

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



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

Applicant	'AQ'
Respondent	Australian Health Practitioner Regulation Agency (Ahpra)
Reference number	NHPO/04472024
Decision date	29 January 2025
Catchwords	FREEDOM OF INFORMATION – Whether disclosure would or could cause damage to State-State relations – Whether documents contain deliberative matter prepared for a deliberative purpose – 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 conditionally exempt documents – Freedom of Information Act 1982 ss. 47B, 47C, 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 8 April 2024.

Background

2. The Applicant made two notifications 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 notifications.
4. The Applicant made a request to Ahpra for access to certain documents. Following consultation with Ahpra, the Applicant requested:
 - *Written correspondence between Ahpra and [the Practitioner] in relation to notifications [notification number] and [notification number].*
 - *Correspondence between [the Practitioner] and the Medical Board and APHRA [sic] in relation to notifications [notification number] and [notification number].*

- *The decisions & actions paper of the [Medical] Board in which the determinative decision/s were made for notifications [notification number] and [notification number].*
 - *Information considered by the [Medical] Board in reaching their determinative decisions, including any response by [the Practitioner], medical records etc for notifications [notification number] and [notification number].*
5. In its decision letter dated 5 March 2024, Ahpra identified 10 documents that fell within the scope of the Applicant’s request. Ahpra decided to:
 - release three documents in full
 - exempt four documents in part under ss. 47E(d) and 47F
 - exempt one document in part under ss. 47B, 47E(d) and 47F
 - exempt two documents in full under ss. 47C, 47E(d) and 47F.
 6. On 7 March 2024, the Applicant requested an internal review of Ahpra’s decision.
 7. In its internal review decision letter dated 8 April 2024, Ahpra affirmed its original decision.
 8. On 8 April 2024, the Applicant sought a review of Ahpra’s internal review decision under s. 54L.

Scope of the review

9. The issues I have decided in this review are:
 - whether the document Ahpra found to be partially exempt under s. 47B is conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest
 - whether the documents that Ahpra found to be exempt in full 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 found to be fully or partially exempt under s. 47E(d) are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest
 - whether the documents that Ahpra found to be fully or partially exempt under s. 47F are conditionally exempt under that provision, and if so, whether giving access would be contrary to the public interest.
10. Where I have found one exemption applies to the document, I have not considered whether any additional exemptions apply.
11. 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

¹ s. 55D(1).

² ss. 55 and 55K.

12. 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 both the Applicant and Ahpra.
13. 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 47C: Documents subject to deliberative processes

14. Ahpra found documents 1 and 6 (assessment reports prepared for the Medical Board's consideration of the two notifications) to be conditionally exempt in full under s. 47C.
15. 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.⁴
16. The term 'deliberative matter' is a shorthand term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.⁵
17. The main requirements of this conditional exemption are that:
 - the document contains or relates to 'deliberative matter'⁶
 - the document was prepared for a 'deliberative purpose'⁷
 - the document contains material that is not 'purely factual' or non-deliberative⁸
 - it would be contrary to the public interest to give access at the time of the decision.⁹
18. 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.¹⁰

³ s. 3(1).

⁴ s. 47C(1).

⁵ *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr71, [38].

⁶ *Ibid.*

⁷ *Ibid.*

⁸ s. 47C(2).

⁹ s. 11A(5).

¹⁰ *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [39].

19. The Office of the Australian Information Commissioner’s FOI Guidelines (FOI Guidelines) explain that a ‘deliberative process’ generally refers to:

...the process of weighing up or evaluating of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the function of an agency are its thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹¹

Ahpra’s submissions

20. In its decision dated 5 March 2024, Ahpra said:

...the documents exempt under section 47C would, if disclosed, disclose opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the deliberative processes of Ahpra and the [Medical] Board. The claim is made in respect of the assessment reports prepared by the Ahpra officer in relation to the notifications that [the Applicant] raised about [the Practitioner]. The reports contain the Ahpra officer’s summary, risk assessments, recommendations and other deliberative communications generated as part of Ahpra’s functions in preparing material for consideration by the Board.

The deliberative material I have identified does not contain operational information (as defined in section 8A) or purely factual material. To the extent that it may contain factual elements, that information is so intertwined with the deliberative nature of the document that its release would not be practicable. The deliberative material does not include reports of scientific or technical experts, reports of a prescribed body or organization, or the record or reasons for a final decision given in the exercise of a power or adjudicative function.

