



Australian Government
Department of Defence
Defence Support and Reform Group

Ministerial and Information
Management Branch
Department of Defence

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Our reference: FOI 181/14/15

[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

1. I refer to your email, dated 6 December 2014, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to a number of documents relating to invalidity considerations.

2. On 9 December 2014, I advised you that we had interpreted your request as seeking access to:

"[Item 1] The 6/7/09 letter from Professor McFarlane (Item 2 of FOI 439/13/14) specifically recommends that "relevant legal experts" should be involved. The document released as Item 3, FOI 439/13/14 devotes a large portion to "Legal Guidance". Colonel Wells' minute 3/6/09, par 17, states "The other matter is the definition of 'could'.....The legal response in relation to the case of (redacted) notes that it gives latitude but does not help much". I request the documents where legal advice was sought on the matter and provision of documents received by COL Wells.

[Item 2] A copy of the final version of the document released as Item 3, FOI 439/13/14 'Invalidity Considerations Under sub-section 51(6) DFRB Act 1942, Section 347 DFRDB Act 1971 or Section 30 MSB Act 1991 Joint Health Command Processes.

[Item 3] A copy of the following documents that were referred to in Item 3, FOI 439/13/14, paragraph 16 (b) Army -:

1. *Military Board Instructions (MBI) 142-2 Medical Boards – Policy and Procedures*
2. *PULHEEMS Administrative Pamphlet 1965*
3. *Manual of Personnel Administration (MPA) Volume 1 Chapter 14 – PULHEEMS Medical Classification System 1976*
4. *PULHEEMS version 1978, 1997, 2001 and 2011"*

Background

3. By letter dated 9 December 2014, you were advised of my decision, in accordance with section 29 of the FOI Act, that you were liable to pay a charge for the processing of your request and for giving access to the requested documents. The statutory processing time for the request was suspended on this date.

4. By email dated 23 December 2014, you sought a review of the charges associated with your request on public interest *and* financial hardship grounds.

5. On 21 January 2015 I advised you of my decision to impose the charges at the reduced amount of [REDACTED]. Your receipt confirming payment of the reduced amount was received in this office on 4 February 2015. As such, the statutory processing time for your request expires on 3 March 2015.

6. The purpose of this letter is to provide you with the decision relating to the documents that are the subject of your request.

FOI decision maker

7. Ms Paula Sear, Director Health Service Delivery, Joint Health Command, is the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

8. Ms Sear identified five documents as matching the description of your request. A schedule of documents is at Enclosure 1. Documents in the form approved for release are at Enclosure 2. For ease of reference and for the purpose of processing this request, the decision maker has added an FOI Item number to each of the documents.

9. Ms Sear advised that she has not considered the document matching Item 2 'Invalidity Considerations Under sub-section 51(6) DFRB Act 1942, Section 347 DFRDB Act 1971 or Section 30 MSB Act 1991 Joint Health Command Processes' as it was previously released to you under FOI 439/13/14. The document has not been finalised and has not been signed off as an official policy document. Ms Sear advised that the version previously released is the latest version of the document.

10. Please be advised that the following requested documents are in the open access period and as such cannot be considered under the FOI Act:

- a. *Military Board Instructions (MBI) 142-2 Medical Boards – Policy and Procedures*
- b. *PULHEEMS Administrative Pamphlet 1965*
- c. *Manual of Personnel Administration (MPA) Volume 1 Chapter 14 – PULHEEMS Medical Classification System 1976*
- d. *PULHEEMS version 1978.*

11. As previously advised, you will need to approach National Archives for access to these documents.

Decision

12. Ms Sear has decided to:

- a. deny access to two emails identified as matching the description of Item 1 in accordance with subsection 42(1) [Documents subject to legal professional privilege] of the FOI Act;
- b. release *PULHEEMS version 1997 and 2001* intact; and
- c. deny access to *PULHEEMS version 2011* in accordance with subsections 47E (c) and (d) [Public interest conditional exemptions – certain operations of agencies] of the FOI Act.

