



DEFENCE FORCE WELFARE ASSOCIATION

Patron-in-Chief: His Excellency Mr Michael Bryce AM AE

NATIONAL OFFICE

PO Box 4166

KINGSTON ACT 2604

T: 02 6265 9530 F: 02 6265 9776

E: national@dfwa.org.au W: www.dfwa.org.au

The Hon Warren Snowden MP
Minister for Veterans' Affairs and Defence Personnel
Parliament House
CANBERRA ACT 2600

Dear Minister

I wish to bring to your attention the serious concern of the Defence Force Welfare Association (and also those of its Alliance partners the Naval Association of Australia; the Royal Australian Regiment Association; the Australian SAS Association; and the Royal Australian Air Force Association) in relation to the privacy of service records of Australian Defence Force and former ADF members, held in the National Archives (NA).

Under the relevant provisions of the *Archives Act 1983* the service records of ADF and former ADF members held by NA are made available for public access during the "open access period" which the Act presently prescribes as 30 years since the creation of the record concerned. I note that the term of the "open access period" will be progressively reduced to 20 years, over a 10 year period commencing on 1 January 2011. This will mean an increase in the proportion of ADF and former ADF members who will still be living at the time when their service records enter the open access period.

I understand that the current practice of the NA in relation to the service records of ADF and former ADF members in the open access period is to grant almost unrestricted access to any member of the public who makes application for such access. Upon payment of a fee the NA will supply a copy of the service record requested. In a case recently brought to our attention, the service record of a living ex-ADF member released by NA contained not only non-contentious details of the member's service such as dates of enlistment and discharge, promotions, service postings and duties performed in such postings but also personal and confidential information such as performance reports and medical history records.

The "subject" of the service record, of course, had no knowledge whatsoever that an application for access to his records had been made nor that copies of them had been supplied by NA. NA has advised that the Act does not require it to consult or advise the subject of the service records concerning their release and that it is the department (Defence), as the creator of the records, which the owner of them, not the subject. Under this practice it is highly unlikely that any living "subject" of a service record (or his or her family if the subject is deceased) would be aware of any application for access to his/her service records. Even if that person did become aware of such an application, there would seem to be no practical or timely means of preventing the NA from releasing the records without resorting to expensive legal proceedings.

Not only is the subject of the records not advised that an application for access to his/her records has been made, he/she would have some difficulty in discovering the identity of the applicant or determining the purpose for which the applicant requires the records. It is ironic that the NA has advised that it is constrained by privacy considerations from identifying applicants for access to records which it holds and that it has no control over the purpose for which the records will be used. There seems to be a gross imbalance of privacy interests at play here.

The Association is obviously concerned that the current practice of the NA has the potential to cause embarrassment and distress to ADF and former ADF members and to the families of deceased former ADF members where the records released contain personal or confidential information such as medical records, performance evaluations and reports and disciplinary records. The Act allows records to be exempted from public access where these records are of a confidential or personal nature (s.33) and also allows arrangements to be made between the Director-General of NA and the responsible minister for determining which records are to be treated as exempt during the open access period (s.35). In relation to the latter provision, NA has advised that it has a standing arrangement with the Department of Veterans' Affairs to protect personal information relating to ex-ADF members who are DVA "clients" and that if a member of the public requests access to such records through NA, that applicant is referred to DVA and must apply for access to the records under the Freedom of Information Act.

The Association believes that the rights of ADF and former ADF members to the privacy of their personal and confidential records justify a similar arrangement being made between the D-G of NA and the Minister (or delegate) so that the onus of establishing a right to access such information is rightly transferred to the person seeking access. It is appreciated that it would be difficult in the extreme to expect NA to seek the consent of a "subject" of a service record in all cases where an application for access to that record is made in the open access period; determining whether the subject is alive or dead, and finding the current address of the subject or his/her surviving family would no doubt be beyond the resources of NA to undertake. If an arrangement were to be made between D-G of NA and you or your delegate to exempt from public access during the open access period those parts of an ADF service record which contain information of a personal or confidential nature (such as those types of records referred to above), then the privacy interests of servicemen and servicewomen and their families would be protected and, if a member of the public believes that the right of the public to access such information outweighs those privacy interests, then that applicant can either obtain the consent of the "subject" or his or her surviving family, or, in the absence of such consent, take appropriate action under the Freedom of Information legislation to obtain authority for NA to release the records.