The Applicant’s submissions

21. During the review, the Applicant submitted:

...regarding section 47C, it is imperative to note that operational information and purely factual material are explicitly delineated as not constituting deliberative matter under the FOI Act. This exclusion does not encompass reports of scientific or technical experts, reports of internal bodies or organizations, or records of final decisions made in the exercise of powers or adjudicative functions.

It is my contention that the information I have requested falls outside the purview of deliberative matter as outlined in section 47C...

...the reports, decisions, and operational information generated by AHPRA are integral to its regulatory functions and do not fall under the exemption outlined in section 47C of the FOI Act. The Office of the Australian Information Commissioner (OAIC) has explicitly stated that records of final decisions made in the exercise of powers or adjudicative functions are not considered deliberative matter and are therefore not exempt from disclosure under section 47C.

¹¹ FOI Guidelines, [6.54].

Application of the deliberative processes exemption

22. I am of the view that documents 1 and 6 contain deliberative matter in the form of opinion, advice, recommendation, consultation and deliberation in relation to the functions of Ahpra and the Medical Board under the Health Practitioner Regulation National Law (the National Law). While the Applicant suggested during the review that the documents include records of final decisions, I am not satisfied that this is the case.
23. I acknowledge that the documents contain some information that is non-deliberative in nature. However, I consider the non-deliberative matter to be an integral part of the deliberative process for which the documents were prepared.
24. In the case of *Hassan v Australian Health Practitioner Regulation Agency* [2014] QCAT 414 (Hassan), the Queensland Civil and Administrative Tribunal (QCAT) found an investigation report and other documents to be exempt under the former s. 36 (internal working documents exemption). This exemption provided that an exempt document is a document that would disclose matter in the nature of or relating to opinion, advice, recommendation, consultation or deliberation occurring or recorded as part of the deliberative processes involved in the functions of an agency and release would be contrary to the public interest.
25. In Hassan, the applicant was a registered medical practitioner whose conduct had been investigated after a number of complaints were received. The investigation was undertaken by the then Health Quality Complaints Commissioner, who ultimately referred the matter to the Medical Board of Queensland (which subsequently became the Medical Board). The applicant sought documents related to the investigation of his conduct, including an investigation report prepared by an investigation officer for consideration by a committee of the Medical Board of Queensland. It contained an analysis of the evidence by the applicant and other factual information, as well as the investigator's findings and recommendations. In finding the document to be exempt, the QCAT stated:

...The investigator's findings are not the Committee's findings and it is up to the Committee to come to its own conclusions about the investigation. Similarly, the recommendation made by the investigator does not necessarily have to be adopted by the Committee it is a matter for it to consider with all of the other relevant information.
26. In the case of *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 (19 July 2013) (Hanes), the Victorian Civil and Administrative Tribunal (VCAT) noted the tribunal had on many occasions found documents exempt under the internal working documents exemption when they concerned the investigation of a complaint.
27. Considering the nature of documents 1 and 6 as reports relating to the assessment of notifications and containing recommendations for the Medical Board's consideration, I am satisfied that the documents are conditionally exempt 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 documents 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.¹²
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.¹³

Factors favouring disclosure

31. The FOI Act provides public interest factors to be considered where relevant, including that disclosure would:
- promote the object 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.¹⁴
32. The FOI Guidelines also provide a non-exhaustive list of public interest factors favouring disclosure.¹⁵
33. In forming its decision, Ahpra identified 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 activities¹⁶
 - facilitating access to information to members of the public that demonstrates that agencies are following proper administrative processes
 - 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.
34. I agree that disclosure of documents 1 and 6 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.

¹² s. 11A(5).

¹³ *Seven Network (Operations) Limited and Australian Competition and Consumer Commission (Freedom of information)* [2019] AICmr 29 (6 June 2019), [47].

¹⁴ s. 11B(3).

¹⁵ FOI Guidelines [6.231].

¹⁶ s. 3(2)(b).