13. Ms Sear further advised that material was also removed in accordance with subsection 22(1)(a)(ii) as it was reasonably regarded as irrelevant to the request.

Material taken into account

14. In making her decision Ms Sear had regard to:

- a. the terms of the request;
- b. the content of the identified documents in issue;
- c. relevant provisions in the FOI Act;
- d. the *Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act* (the Guidelines); and
- e. advice from the Joint Health Command Legal Officer.

Reasons for decision Section 42

15. On review of the two emails matching the description of Item 1, Ms Sear found that they contained material considered to be exempt under subsection 42(1) of the FOI Act. The documents matching Item 1, detail the communications where legal advice has been sought and the actual legal advice that was given to officers working in Defence. Furthermore, these documents contain confidential communications between a lawyer and a client for the dominant purpose of seeking or giving legal advice in circumstances where the privilege has not been waived. These communications would be privileged from production in legal proceedings on the grounds of legal professional privilege.

16. For the reasons set out above, Ms Sear decided to deny access to Item 1. Ms Sear advised that she consulted with the Joint Health Command Legal Officer on this matter and they have agreed that it would be prudent to deny access to these documents so legal professional privilege is not inadvertently waived.

17. On review of one of the emails matching Item 1, Ms Sear found that it contained irrelevant material pursuant to subsection 22(1)(a)(ii) of the FOI Act. The document matching Item 1 was an e-mail chain containing legal advice. The email chain was forwarded from COL Wells to Melissa Davidson when your request was received. The forwarding part of this email is irrelevant to the request to access the legal advice provided.

Reasons for decision 47E

18. Upon examination of the PULHEEMS version 2011 Ms Sear found that it contained information that she considered would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel as well as have a substantial adverse effect on the proper and efficient conduct of the operations of Defence.

19. Ms Sear considered paragraph 6.105 of the Guidelines which states that if documents are to be exempt under section 47E(c) of the FOI Act, they must relate to *the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassments and occupational health and safety*. Ms Sear considered that the specific information meets this criteria. Ms Sear found that the document details the PULHEEMS and Medical Employment Classification standards required to enlist in the Australian Army as well as the ongoing retention and employment of currently serving Australian Army personnel. If this manual was released, personnel would be able to identify the PULHEEMS profile required for enlistment which may lead to potential enlistees to not disclose certain factors that may affect their enlistment thus affecting both the management of personnel and the operations of the agency.

20. In regards to the terms 'could reasonably be expected to' and 'damage', paragraphs 5.13 and 5.14 of the Guidelines provide that:

5.13 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of the documents.

5.14 The use of the word 'could' in this qualification is less stringent than 'would', and so requires no more than a degree of reasonableness being applied to deciding whether disclosure would cause the consequences. Therefore, the reasonable expectation refers to activities that might reasonably be expected to have occurred, be presently occurring, or could occur in the future.

21. Ms Sear considered the content and context of the relevant document and identified the purpose and intended objective in accordance with Guideline paragraph 6.96. This information has provided her with the necessary context to determine that, if released:

- a. the information would provide an understanding of the factors assessed during the medical assessment process for enlistment, retention and employment; and
- b. the integrity and efficacy of Joint Health Command's processes may be compromised. Personnel will be forewarned of the testing used and then have scope to tailor information accordingly.

22. Ms Sear noted that the department relies on the frank and honest responses provided by personnel as part of the medical process. Without such responses, Defence would find it difficult to make accurate medical assessments about personnel, which ultimately affects Defence's ability to operate.

23. Ms Sear noted that personnel are provided with sufficient information to enable them to meet medical requirements that does not detract from the process. Ms Sear considered the information already available to personnel is sufficient.

24. Ms Sear noted that there is some material in the current publication that is duplicated in the previous versions of the document, which she decided to release. Ms Sear decided to withhold the duplicated material in the current document as it shows the reader what processes have changed and what has not, which gives more information than the actual content of the document.

