's] application for registration. The reason in the Decision and Action minutes of the Registration, Notification and Compliance Committee of the Paramedicine Board of Australia as

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

<sup>4</sup> s. 42(1).

<sup>5</sup> s. 42(2).

<sup>6</sup> FOI Guidelines, [5.129].

<sup>7</sup> s. 42(3).

<sup>8</sup> s. 8A(1).

stating: “The Board requested legal advice to determine if flexibility can be provided tot [sic] the Board’s registration standard: English Language Skills (the Standard)”. The board was seeking advise [sic] regards to operational information. The Freedom of Information Act is clearly defining the information that the [Paramedicine] Board was seeking as ‘operational information’, as the Board was seeking additional information to assist them to perform or exercise their powers under the registration standard in accordance with the Health practitioners regulations National Law Act 2009 [sic]...

23. During the review, the Applicant further submitted:

For information to be subjected to legal professional privilege the information must meet several requirement[s]. The information must be confidential communication made:

- In the course of a lawyer/client relationship [sic] for the **dominant purpose** of seeking or providing legal advice (advice privelege [sic]); or
- For the puprose [sic] of use in existing or reasonably anitcipated [sic] legal proceedings [sic] (litegations [sic] privilege).

The purpose for which the confidential communication were [sic] brought into existence [sic] is vital to determining wether [sic] [legal professional privilege] attaches to the communication. The purpose for which the communication is brought into existence is a question of fact which is generally determined by considering:

1. evidence of the intended use
2. the nature of the communication; and
3. submissions from the parties.

The purpose of which the information was brought into existance [sic] was because the Board sought advise [sic] on the question “can flexibility be provided under the Registration Standard: English Language Skills Standard”...

...Ahpra’s in-house legal team has various roles within the agency [sic]. The team provides support to the National Boards by providing operational and adminstrative [sic] advice regarding the National Boards adjudicative functioning in addition to advice regarding anticipated or existing legal proceedings [sic].

The document which Ahpra’s prepared for the Paramedice [sic] Board of Australia was... created with the dominant purpose of providing advise [sic] and recommendation for adjudicartive [sic] functioning, for the purpose of deciding on [the Applicant’s] application for general registration as a paramedic with the Paramedicine Board of Australia. The document was not created for use in existing or reasonably anitcipated [sic] legal proceedings [sic]. Consequently [sic] the information does not meet the elements of Legal... [sic]

...To attract [legal professional privilege], the communication must be confidential. It is questionable if the advise [sic] provided by Ahpra can be considered as confidential. The information was provided to the Board in a memorandum wich [sic] was attached to an agenda paper. The meeting and meeting papers were prepared by [an Ahpra Regulatory Officer] and cleared by [Ahpra’s National Manager for Registration – Case Management], prior to being presented to the Registration Notification and Compliance Committee of the Paramedicine Board of Australia, and consequently being reviewed in the meeting on the 16/12/2019. It is important

to note that there was no member of Ahpra's legal team present at this meeting, they merely drafted the advise [sic] which was then presented to the administrative [sic] staff of Ahpra. There was no meeting between the client and the lawyer [sic] and the communication was not confidential, it was passed on to third parties within Ahpra [sic]. Therefore, I believe that the document is not classified [sic] as confidential.

The legal team did not present the advise [sic] to the [Paramedicine] Board, the [sic] merely submitted a submission. There was no client-lawyer [sic] relationship, there was no active collaboration between the in-house legal team and the Paramedicine Board of Australia, Ahpra merely prepared a document with advise [sic], this does not constitute [sic] a professional client-lawyer relationship [sic] for the purpose of claiming [legal professional privilege]...

In summary, the document is an administrative decision-making document, it was created with the dominant purpose of providing advise [sic] and recommendation for consideration by the Board for the purpose of deciding on [the Applicant's] application for general registration as a paramedic...

## Ahpra's submissions

24. In its original decision dated 17 August 2023, Ahpra's decision-maker explained that:

Ahpra has a legal branch which is staffed by lawyers admitted to practice and who hold practising certificates. The lawyers in this branch provide independent legal advice to Ahpra staff from other branches within Ahpra (e.g. Registration) and the National Boards. I am satisfied that Ahpra's in-house lawyers provided legal advice in relation to [the Applicant's] application for general registration as a Paramedic and that a lawyer-client relationship existed between the [Paramedicine] Board and Ahpra's in-house lawyers. It is clear from the communications themselves that a lawyer-client relationship existed...

The document contains communications made in the context of the lawyer-client relationship between Ahpra and the [Paramedicine] Board. It was made on the understanding that the usual and well-established relationship of confidence between a lawyer and client governed the communication. The communication was not provided outside of that context. It was confidential at the time it was made and remains confidential now...

The correspondence was made for the dominant purpose of providing legal advice. It comprises of comments to the [Paramedicine] Board of a legal advisory nature which relate to [the Applicant's] application...

