



Australian Government
Australian Institute of
Health and Welfare

Authoritative information and statistics
to promote better health and wellbeing

[mailto: [REDACTED]]

Dear [REDACTED]

I refer to your Freedom of Information (FOI) request of 18 January 2016, in which you advised that you sought access to the following documents held by AIHW:

1. A copy of any personal information of [REDACTED] (DOB [REDACTED]), being yourself, that exists within the Military and Veteran Research "Study Roll"; and
2. Details of the fields/headers (i.e. Name, DOB, Address, etc) contained within a typical entry for an individual record of the "study roll" database [which does not involve revealing protected information] - where the field/header title is not self explanatory, a brief description is required of the specific type of information collected by that field/header.

In considering your application, I have had regard to the relevant provisions of the *Freedom of Information Act 1982* (FOI Act), the Guidelines issued by the Australian Information Commissioner under s.93 of the FOI Act (FOI Guidelines), and s. 29 of the *Australian Institute of Health and Welfare Act 1987* (AIHW Act).

Considerations relating to disclosure

1(a). Interaction between confidentiality provisions in the AIHW Act and section 38 of the FOI Act

In relation to the first element of your request, I have considered the requirements of s. 29 of the AIHW Act. Section 29 relevantly provides:

29 Confidentiality

- (1) Subject to this section, a person (in this subsection called the *informed person*) who has:
 - (a) any information concerning another person (which person is in this section called an *information subject*), being information acquired by the informed person because of:
 - (i) holding an office, engagement or appointment, or being employed, under this Act;
 - (ii) performing a duty or function, or exercising a power, under or in connection with this Act; or
 - (iii) doing any act or thing under an agreement or arrangement entered into by the Institute; or
 - (b) any document relating to another person (which person is in this section also called an *information subject*), being a document furnished for the purposes of this Act;shall not, except for the purposes of this Act, either directly or indirectly:

- (c) make a record of any of that information or divulge or communicate any of that information to any person (including an information subject);
- (d) produce that document to any person (including an information subject); or
- (e) be required to divulge or communicate any of that information to a court or to produce that document in a court.

Penalty: \$2,000 or imprisonment for 12 months, or both.....

(4) In this section...

- (e) a reference to information concerning a person includes:
 - (i) a reference to information as to the whereabouts, existence or non-existence of a document concerning a person....

I have also had regard to section 38 of the FOI Act, which provides:

38 Documents to which secrecy provisions of enactments apply

- (1) Subject to subsection (1A), a document is an exempt document if:
 - (a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and
 - (b) either:
 - (i) that provision is specified in Schedule 3; or
 - (ii) this section is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.
- (1A) A person's right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment concerned or any other enactment.
- (2) Subject to subsection (3), if a person requests access to a document, this section does not apply in relation to the document so far as it contains personal information about the person.
- (3) This section applies in relation to a document so far as it contains personal information about a person if:
 - (a) the person requests access to the document; and
 - (b) disclosure of the document, or information contained in the document, is prohibited under section 503A of the *Migration Act 1958* as affected by section 503D of that Act.

Schedule 3 to the FOI Act includes the '*Australian Institute of Health Act 1987*, subsections 29(1) and 29(3)'. Whilst Schedule 3 has not been updated to reflect the addition of the words 'and welfare' to the AIHW's establishing act, it is clearly a reference to the AIHW Act. As a result, I am satisfied that the exemption in s. 38(1) of the FOI Act would generally apply where information or documents fall within the scope of the confidentiality provisions in s. 29 of the AIHW Act.

I have also considered the operation of subsections 38(1A) and 38(2) of the FOI Act, which impose limits on the exemption claimable under s. 38(1).

Subsection 38(1A) limits the use of the exemption in s. 38 to the terms of the particular secrecy provision, and only to the extent that the provision prohibits disclosure. Section 29 of the AIHW Act is more restrictive than some other secrecy provisions in that it prohibits disclosure of information concerning a person ('information subject') even to that information subject; and also prohibits the disclosure of information as to the whereabouts, existence or non-existence of a document concerning a person. Accordingly, I am satisfied

that s. 38(1A) of the FOI Act would not restrict the AIHW's ability to claim the s. 38(1) exemption in respect of information to which s. 29 of the AIHW Act applies.

However, s.38(2) of the FOI Act provides that an exemption may not be claimed under subsection s. 38(1) to the extent that a document contains personal information of the applicant. In forming a view as to the apparent conflict between s. 38(2) of the FOI Act and s. 29(1) of the AIHW Act, I have turned my mind to the following principles:

- the general presumption that there is no contradiction between two Acts of the one legislature (*Saraswati v R* (1991) 172 CLR at 17)
- the presumption of statutory interpretation that later Acts repeal earlier Acts to the extent of any inconsistency (*Goodwin v Phillips* (1908) 7 CLR at 7 per Griffith CJ).
- the principle that where there is a conflict between general and specific provisions, the specific provisions will prevail (applies only where two inconsistent provisions cannot be reconciled as a matter of ordinary interpretation: *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 4 ALR 353 at 359).