25. Ms Sear is satisfied that the expected effect of disclosing to you material identified exempt under section 47E(c) and (d) could have a substantial adverse effect on the management of personnel and the proper and efficient conduct of the operations of the agency. In light of the foregoing, Ms Sear decided that this document is conditionally exempt pursuant to section 47E(c) and (d) of the FOI Act.

Public interest considerations

26. In assessing whether disclosure is, on balance, contrary to the public interest, Ms Sear considered the relevant factors set out in section 11B of the FOI Act, which favours access to a document. Ms Sear noted that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource. However, disclosure of the exempted information would not increase public participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

27. Further, while Ms Sear notes that release of this information may be of some interest to you, it would not inform public debate on any matter of public importance in any meaningful way.

28. In coming to her decision, Ms Sear had regard to the guidelines, specifically paragraph 6.29, in regard to public interest factors against disclosure and found that the identified material if released:

- (a) *could reasonably be expected to prejudice an agency's ability to obtain confidential information;*
- (b) *could reasonably be expected to prejudice an agency's ability to obtain similar information in the future; and*
- (c) *could reasonably be expected to prejudice the management function of an agency.*

29. In coming to the above decision, Ms Sear also considered subsection 11B(4) [public interest exemptions - irrelevant factors] of the FOI Act.

30. Accordingly, Ms Sear considered that, on balance, the public interest factors against disclosure outweigh the factors for disclosure of the identified material. Therefore, she decided it would be contrary to the public interest to release the specific information considered exempt under subsection 47E(c) and 47E(d) of the FOI Act.

Section 22

31. Where a decision maker decides to deny access to a document they must consider whether the document can be released with the exempt matter deleted in accordance with subparagraph 22(1)(b) of the FOI Act. Ms Sear considered providing you with an edited version of *PULHEEMS version 2011*, having regard to subparagraph 22(1)(c) of the FOI Act and paragraph 5.3 of the Australian Information Commissioner Guidelines. However, she decided against this course of action as it would not be practicable to delete the exempt material and retain a meaningful non-exempt version of the document as almost all of the text within the document would be deleted. Furthermore, Ms Sear formed a view that legal professional privilege could be inadvertently waived if some material in Item 1 is released.

Payment of Charges

32. In our letter, dated 21 January 2015, after deducting the free decision making time, the department estimated the cost associated with processing your request to be [REDACTED]. You agreed to pay charges for the administration of your request on 21 January 2015, an invoice for the preliminary assessment deposit of [REDACTED] was subsequently sent directly from Defence Finance.

33. Upon completion of your request, after deducting the free decision making time, the actual amount for processing was minimal. Accordingly, on this occasion you are not required to pay any further charges for the processing of your request.

Rights of review

34. The FOI Act provides for rights of review of decisions. A copy of the fact sheet, "Freedom of Information – Your Review Rights", setting out your rights of review is at Enclosure 3.

FOI Disclosure Log

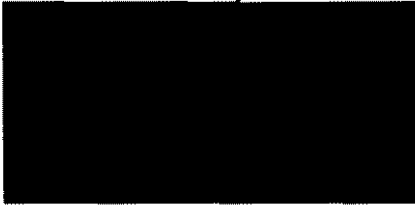
35. In accordance with the requirements of section 11C of the FOI Act, Defence is required to publish details of information released under the FOI Act. Defence publishes identified documents relating to requests within five working days of receipt by the applicant. Defence will also publish this decision notice with privacy deletions.

Further information

36. The FOI Act may be accessed at: <http://www.comlaw.gov.au/Details/C2014C00673>

37. All departmental action on your request is now complete. Should you have any questions in regard to this matter please contact this office.

Yours sincerely



Melissa Davidson
Assistant Director
Freedom of Information

2 March 2015

Enclosures:

1. Schedule of documents
2. Documents in the form for release
3. Fact Sheet: Freedom of Information – Your Review Rights