

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



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

Applicant	'AP'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/11622023
Decision date	26 November 2024
Catchwords	FREEDOM OF INFORMATION — Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency – Whether disclosure of personal information is unreasonable – Whether it is contrary to the public interest to release a conditionally exempt document – Freedom of Information Act 1982 ss. 47E(d) and 47F

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

Decision

1. Under s. 55K, I affirm Ahpra's decision of 21 July 2023.

Background

2. The Medical Board of Australia (the Medical Board) has responsibilities relating to the regulation of medical practitioners. Ahpra provides administrative assistance and support to the Medical Board in exercising its functions.
3. The Applicant made a notification to Ahpra and the Medical Board about a medical practitioner (the Practitioner).
4. The Medical Board decided to take no further action in relation to the notification.
5. On 5 July 2023 the Applicant made a request to Ahpra for access to:

'Submissions and or response to AHPRA by [the Practitioner] as indicated in Ahpra's letter to my self [sic] on the 29 June 2023.'
6. In its decision letter dated 21 July 2023 Ahpra identified one document that fell within the scope of the Applicant's request. This document was the Practitioner's response to the Applicant's notification

about the Practitioner (the document). Ahpra decided to exempt the document in full under ss. 47E(d) and 47F.

7. On 25 July 2023 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 about this review of Ahpra's decision. 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 applied to the document

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

13. Ahpra found 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

¹ s. 55D(1).

² ss. 55 and 55K.

³ s. 3(1).

⁴ s. 47E(d).

⁵ FOI Guidelines, [6.90].

16. 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.
17. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.⁶

Ahpra’s operations

18. Under the *Health Practitioner Regulation National Law Act 2009* (as it applies in each State and Territory) (the National Law), the Medical Board oversees the receipt, assessment and investigation of notifications about persons who are or were registered as medical practitioners under the National Law.⁷
19. During the notification process, Ahpra supports the Medical Board by collecting and assessing relevant information. Ahpra then provides this information to the Medical Board and the Medical Board is the regulatory decision-maker.
20. Under the National Law, all ‘protected information’ must be treated confidentially, subject to specific exceptions.⁸ ‘Protected information’ means any information that comes to a person’s knowledge in the course of, or because of, the person exercising functions under the National Law. This includes when handling notifications.⁹

Ahpra’s submissions

21. Ahpra said in its decision:

[Ahpra is] satisfied that the disclosure of the document would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the National Boards for the following reasons:

- Information received, generated or otherwise held by Ahpra and the Board is held on the understanding that it will be treated in a confidential manner and used in accordance with the National Law and the *Privacy Act 1988* (Cwlth) (the Privacy Act). The information in this instance is protected information within the meaning of section 214 of the National Law. It is an offence to disclose protected information unless an exception applies.
- Practitioner submissions are provided to Ahpra and the Board in the context of responding to the issues raised in the 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 assessment of the matters raised. In *YJI v Australian Health Practitioner Regulation Agency* at [66], the Tribunal remarked that:

“it is important that third parties such as notifiers, practitioners and other government bodies be willing to provide information necessary to facilitate Ahpra and the Board’s efficient assessment of a notification. This allows the Board to determine whether

⁶ FOI Guidelines, [6.92].

⁷ For more information about the Medical Board’s functions refer to s. 35 of the National Law.

⁸ National Law, s. 216.

⁹ *Ibid*, s. 214 (definition of ‘protected information’).

regulatory action is required to manage any risks posed by the relevant health practitioner's health, conduct or performance on the basis of all relevant information."

- It is integral for the efficient management of complaints that Ahpra can continue to meet an individual practitioner's expectation of confidentiality over the communications and documents comprising their communications and submissions, which are provided to Ahpra to assist in the assessment of notifications. This maintenance of confidentiality is critical to ensuring that the notification process is 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."¹⁰

[Ahpra] note the Commissioner has extensively considered these issues in several of its review decisions.¹¹ 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 correspondence shared with Ahpra or the National Boards in the course of exercising their functions will be treated confidentially.

- If the relevant document 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 practitioners and other parties. Pertinently, this may inhibit individuals from expressing freely and providing complete and frank information out of concern that their communications may be subject to disclosure under the FOI Act. This would reduce the effectiveness of practitioner participation in the regulatory process and in turn make the assessment of notifications less effective, slower and more costly.
- As it is a core function of Ahpra under the National Law to provide assistance to the Board in overseeing assessment and investigation of notifications, damage to Ahpra's ability to do this would have substantial adverse effect on the proper and efficient conduct of the agency.

Applicant's submissions

22. Throughout the review, the Applicant outlined various concerns about Ahpra's decision-making and FOI process.

23. The Applicant submitted:

¹⁰ *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [78].

¹¹ 'AA' and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2020] 'AC' and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2021]. AD' and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2021]. 'MS' and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2020]. 'JH' and the Australian Health Practitioner Regulation Agency (*Freedom of Information*) [2020].

This matter has escalated to all out cover up and dishonesty of AHPRA FOI... I respectfully request that [the Commissioner] penalize AHPRA FOI for going out of there [sic] way to advance the interests [of] [the Practitioner].