Finally, I would like to say that I have an understanding of the position of NA in relation to this matter and enclose a copy of a letter dated 24 September 2010 received from Mr. Adrian Cunningham, the Acting Assistant Director-General, National Coordination, National Archives in reply to a letter from the Association dated 2 September 2010, a copy of which is also enclosed. I appreciate that NA must interpret and carry out its role and functions in accordance with the provisions of the Act and that the nature and range of records which it is required to hold and control are diverse and immense, but having said that, the Act does allow exemption for records of a personal or confidential nature and I am simply asking that that exemption be extended to protect the privacy of ADF and former ADF members.

I have forwarded a copy of this letter to your colleague the Special Minister for State, the Hon. Mr. Gary Gray and the Cabinet Secretary, the Hon. Mr. Mark Dreyfus QC, being the Minister responsible for the National Archives.

I look forward to receiving your reply at your earliest convenience on how this important matter may be resolved.

Yours faithfully

Les Bienkiewicz
Executive Director

9 November 2010

Attached:

- a. Letter dated 24 September 2010 received from Mr. Adrian Cunningham, the Acting Assistant Director-General, National Coordination, National Archives
- b. Letter from the Association dated 2 September 2010

cc

Special Minister for State
The Hon Gary Gray *AO MP*

Cabinet Secretary
The Hon. Mr. Mark Dreyfus QC, MP

→ Mr Les Dwyer
National President, Naval Association of Australia

MAJGEN Brian Howard (Retd)
National President, Royal Australian Regiment Association

LTCOL David R Lewis AM (Retd)
Chairman , Australian Special Air Service Association

AVM Roxley McLennan AO (Retd)
National President, Royal Australian Air Force Association

Our reference 2010/1146

Mr Les Bienkiewicz
Executive Director
Defence Force Welfare Association
PO Box 4166
KINGSTON ACT 2604

Dear Mr Bienkiewicz

I refer to your letter of 2 September 2010 to Mr Ross Gibbs, Director-General of the National Archives of Australia (the Archives), to which the Director-General has asked that I respond on his behalf.

I note that your letter is the same as that sent in March 2010 to the Privacy Commissioner, copied to the Director-General, and about which the Archives was consulted when the Privacy Commission was compiling its response.

You raised a number of concerns, of which I have sought to answer as follows:

The current practice of the National Archives making service records available to the general public during the open access period.

The National Archives of Australia (the Archives) is responsible for making Commonwealth records available to the public in accordance with the provisions of the *Archives Act 1983 (the Act)*. The Archives is legally required to make records, including military service records, available in response to an application for access by any member of the public. Once records enter the open access period they are released as part of the Archives obligation to provide public access to open period Commonwealth records, unless the information is able to be exempted under the Act.

It is possible that you are not aware that the open access period will move to 20 years under recent reforms to Freedom of Information laws, commencing 1 January 2011. These earlier open access periods will be phased in over 10 years, commencing on 1 January 2011. During the implementation period, two years' worth of records rather than the current one year will enter the open access period each 1 January for the ten years from 2011.

After paying a fee any member of the public can obtain a copy of a service record where the record is in the open access period.

This is correct. The public can only access that part of the record after it has been examined and we have decided that all or part of the record can be released. While access to a record is free, we require the applicant to pay a fee for a copy of the service record.

The subject of a record was not consulted by the Archives about details of his records being released and this is a gross invasion of his privacy.

There is no requirement under the Act for the Archives to consult the subject of a record about the release of the record. The owner of the record is the department that created them, not the subject of the record. Once service personnel records enter the open period they can be released as part of the Archives' responsibility to provide public access to records of enduring national significance.

The *Privacy Act 1998* and privacy principles do not apply to Commonwealth archival records, as they do for records currently under 30 years old (which are not usually subject to archival release). Usually this distinction is not well known or understood by many members of the public and we know that it causes people some distress when they find out that these privacy protections do not apply to archival releases.

Release of personal details such as confidential performance reports, medical history records, disciplinary and course training records and results should not be permitted.