35. While I agree there are public interest factors that favour disclosure of documents 1 and 6, 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:

- the public interest in protecting and maintaining the integrity of Ahpra and the Medical 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,¹⁷ and that only suitable practitioners in various fields of the health profession are able to provide services to the public.¹⁸
- the potential damage to the relationship between Ahpra and [an organisation] in circumstances where it was understood that communications referenced in documents 1 and 6 were confidential and generated solely for the purpose of carrying out Ahpra's regulatory functions as required by the National Law
- the prejudice to an individual's right to privacy, particularly where the relevant material is not well known nor publicly available, and in circumstances where the individual understood their personal information would be confidential. The personal privacy exemption is designed to prevent the unreasonable invasion of an individual's privacy.¹⁹
- that disclosure could reasonably be expected to prejudice the conduct of future regulatory operations, by discouraging staff from Ahpra and other agencies from keeping complete records of their deliberations²⁰ or being more circumspect in their preliminary findings that are expressed to Ahpra because of public scrutiny²¹
- that disclosure of an officer's preliminary analysis, before it has been considered and tested, may generally undermine confidence in the health regulation system and health practitioners
- 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.

37. The Hanes decision is also relevant when considering factors against disclosure. 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.

¹⁷ *Ah Teo v Pacific Media Group* [2016] VSC 626, [30].

¹⁸ *Hanes v Ahpra* [2013] VCAT 1270 [67] quoting *Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

¹⁹ *Re Veale and Town of Bassendean* [1994] WAICmr 4.

²⁰ *Hanes*, [30].

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

38. In Hanes, the Tribunal noted how disclosure of information relating to notifications would make investigations more difficult and suggested that the broad public interest centres around Ahpra's role in protecting the public in terms of regulating the provision of medical services. I consider this to be a persuasive point.

Balancing the public interest factors for and against disclosure

39. In balancing the public interest in this case, I have considered the factors for and against disclosure, including relevant factors favouring disclosure set out in s. 11B(3). In particular, I consider that releasing documents 1 and 6 would promote the objects of the FOI Act by facilitating access to documents generally, as well as facilitating access to information that allows individuals to be satisfied that proper processes have been followed, revealing information that informed a decision-making process, and allowing a person to access information relating to matters that concern them.

40. The factors against disclosure include the public interest in protecting and maintaining the integrity of Ahpra and the Medical Board's processes for receiving, assessing and investigating notifications about the health, performance and/or conduct of registered health practitioners. There is a strong public interest in Ahpra and the Medical Board being able to carry out their statutory functions as efficiently and effectively as possible.

41. I also note that the National Law creates a reasonable expectation of confidentiality over the communications and documents relevant to the assessment and investigation of notifications. I acknowledge that the deliberative matter in the form of opinions, advice, preliminary findings and recommendations to the Medical Board are made on the understanding that they will be treated confidentially and will only be used to assist the Medical Board in undertaking its functions under the National Law.

42. While I acknowledge the Applicant's interest in obtaining access to documents 1 and 6, I accept there is a stronger public interest in Ahpra and the Medical Board's ability to perform their functions in a way that is consistent with their statutory duties and legislative framework.

43. 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

44. I am satisfied that documents 1 and 6 are exempt in full under s. 47C.

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

45. Ahpra found document 2 (the attachments to an assessment report) and documents 4, 5, 9 and 10 (correspondence from Ahpra to the Practitioner) to be conditionally exempt in part under s. 47E(d).

46. Ahpra also found documents 1 and 6 to be conditionally exempt in full under s. 47E(d). However, as I have found documents 1 and 6 to be exempt in full under s. 47C, I have not considered whether the documents are also exempt under s. 47E(d).

47. 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.²²
48. 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.²³
49. The term ‘substantial adverse effect’ is broadly taken to mean an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person.
50. A decision-maker should clearly describe the expected effect and its impact on usual operations or activities in the statement of reasons.²⁴

Ahpra’s operations

51. Under the National Law, Ahpra oversees the receipt, assessment and investigation of notifications about persons who are or were registered as medical practitioner under the National Law.²⁵
52. 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.
53. Under the National Law, all ‘protected information’ must be treated confidentially, subject to specific exceptions.²⁶ ‘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.²⁷

Ahpra’s submission

54. In its decision dated 5 March 2024, Ahpra said:

Section 47E(d) provides that documents are conditionally exempt 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 such as Ahpra and the [Medical] Board.

The functions of the National Boards include overseeing the receipt, assessment and investigation of notifications about persons who are or were registered as health practitioners under the National Law. Further, under the National Law, Ahpra provides administrative assistance and support to the [Medical] Board in exercising its functions.

The information in the FOI documents that I have found to be conditionally exempt from disclosure in [sic] under section 47E(d) consist of correspondence from [an organisation] to Ahpra that was made in the context of assessing a complaint raised by [the Applicant]. The exemption

²² s. 47E(d).