Section 42(2) of the FOI Act provides that a document is not exempt if the person entitled to claim [legal professional privilege] waives that claim. A person entitled to the benefit of [legal professional privilege] may waive that privilege either expressly or by implication. [Legal professional privilege] is waived if the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege. This will depend on the circumstances of the case, including whether the disclosure was for any advantage.

There is no evidence to indicate that the substance of the communication has been disclosed more broadly or used in any way that would be inconsistent with maintaining the confidentiality of the communication. I am therefore satisfied that privilege has not been waived...

Section 42(3) of the FOI Act provides that a document is not exempt under section 42(1) of the FOI Act insofar as it is operational information... I am satisfied that the privileged communication in the documents does not comprise of operational information. To the extent that the information is of a factual nature, such information is an integral part of the deliberative content and the purpose of the document or is otherwise so embedded in or intertwined with the deliberative content such that it is impracticable to separate it.

Accordingly, I am satisfied that the relevant document is exempt in part from release under section 42 of the FOI Act. As section 42 provides an absolute exemption not subject to a separate public interest test, the relevant part of the document is exempt.

25. During the review, Ahpra further submitted:

The document itself is clearly headed as 'Memorandum of Legal Advice' and is advice provided by Ahpra's in-house lawyers to the Paramedicine Board of Australia in the context of the lawyer-client relationship. The document bears a clear disclaimer about its content being privileged and confidential and there is no indication that the privilege or its confidentiality has been waived.

## Application of the exemption

26. After inspecting the relevant document, I am of the view that a legal adviser-client relationship existed between Ahpra's in-house legal team and the Paramedicine Board, and that the exempt part of the document was created for the dominant purpose of giving independent and confidential legal advice in relation to the Applicant's application for registration. I am therefore satisfied that the relevant part of the document attracts legal professional privilege and as there is no evidence that privilege has been waived, the document is exempt in part under s. 42.

### Existence of an independent legal adviser-client relationship

27. Based on my assessment of the document, I am satisfied a legal adviser-client relationship existed between Ahpra's in-house legal team and the Paramedicine Board.

28. The FOI Guidelines explain that a legal adviser-client relationship exists where a client retains the services of a lawyer for the purposes of obtaining professional advice.<sup>9</sup> This relationship may be obvious where the advice is obtained from an external law firm. However, where the advice is obtained from an in-house legal adviser, as was the case in relation to this document, the question of whether the required relationship exists will depend on the circumstances of the particular advice that was given.

29. Relevant considerations for determining whether a legal adviser-client relationships exists include:

- the legal adviser is acting in the capacity of a professional legal adviser and the advice is given with sufficient independence
- the dominant purpose of the communication is for giving legal advice or use in actual or anticipated litigation
- the advice is confidential.<sup>10</sup>

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<sup>9</sup> FOI Guidelines [5.130].

<sup>10</sup> FOI Guidelines [5.131].

30. In relation to the document in question, I am satisfied the legal advisor was acting in a professional capacity. The legal adviser was a qualified legal practitioner holding a practising certificate. Further, it is clear that the Paramedicine Board sought the services of Ahpra's in-house legal team for the purposes of obtaining professional advice.
31. I am also satisfied the legal advice was provided with the requisite degree of independence. There is evidence that Ahpra's in-house legal team operates independently from Ahpra's other branches and the Paramedicine Board. Further, the relevant in-house legal adviser appears to have the requisite degree of independence from the Paramedicine Board, as there is nothing to suggest their personal loyalties, duties or interests have influenced their advice.<sup>11</sup>
32. Additionally, I am satisfied the relevant part of the document was created for the dominant purpose of giving legal advice. Paragraphs [35] to [38] are relevant here.
33. I also accept that the legal advice was confidential. Paragraphs [39] to [41] discuss this further.
34. I do not accept the Applicant's submission that a legal adviser-client relationship did not exist because there was no "active collaboration" between Ahpra's legal team and the Paramedicine Board, including that the legal adviser was not present at the Paramedicine Board meeting when the advice was considered. The legal advice was requested by the Paramedicine Board and presented to it in a document labelled "Memorandum of Legal Advice". In my view, this is relevant evidence of the existence of a legal adviser-client relationship. Professional legal advice is often provided in writing and there is no requirement for a legal adviser to attend meetings in person for a legal adviser-client relationship to exist.

#### **Dominant purpose of the communication**

35. I am satisfied the document was created for the dominant purpose of providing legal advice.
36. Ahpra's legal team prepared the relevant part of the document following the Paramedicine Board's request for professional legal advice in relation to the Applicant's application for registration. My review of the relevant part of the document confirms that it comprises comments to the Paramedicine Board that are of a legal advisory nature, particularly in relation to the requirements of the ELS Standard and the Applicant's request for special consideration.
37. As highlighted in a recent decision of the Acting Information Commissioner, Toni Pirani, "[i]t is clear that 'the concept of legal advice in the context of advice privilege is fairly broad. It goes beyond formal advice as to the law, and extends to professional advice as to what a party should prudently or sensibly do in a relevant legal context...'"<sup>12</sup>
38. The s. 42 exemption can be claimed in regard of giving legal advice or in anticipation of litigation.<sup>13</sup> Irrespective of whether litigation could be reasonably anticipated in the circumstances of this matter, I am satisfied that the relevant part of the document was prepared for the dominant purpose of giving legal advice and therefore satisfies the dominant purpose test.