There are a number of issues to be considered by the Archives before any records are released and these include:

- 1) Do any of the two typical exemption categories apply?
 - (a) **Confidential classification** - s33 (1) (d) covers breach of confidence. Documents cannot be withheld under this exemption simply because they bear a marking of 'confidential' or 'in confidence'. For information to be exempt, it must remain confidential in nature despite the passage of time.
Once a record has become available for public release any information that falls into the exemption categories is blacked out (redacted), the security classification applied to the record ceases to have any effect and the record available for release is de-classified.
 - (b) **Confidential information** - We would identify any information that falls under any exemption category under the Act. Any exemptions we apply are able to be reviewed internally then challenged before the Administrative Appeals Tribunal (AAT).
 - (c) Section 33(1) (g) covers unreasonable disclosure of personal affairs. For information to be exempt it must have continuing sensitivity. Specific medical history records are normally exempt from release.
- 2) What do we take into account?
 - (a) We take into account the age of the record and its contents; and
 - (b) We consider any legal precedents to determine whether any (all or part) information contained within the record falls under one of the exemption categories of the Act and should be blacked out. It should also be legally defensible to exempt any material.

The subject of a file is entitled to make a complaint to the Archives about the content of specific files. Before doing so, we advise that more information about our policies is available from our website at www.naa.gov.au. Archives staff can provide assistance on 1300 886 881.

The Archives won't reveal the identity of the person who has made application for access.

This is correct. In broad terms, the Privacy Act and principles prevent the Archives from providing personal details of applicants for access to records to third parties. We do not do background checks on people applying for access to archival records. We do not have any legislative basis to do this.

The Archives doesn't have any control over the purpose for which those records will be used.

This is correct. Under s57 (2), we are protected from any subsequent liability where we have released the record in accordance with the Act. When the Archives provides access to a record we do not authorise the misuse of the record and we do not approve any publication of the record or its content.

Release of personal details such as confidential performance reports and medical history records.

The Archives holds the view that:

- (a) there is no legal basis for the Archives to decide on a global exemption for all service records to be withdrawn from public access under s33(1)(d) or (g);
- (b) unless we can apply an exemption category defined at Section 33 of the Act which is defensible at law, records are publicly released.

Section 35 of the Act allows Archives to make arrangements for determining which records in the open access period are to be treated as exempt records.

This is correct. Where necessary, we consult with agencies and seek their expert advice to help us determine what information should be legally exempted from public release. Generally, this does not include advice on service personnel records. We are not obliged to seek advice from agencies for every record to be released. We consider that we have sufficient expertise and skills to make decisions on service records in an impartial, professional and judicious manner.

The Archives gives undue rights to members of the public over service personnel and their families' right to privacy.

There is a delicate balance between providing lawful access to records in the open period and applying the exemptions under Section 33 of the Archives Act. In our long experience and based on legal advice and proceedings before the AAT, we hold the view that global closure or exemption of service personnel records on the basis of 'unreasonable disclosure of personal affairs' cannot be defended.

Request for reassurance that appropriate arrangements are in place to exempt personal, private or confidential material in service records subject to general release.

We believe that we achieve the right balance between providing lawful access to Commonwealth records and applying the exemptions under the Act. While we review our policies over time, we will respond to any potential legislative reforms where necessary.

The Archives is aware that the recent FOI reforms require a review of our internal guidelines regarding the sensitivity of material to be released which is at least 20 years old.

I can say that:

- Any decision by the Archives to exempt material under the Act can be appealed before the AAT.
- Over many years, in response to legal challenges to the Archives' decision to exempt material, the AAT has expressed the view that archival information should be released unless there are strong grounds to exempt it and this is supported by evidence before the AAT.
- While there is no avenue for your members to appeal to the AAT on the Archives' decision to open their record, they can file a complaint with the Commonwealth Ombudsman who may decide to investigate their complaint.
- If your members can provide strong reasons or proof of real or potential harm caused by the release of all or any part of their service record, they can provide those details together with any evidence to the Archives so we can review our decision to release any part of your service record. If we decide to exempt any part of a record based on that information and our decision is appealed, your members will be required to provide a sworn affidavit and give evidence before the AAT. If they fail to assist the Archives in the defence of any legal challenge, we will have to release the material. The AAT may decide that there are insufficient grounds to exempt the material and order the Archives to release it.