²³ FOI Guidelines [6.90].

²⁴ FOI Guidelines [6.92].

²⁵ For more information about the Board’s function see s. 35 of the National Law.

²⁶ National Law, s. 216.

²⁷ National Law, s. 214 (definition of ‘protected information’).

also extends to the Ahpra assessment reports and attachments that were provided to the Board for consideration of the concerns that [the Applicant] raised about [the Practitioner].

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

- The FOI Act does not restrict the subsequent use of information released to an applicant under the FOI Act. In Australia there is case law relating to disclosure of information under the FOI Act, for example, the Administrative Appeals Tribunal (AAT) has stated that *'access to a document under the FOI Act must be considered not on the basis of the identity and the qualities of the person who seeks that access but on the basis that it may be seen by anybody. As it is usually expressed, access under the FOI Act, is access to the world at large'*.²⁸
- Information received, generated or otherwise held by Ahpra and the National Boards is held on the understanding that it will be treated in a confidential manner and used in accordance with the National Law and the *Privacy Act 1988* (Cth) (the Privacy Act). The information in this instance is protected information within the meaning of section 214 of the National Law. It is an offence to disclose protected information unless an exemption applies.²⁹
- If documents pertaining to Ahpra's communication with [an organisation] were released under the FOI Act without the express consent of the [organisation], this would likely have a significant adverse impact on the future flow of information between Ahpra and the [organisation]. Pertinently, this may prevent health care entities from engaging in meaningful cooperation and sharing of information to assist with investigations and enquiries by agencies like Ahpra and the [Medical] Board.
- In its role as a regulator, Ahpra receives and holds private information relating to health practitioners and their registration, employment, and education history. This information is held and relied upon for the primary purpose of regulating the health professions. Disclosure of personal information relating to an individual through the FOI process would frustrate the operations of the agency by undermining individuals' faith in Ahpra's ability to maintain confidence over the conditionally held information it possesses. This would in turn cause individuals to be more cautious in their dealing with Ahpra out of concern that their information could be released more broadly.
- Similarly, Ahpra staff may be discouraged from keeping detailed and fulsome records of their deliberations or being more circumspect in their preliminary findings that are expressed to other officers or the [Medical] Board because of public scrutiny. The maintenance of confidentiality over deliberative documents and communications is essential to ensure that staff are able to thoroughly discuss and deliberate on relevant issues in order to provide robust and defensible information to the decision makers.
- As it is a core function of Ahpra under the National Law to provide assistance to the National Boards in overseeing assessment and investigation of notifications, damage to Ahpra's ability

²⁸ *Meschino and Centrelink* [2002] AATA 627, [23].

²⁹ National Law, s. 216.

to do this would have [a] substantial adverse effect on the proper and efficient conduct of the agency.

The Applicant's submission

55. During the review, the Applicant submitted:

...section 47E(d) of the FOI Act permits the withholding of information if its disclosure would result in a substantial adverse effect on the proper and efficient conduct of operations. While procedural fairness is indeed a paramount legal principle, it is essential to underscore that procedural fairness does not equate to the perception of fairness in the outcome of a decision. Rather, it ensures that decision-making processes are conducted with due diligence, impartiality, and transparency. As such, the application of section 47E(d) must be scrutinized in light of these principles, with due consideration given to the fundamental tenets of procedural fairness. (AHPRA Regulatory Guide September 2023).

The main guiding principle of AHPRA is the paramount importance of public protection.

Furthermore, the regulatory scheme is designed to operate in a transparent, accountable, efficient, effective, and fair manner. These guiding principles stand in stark opposition to the use of section 47E(d) of the FOI act to deny access to information. Denying access to information undermines the transparency and accountability of AHPRA's operations, detracts from its effectiveness and fairness, and ultimately harms public perception and trust in how AHPRA functions. Therefore, applying section 47E(d) in this matter is inconsistent with AHPRA's foundational principles and objectives, as it hinders the agency's commitment to operating in a transparent and accountable manner that upholds public confidence.

Application of the certain operations of agencies exemption

56. I have considered whether documents 2, 4, 5, 9 and 10 are conditionally exempt in part under s. 47E(d).

57. After inspecting the documents, I am of the view that the documents were created by Ahpra while Ahpra was undertaking its functions under the National Law, namely to:

- assess the Applicant's notifications about the Practitioner's performance
- provide information to the Medical Board to support the Medical Board's decision-making in relation to the notification.