In considering these principles, I note that the relevant FOI Act amendments relating to personal information were made later in time and that s. 29 of the AIHW Act and s. 38(2) of the FOI Act could be read together so that both have operation: Section 29 of the AIHW could operate on its terms except that it is not available as an exemption to support refusal of access to documents in the particular circumstances described in s. 38(2).

On the bases described above, I am satisfied that I may provide an FOI applicant with access to documents containing that applicant's personal information, despite the requirements of section 29 of the AIHW Act.

1(b). Reasonable attempts to establish identity of the applicant

Establishing the identity of an FOI applicant is naturally very important in circumstances that involve providing an applicant with access to personal information under s. 38(2) of the FOI Act which would otherwise comprise a breach of s. 29 of the AIHW Act. As decision-maker, I must have a reasonable basis for believing that the information sought is genuinely the personal information of the FOI applicant.

The FOI Guidelines refer to the issue of identity and relevantly state:

3.39 The FOI Act does not require an applicant who is a natural person to disclose or provide proof of their identity ...

3.40 An applicant's identity can nevertheless be relevant in deciding if requested documents are exempt. Where a person has submitted an FOI request for their own personal information or documents relating to their business affairs, an agency or minister's office should be satisfied of the applicant's identity before giving the applicant access to the documents The protections under ss 90-92 of the FOI Act for officers disclosing documents in good faith may not apply if an agency or minister's office has been negligent in failing to make appropriate enquiries (see [3.191]-[3.192]).

3.41 If a need arises to establish an FOI applicant's identity, an agency should seek only the minimum amount of personal information required (consistently with APP 3). ...

As part of the process of making appropriate enquiries to establish your identity, over the past week, the AIHW exchanged emails with you regarding a number of proposed means of doing so. You advised the AIHW that you had no objection to the AIHW contacting the Office of the Australian Information Commissioner (OAIC) to verify your identity and

confirm the information you had supplied. Following our contact with the OAIC, the OAIC advised that it could not warrant your identity however confirmed that it had contact with a [REDACTED], with your specified date of birth, at the address and on the contact email you had provided. The OAIC also stated that if AIHW was of the view that it has additional verification obligations imposed by its legislation it would need to resolve those directly with you.

As a result of this advice, I was mindful of the following considerations:

- seeking only the minimum amount of personal information required, consistently with Australian Privacy Principle (APP) 3;
- balanced against the very restrictive nature of s. 29 of the AIHW Act, as described above, which requires me to be satisfied on the issue of identity not only when providing access to personal information, but even to the extent of deciding whether to disclose information as to the whereabouts, existence or non-existence of a document 'concerning a person'.

Accordingly, I requested that you provide a scanned copy of the opening page of your passport that contains your signature, to verify this against the signature provided on the letter attached to your FOI application dated 18 January 2016. You promptly provided a scanned copy of that document as requested. On this basis, I believe I have taken appropriate steps to establish your identity.

Decision on access request

Having regard to the considerations above, I have made the following decisions in relation to the documents you requested in your application.

First element of your request

In respect of the first element of your request—a copy of any personal information of [REDACTED] (DOB [REDACTED]), being yourself, that exists within the Military and Veteran Research 'Study Roll'—I have decided that, if the AIHW holds such documents, I would release them to you under the FOI Act.

However, pursuant to paragraph 24A(1)(b)(ii) of the FOI Act, an agency may refuse to grant access to a document where all reasonable steps have been taken to find the document and the agency is satisfied that the document does not exist. In accordance with that paragraph of the Act, we confirm that no personal information exists on the Study Roll held by the AIHW with data: surname = [REDACTED], given names = [REDACTED] and date of birth = [REDACTED].

The information on the Study Roll held by AIHW is based on data provided from Defence, DVA, ComSuper and CTSS Surveys. The data on the Roll of people who opted out of the Roll comprises only the PMKEYS and the two flags: 'OptoutTWRP' and 'OptoutFutureResearch' indicating that the person has opted out from the TWRP Study and future research respectively; all other fields are blank.

Second element of your request

In relation to the second element of your request and pursuant to s. 23 of the FOI Act—details of the fields/headers contained within a typical entry for an individual record of the "study roll" database held by AIHW—I agree to release these to you. The relevant document is attached. The AIHW does not have any documents which specify definitions for these fields. The fields/headers requested are fairly self-explanatory. However, to assist you in

understanding what might be received or inserted, some explanation and/or examples have been provided in blue text in the attached.

Your review rights

Although I have decided to release to you those documents you have requested of which the AIHW has custody, please find attached for your information a document prepared by the OAIC which explains your rights of review regarding this decision.

Yours sincerely



Charlie Drummond
Acting Senior Executive,
Business and Governance Group

Date: 17/2/16

(An officer authorised pursuant to sections 23 and 54 of the Freedom of Information Act 1982 to make decisions about Freedom of Information requests.)

Attachments:

1. Study Roll - list of fields (with AIHW comments/examples)
2. OAIC Fact sheet 12: Freedom of Information - your review rights