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<sup>11</sup> FOI Guidelines [5.132].

<sup>12</sup> *John Theodoridis and Services Australia (Freedom of information)* [2023] AICmr 135 (19 December 2023), [28].

<sup>13</sup> FOI Guidelines [5.136].

## Confidentiality

39. I am satisfied that the relevant part of the document contains confidential communication created for the dominant purpose of giving legal advice.
40. My review of the relevant part of the document confirms that it is clearly labelled as confidential and for the sole use of the Paramedicine Board. There is no indication the document has been broadly distributed or that other circumstances exist that would impact its confidentiality.
41. I note that confidentiality is still maintained where the document has been distributed to a select class of people with a common interest in the matter.<sup>14</sup> In the circumstances of this matter, the relevant class of people includes Ahpra officers outside of its in-house legal team who were providing administrative support to the Paramedicine Board.

## Waiver of privilege

42. The FOI Act makes it clear that a document is not exempt under s. 42 if legal professional privilege has been waived. Legal professional privilege can only be waived by the person entitled to claim the privilege.<sup>15</sup> As the client and receiver of the legal advice in this case, only the Paramedicine Board can waive its privilege in relation to the relevant part of the document in question.<sup>16</sup>
43. I am satisfied that the Paramedicine Board has not explicitly or implicitly waived privilege. The relevant part of the document has not been widely distributed, the advice has not been disclosed to others, and the Paramedicine Board has not publicly announced its reliance on the legal advice in a manner that discloses the substance of the legal advice.<sup>17</sup> Further, there are no other circumstances indicating a disclosure of information inconsistent with the document's confidentiality protected by the privilege.<sup>18</sup>
44. I note that limited disclosure of legal advice will not necessarily imply a waiver of privilege, especially where disclosure has been to a restricted audience with a mutual interest in the contents of the relevant document. The FOI Guidelines highlight that this principle is particularly relevant for modern organisations that work across teams with many people.<sup>19</sup> Ahpra and the National Boards, including the Paramedicine Board, work in partnership to regulate Australia's registered health practitioners in accordance with the National Law. Where the Paramedicine Board is the decision-maker for matters relating to registered health practitioners, Ahpra provides administrative support to the Paramedicine Board in the exercise of its functions. This supporting role is explicitly provided for in s. 25 of the National Law. Given these roles, I am satisfied that the Paramedicine Board has not waived its privilege in permitting Ahpra officers outside of its in-house legal team to collate the legal advice in an Agenda paper and attachments for the consideration of the Paramedicine Board.

## Operational information

45. A document is not exempt from release under s. 42 where the relevant information is operational information.<sup>20</sup> Operational information is information held by an agency to assist it to perform or

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<sup>14</sup> FOI Guidelines [5.142].

<sup>15</sup> s. 42(2).

<sup>16</sup> FOI Guidelines [5.145].

<sup>17</sup> FOI Guidelines [5.146].

<sup>18</sup> FOI Guidelines [5.147].

<sup>19</sup> FOI Guidelines [5.148].

<sup>20</sup> s. 42(3).



exercise its functions or powers in making decisions or recommendations affecting members of the public.<sup>21</sup>

46. The FOI Guidelines state that a document is not considered to contain operational information if it is legal advice prepared for a specific matter and is not intended for wider or general use in the agency.<sup>22</sup>
47. Having reviewed the relevant part of the document in question, I am satisfied the information is not operational information. The information is almost exclusively legal advice regarding the Applicant's specific circumstances and their application for registration as a paramedic. There is no indication that the legal advice was intended for wider or general use by the Paramedicine Board or Ahpra.
48. I acknowledge that the relevant part of the document contains a small amount of information that could be considered factual in nature. However, this information is so intertwined with the legal advice specific to the Applicant's circumstances that it would be impracticable to separate it.

## Finding

49. I am satisfied that the document is exempt from release in part under s. 42 to the extent that it would disclose information subject to legal professional privilege.

## Conclusion

50. Under s. 55K, I affirm Ahpra's decision of 9 October 2023.

**Richelle McCausland**

National Health Practitioner Privacy Commissioner

## Rights

### Review rights

If a review party is not satisfied with the Commissioner's review decision, the party may apply to a relevant tribunal to have the decision reviewed. An application must be made within 28 days after the day the party receives the Commissioner's decision.<sup>23</sup>

Where an application for a review is made to the relevant tribunal, the proper respondent to such a proceeding is the agency to whom the freedom of information request was initially made (not the Commissioner). In this case, the respondent is Ahpra.<sup>24</sup>

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<sup>21</sup> s. 8A.

<sup>22</sup> FOI Guidelines [5.154].

<sup>23</sup> s. 57A.

<sup>24</sup> s. 60(3).

## 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
- 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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