58. 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.

59. As outlined in my decisions of 'AA', 'AC', 'AD', 'AE', 'AF', 'AG', 'AI', 'AM' 'JH', 'MS', 'AN' and 'AO'³⁰, 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

³⁰ <https://www.nhpo.gov.au/foi-review-decisions>.

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.³¹

60. 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 documents requested by the Applicant, a reasonable person could conclude that information provided to Ahpra and 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.

61. 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 (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.³² In making its decision, the Tribunal stated:

...the proper and efficient conduct of the operations of the agency are assisted by the circumstance that information provided to it by a registered health practitioner under compulsion is protected information and its disclosure is prohibited. The agencies [sic] operations are advanced when a registered health practitioner is forthright and frank in providing information when required. The Tribunal finds that the prospects of a forthright and frank answer are considerably enhanced in circumstances where the practitioner has confidence that the information provided is protected information...³³

62. Taking all relevant factors into consideration, I am satisfied that disclosing the information exempted in documents 2, 4, 5, 9 and 10 could reasonably be expected to affect the future flow of information from other health care entities and practitioners to Ahpra and the Medical Board. Ahpra and the Medical Board rely on candid communication from health care entities and practitioners to carry out their role in ensuring public safety.

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

³² *Spragg and Australian Health Practitioner Regulation Agency* [2017] WASAT 103 (26 July 2017), [35], [75].

³³ *Ibid* [78].

63. In addition, the National Law imposes a duty of confidentiality in relation to protected information. I consider that release of the information exempted in documents 2, 4, 5, 9 and 10 could reasonably be expected to reduce other health care entities and practitioners' confidence in Ahpra's ability to maintain the confidentiality of protected information.
64. I consider that disclosure of the exempted information in documents 2, 4, 5, 9 and 10 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.
65. Accordingly, I am satisfied that documents 2, 4, 5, 9 and 10 are conditionally exempt in part under s. 47E(d).
66. 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

Factors favouring disclosure

67. I consider paragraph [33] to be of particular relevance here.
68. I agree that disclosure of the exempted material in document 2, 4, 5, 9 and 10 would:
- promote the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of Ahpra's activities³⁴
 - facilitate access to information to members of the public that allows them to be satisfied that proper processes have been followed by an agency
 - allow a person to access information relating to matters that concern them.

Factors against disclosure

69. Paragraphs [36] to [38] are relevant here.
70. In particular, I consider there is a strong public interest in protecting and maintaining the integrity of Ahpra and the Medical Board's assessment and investigative processes. Disclosure of the exempted information in documents 2, 4, 5, 9 and 10 could have a significant adverse impact on the integrity and robustness of assessment and investigation processes, and the ability of Ahpra and the Medical Board to carry out their functions and duties in an effective manner.

Balancing the public interest factors for an against disclosure

71. The proper and efficient management and investigation of health practitioners 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 core function to ensure the protection of the health and safety of the public) were prejudiced as a result of the disclosure of exempted information in the documents under the FOI Act. In addition, the prejudice to the protection of the practitioner's privacy weights heavily against disclosure.

³⁴ s. 3(2)(b).

72. Based on the available information, I am satisfied that the public interest factors against disclosure outweigh those in favour of disclosure.
73. 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

74. I am satisfied that documents 2, 4, 5, 9 and 10 are partially exempt under s. 47E(d).

Section 47F: Documents affecting personal privacy

75. I found documents 1 and 6 to be exempt in full under s. 47C. I also found documents 2, 4, 5, 9 and 10 to be exempt in part under s. 47E(d). I will therefore not consider whether the documents are also exempt under s. 47F.

Section 47B: Documents affecting State-State relations

76. I found document 2 to be exempt in part under s. 47E(d). I will therefore not consider whether the document is also exempt under s. 47B.

Conclusion

77. I affirm Ahpra's decision of 8 April 2024.

Richelle McCausland

National Health Practitioner Privacy Commissioner

Rights

Review rights

If a review party is not satisfied with a review decision of the Commissioner, the party may apply to a relevant tribunal to have the decision reviewed. This application must be made within 28 days after the day the party receives the Commissioner's decision.³⁵

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.³⁶

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.

To receive this document in another format phone 1300 795 265, using the National Relay Service 13 36 77 if required, or email our FOI team, <foi@nhpo.gov.au>.

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³⁵ s. 57A.

³⁶ s. 60(3).