Application of the conditional exemption

24. I have considered whether the document is conditionally exempt in full under s. 47E(d).
25. After inspecting the 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
 - provide information to the Medical Board to support the Medical Board's decision-making.
26. 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.
27. As outlined in my decisions of 'AA' 'AC', 'AD', 'AE', 'AF', 'AG', 'AI', 'JH', 'MS', 'AM' and 'AN'¹², I draw on the Australian Information Commissioner's decision in *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019) (Mahony). In Mahony, the request was for access to all documents relevant to investigations conducted by the Australian Charities and Not-for-profits Commission (ACNC) into concerns relating to a particular building fund. The Australian Information Commissioner affirmed the ACNC's decision to exempt 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.¹³
28. 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.

¹² The Commissioner's decisions are published on her office's [website](http://www.nhpo.gov.au/foi-review-decisions): <www.nhpo.gov.au/foi-review-decisions>.

¹³ *Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information)* [2019] AICmr 64 (31 August 2019), [22].

29. In reaching my view, I also draw similarities between this matter and the case before the State Administrative Tribunal in *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017) (Spragg). Notably, in Spragg the Tribunal considered the application of s. 47E(d) specifically in the context of Ahpra's operations. In that case, the Tribunal found that disclosure of protected information could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.¹⁴ In making 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...¹⁵

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

31. 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.

32. I consider that disclosure of the document would prejudice the integrity and robustness of the notification process and thereby have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra and the Medical Board.

33. Accordingly, I am satisfied that the document is conditionally exempt under s. 47E(d).

34. 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

35. 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.¹⁶

36. 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

¹⁴ Spragg, [35], [75].

¹⁵ Ibid, [78].

¹⁶ s. 11A(5).

access to the document, at the time of the decision would, on balance, be contrary to the public interest.¹⁷

Factors favouring disclosure

37. 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.¹⁸
38. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.¹⁹
39. In forming its decision, Ahpra considered the following factors in favour of disclosure:
- promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities²⁰
 - public scrutiny of documents relevant to deliberations of Ahpra and the Board may improve the quality of advice and decision-making 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 (including assessment and investigation processes of Ahpra and the Board)
 - allowing a person to access information relating to matters that concern them.
40. 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.
41. 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

42. Ahpra put forward the following factors against disclosure:
- the public interest in protecting and maintaining the integrity of Ahpra and the Board's processes. Ahpra's ability to receive, assess and investigate notifications in respect of the health, performance and/or conduct of registered health practitioners is integral to the maintenance and enforcement of the National Law. There is a strong public interest in ensuring proper processes for consumer protection,²¹ and that only suitable practitioners in various fields of the health profession are able to provide services to the public²²

¹⁷ *Seven Network (Operation) Limited and Australian Competition and Consumer Commission (freedom of Information)* [2019] AICrm 29 (6 June 2019, [47]).

¹⁸ s. 11B(3).

¹⁹ FOI Guidelines, [6.229].

²⁰ s. 3(2)(b).

- it is in the public interest, and vital to the functions of Ahpra in managing 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 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 Board²³
- the prejudice to an individual's right to privacy, particularly as the relevant material is not well known or publicly available. Disclosure could also expose individuals to unfair scrutiny, in circumstances where there was a reasonable expectation of confidentiality or where they otherwise understood their personal information would be confidential. The personal privacy exemption is designed to prevent the unreasonable invasion of an individual's privacy.²⁴ [Ahpra] considers that the prejudice to the protection of an individual's right to privacy is a factor that weighs heavily against full disclosure.

Balancing the public interest factors for and against disclosure

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 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 in full under s. 47E(d).

Section 47F: Documents affecting personal privacy

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

²¹ *Ah Teo v Pacific Media Group* [2016] VSC 626 [30].

²² *Hanes v Ahpra* [2013] VCAT 1270 [67] quoting *Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

²³ Refer to *Spragg*; See also: '*JH*' and *Australian Health Practitioner Regulation Agency (Freedom of Information)* (2020) NHPOPC, '*MS*' and *Australian Health Practitioner Regulation Agency (Freedom of Information)* (2020) NHPOPC.

²⁴ *Re Veale and Town of Bassendean* [1994] WAICmr 4.

Conclusion

49. I affirm Ahpra's decision of 21 July 2023.

Richelle McCausland

National Health Practitioner Privacy Commissioner

Rights

Review rights

If a review party is not satisfied with a review decision of the Commissioner, the party may apply to a relevant tribunal to have the decision reviewed. This application must be made within 28 days after the day the party receives the Commissioner's decision.²⁵

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.²⁶

Appeal rights

A review party may appeal to the Supreme Court on a question of law from a decision of the Commissioner if the party believes the Commissioner incorrectly interpreted and applied the FOI Act.

An appeal must be made either:

- within 28 days after the day a review party receives the Commissioner's review decision, or
- within further time that the Supreme Court or another appropriate court allows, and
- in any way that is prescribed by rules of court made under the relevant legislation of the Supreme Court or another appropriate court.

In determining a question of law, the Supreme Court may make findings of fact if its findings of fact are not inconsistent with findings of fact made by the Commissioner (other than findings resulting from an error of law), and it appears to be convenient for the Supreme Court.

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²⁵ s. 57A.

²⁶ s. 60(3).

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