Department of Veterans' Affairs (DVA) case files are generally post service records and include personal information such as medical records. The Archives has a standing agreement with the DVA that these files about people who served in World War II or later conflicts are not released through the Archives. If a person seeks these files, they are

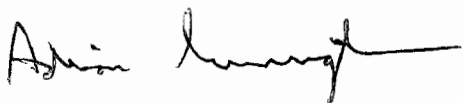
referred to the DVA and must apply for access under the Freedom of Information Act 1988. This process is not the responsibility of the Archives.

I hope this information is of value to you. More information is available from our website at www.naa.gov.au.

I have provided a link to fact-sheets on our website that you might find useful:

<http://www.naa.gov.au/about-us/publications/fact-sheets/fs10.aspx>
<http://www.naa.gov.au/about-us/publications/fact-sheets/fs11.aspx>
<http://www.naa.gov.au/about-us/publications/fact-sheets/fs12.aspx>
<http://www.naa.gov.au/about-us/publications/fact-sheets/fs46.aspx>
<http://www.naa.gov.au/about-us/publications/fact-sheets/fs110.aspx>
<http://www.naa.gov.au/about-us/publications/fact-sheets/fs54.aspx>

Yours sincerely



Adrian Cunningham
Acting Assistant Director-General
National Coordination
24 September 2010



DEFENCE FORCE WELFARE ASSOCIATION

Patron-in-Chief: His Excellency Mr Michael Bryce AM AE

NATIONAL OFFICE

PO Box 4166
KINGSTON ACT 2604
T: 02 6265 9530 F: 02 6265 9776
E: national@dfwa.org.au W: www.dfwa.org.au

Mr Ross Gibbs
Director-General of the National Archives of Australia
PO Box 7425
Canberra Business Centre ACT 2610

Dear Mr Gibbs

I am writing to express the serious concern of the Defence Force Welfare Association over the current practice of the National Archives making available to the general public the service records of members and former members of the Australian Defence Force (ADF) during the "open access period" as defined in the *Archives Act 1983*.

My understanding of the current practice is that any member of the public, upon payment of the prescribed fee, can obtain a copy of the entire service record of any ADF member or ex-member where that record is in the open access period.

A recent case brought to my attention revealed that not only were the details of the ex-member's service history (such as dates of enlistment and discharge, promotions, service postings and duties performed in such postings) supplied, but also personal details such as confidential performance reports and medical history records.

- This was done without any reference to the ex-serviceman concerned and we believe the release of such personal information to be a gross invasion of the ex-serviceman's privacy.

My further understanding is that while the National Archives, under the "open access period" rule, must make available to the public all such personal and private records, it will not reveal the identity of the person who has made application for access to such records, nor does it appear that it has any control over the purpose for which those records will be used.

- It would seem there is a clear imbalance of privacy interests in operation here ?

In the Association's view some parts of a serviceman's record should not be open to unrestricted public scrutiny. We submit that confidential performance reports and medical records are of a private and personal nature, and others such as disciplinary records and course training reports and results could also be similarly regarded.

The Archives Act (section 33) allows for records to be exempt from disclosure where such disclosure would constitute a breach of confidence or would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person). The Act also allows the National Archives to make available for public access parts of an exempt record without disclosing those other parts by reason of which the record as a whole is exempt (s.38).

I also note that s.35 of the Act allows the Director-General of the National Archives, in consultation with the responsible Minister, to make arrangements for determining which Commonwealth records, in the open access period, are to be treated as exempt records. I am not aware that any such determination has been made in respect of ADF members' records, and recent incidents would suggest not.

I appreciate that the National Archives has a statutory duty to make available for public access all non-exempt Commonwealth records in the open access period. However I believe that the provisions of the Act take no account of the privacy concerns of serving and former members of the ADF and of the families of deceased members and former members, whilst giving an undue right to any member of the public, for whatever reason or purpose, to have access to what is private and personal information.

It is the strong view of the Association that present and former members of the ADF have a right to know that their personal records are protected from general release. I therefore ask if you could reassure the Association that appropriate arrangements are in place so that the service records of ADF personnel (or such parts of those records as are deemed to be personal, private or confidential) be exempt from general release.

Yours sincerely

A handwritten signature in black ink, appearing to read 'LB', with a long horizontal flourish extending to the right.

Les Bienkiewicz
Executive Director

2 September 2010