Summary

1. I affirm the decision of the Repatriation Medical Authority (the RMA) of 2 July 2012 to refuse access to documents requested under the Freedom of Information Act 1982 (the FOI Act).
Background

2. The RMA determines Statements of Principles (SOPs) for any disease, injury or death that could be related to military service, based on medical and scientific evidence. The SOPs state the factors which "must" or "must as a minimum" exist to cause a particular kind of disease, injury or death. In carrying out its duties the RMA is bound by relevant sections of the Veterans' Entitlements Act 1986 (VEA).

3. On 14 January 2009, the RMA issued a Notice of Investigation in respect of Gulf War Syndrome. On 18 June 2010, the RMA made a declaration that it did not propose to determine a SOP concerning Gulf War Syndrome under the VEA because it had found that Gulf War Syndrome is not a “disease” or “injury” as defined in s 5D of the VEA. The declaration was published in the Government Notices Gazette on 30 June 2010.

4. On 18 May 2012, the Australian Gulf War Veterans Association (AGWVA) applied to the RMA for access to the following documents under s 196I of the VEA:

   (i) Copies of all correspondence concerning this matter sent to each of the major national Ex-Service Organisations (ESOs), as well as the Repatriation Commission, Military Rehabilitation and Compensation Commission, Veterans Review Board, Administrative Appeals Tribunal and Specialist Medical Review Council.

   (ii) Copies of all correspondence concerning this matter received from each of the major national ESOs, as well as the Repatriation Commission, Military Rehabilitation and Compensation Commission, Veterans Review Board, Administrative Appeals Tribunal and Specialist Medical Review Council.

   (iii) A copy of the initial request for the investigation along with any supporting evidence presented to the RMA and supporting evidence subsequently collected and utilised by the RMA in making this determination.

   (iv) All copies of minutes, transcripts of meetings, letters, notes, emails or other correspondence made between members of the RMA discussing opinion, fact or otherwise in relation to the Gulf War Syndrome investigation.

   (v) Copies of any legal opinion, advice or otherwise provided to the RMA in relation to section 5D of the VEA and the definition of “disease” that the RMA utilises when making its determinations.

5. On 31 May 2012, the AGWVA applied for access to the same documents under the FOI Act.

6. On 15 June 2012, the RMA provided the AGWVA copies of a number of documents related to its investigation into Gulf War Syndrome, including

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1 Section 196I (Access to information) of the VEA provides:
   (1) Subject to subsection (2), any person or organisation referred to in any of paragraphs 196E(1)(a) to (c) is entitled, on request made in writing to the Repatriation Medical Authority, to have reasonable access to any document containing information considered by the Authority for the purposes of an investigation.
   (2) The Authority may not disclose any personal information about a particular person if the information is likely to reveal the identity of that person.
medical-scientific papers and the Statement of Reasons. The RMA also advised that it was undertaking consultation with a number of third parties regarding personal information in the remaining documents.²

7. On 15 June 2012, the RMA advised the AGWVA that, in light of the documents the RMA had provided the AGWVA under s 196i of the VEA, it understood the scope of the AGWVA’s FOI request to be limited to items (iv) and (v) above.

8. On 2 July 2012, the RMA advised the AGWVA that it had identified 12 documents within the scope of the AGWVA’s request. In making its decision, the RMA applied the legal professional privilege exemption (s 42). The RMA also edited some of the documents to remove material it considered irrelevant (s 22).

9. On 11 August 2012, the AGWVA sought IC review of the RMA’s decision under s 54L of the FOI Act. In its application for IC review, the AGWVA advised that it was only seeking review of the RMAs decision in relation to s 42.

Decision under review

10. The decision under review is the decision of the RMA on 2 July 2012 to refuse the AGWVA access to documents 1 and 8-12.

Legal professional privilege exemption (s 42)

11. Section 42 of the FOI Act relevantly provides:

Documents subject to legal professional privilege

(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

(2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

12. Legal professional privilege (LPP) protects confidential communications between a lawyer and a client from compulsory production.

13. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that, at common law, determining whether a communication is privileged requires a consideration of the following:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice or for use in connection with actual or anticipated litigation

² This information was later released to the AGWVA under s 196l of the VEA on 2 July 2012.
• whether the advice given is independent
• whether the advice given is confidential.³

14. For LPP to apply to a communication, there must be a true lawyer-client relationship between the legal adviser and the agency. It is well established that an independent legal adviser-client relationship can exist between a lawyer employed by the government and a government agency.⁴ Whether such a relationship exists in a particular case is a question of fact.⁵

Does the advice attract privilege?

15. I have examined documents 1, 8, 9, 10, 11 and 12. Document 1 is the minutes of an RMA meeting held on 7-8 April 2009. The RMA exempted one paragraph on page 9 of document 1 that summarises the advice provided to the RMA from the Australian Government Solicitor (AGS). Documents 8-12 are correspondence between the RMA and an AGS lawyer about the RMA’s investigation into Gulf War Syndrome; draft and final advices provided to the RMA from the AGS; and correspondence between the RMA and AGS regarding advice about the draft Statement of Reasons of the RMA’s investigation.

16. In submissions to the OAIC, the AGWVA questioned whether the RMA could rely on LPP for advice provided to it by a solicitor of the AGS. The AGWVA also questioned the independence of the AGS solicitor from the RMA.

17. Section 55Q(1) of the Judiciary Act 1903 provides that:

\[
\text{AGS lawyers}
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(1) An AGS lawyer acting in that capacity is entitled:

(a) to do everything necessary or convenient for that purpose; and

(b) to practise as a barrister, solicitor, or barrister and solicitor in any court and in any State or Territory; and

(c) to all the rights and privileges of so practising;

whether or not he or she is so entitled apart from this subsection.

18. Section 55K of the Judiciary Act 1903 also provides that one of the functions of AGS lawyers is to provide legal and related services to the Commonwealth. AGS lawyers are also required to adhere to the same duties and obligations to their clients as solicitors in private practice, including maintaining a client’s LPP.

19. The AGS solicitor who provided the advice to the RMA is legally qualified, was employed by the AGS as a lawyer and was acting in that capacity, at the time he provided the advice. I am satisfied that the AGS and RMA had a legal relationship.

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³ Office of the Australian Information Commissioner, Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (2010), [5.118].
⁴ Guidelines [5.120].
⁵ Guidelines [5.120].
adviser-client relationship and that the advice provided by the AGS to the RMA was independent.

20. The advice was sought and provided to assist the RMA in its investigation into Gulf War Syndrome under the VEA. I am also satisfied that the summary of the legal advice in document 1 and the communications between the RMA and AGS in documents 8-12 was for the dominant purpose of giving or receiving legal advice.

Has privilege in the communication been waived?

21. Section 42(2) of the FOI Act provides that a document is not exempt if ‘the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim’.

22. Legal professional privilege is sometimes called ‘client legal privilege’ to emphasise the fact that the client is entitled to its benefit. The client in this case—the person entitled to claim legal professional privilege in relation to the documents that are the subject of this IC review—is the RMA. Section 42(2) will apply in this case if the RMA has waived the privilege.

23. Waiver may be express or implied. None of the information before me suggests that the RMA has done anything inconsistent with the maintenance of legal professional privilege in the documents that are the subject of this IC review. Section 42(2) does not apply.

Findings

24. Documents 1, 8, 9, 10, 11 and 12 are exempt under s 42(1) of the FOI Act.

Giving access to exempt documents

25. In submissions to the OAIC, the AGWVA contended that no ‘real harm’ would result from the disclosure of the documents.

26. Even though part of document 1 and all of documents 8-12 are exempt under s 42 of the FOI Act, it is open to the RMA to give the AGWVA access to all of those documents. The FOI Act is expressly not intended to limit any power to give access to documents, including exempt documents.

27. Further, the Guidelines explain that ‘[a]gencies are advised not to claim exemption for a document under s 42 unless it is considered that ‘real harm’ would result from releasing the document.’

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6 See, for example, Esso Australia Resources Ltd v Commissioner of Taxation [1999] HCA 67 [35]; 201 CLR 49, 64 (Gleeson CJ, Gaudron and Gummow JJ). See also Division 1 of Part 3.10 of the Evidence Act 1995, though that statutory test is not applicable to s 42 of the FOI Act: Guidelines [5.116]; Commonwealth v Dutton [2000] FCA 1466; 102 FCR 168.
7 See Doney and Department of Finance and Deregulation [2012] AICmr 25 [19]–[21].
8 Guidelines [5.134].
28. However, because of s 55L of the FOI Act, I do not have the power to decide, on an IC review, that access be given to exempt material.

Decision

29. Under s 55K of the FOI Act, I affirm the RMA’s decision of 2 July 2012.

Timothy Pilgrim  
Privacy Commissioner  
20 February 2014

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the Administrative Appeals Tribunal Act 1975). An application fee may be payable when lodging an application for review to the AAT. The current application fee is $816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT’s website (www.aat.gov.au) or by telephoning 1300 366 700.