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Report of the Veterans Ombudsman

November 2012

Veterans' Right to Disclosure A Matter of Procedural Fairness

Examination of the procedures used by Veterans Affairs Canada to retrieve and process service and health records to prepare disability benefit applications for adjudication

Canada

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November 23, 2012

The Honourable Steven Blaney, P.C., M.P.
Minister of Veterans Affairs
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister:

I am pleased to submit to you the report *Veterans' Right to Disclosure: A Matter of Procedural Fairness*. The report contains the results of our examination of the Department's application process for disability pensions and disability awards. The objective was to determine if the process to prepare the application package that disability adjudicators use to render decisions is compliant with the legislation and procedurally fair.

I look forward to discussing the findings and the recommendations contained in the report at your earliest convenience.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Guy Parent".

Guy Parent
Veterans Ombudsman

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THE MANDATE OF THE VETERANS OMBUDSMAN

The Office of the Veterans Ombudsman, created by Order in Council,¹ works to ensure that Veterans, serving members of the Canadian Forces and the Royal Canadian Mounted Police, and other clients of Veterans Affairs Canada are treated respectfully, in accordance with the *Veterans Bill of Rights*, and receive the services and benefits that they require in a fair, timely and efficient manner.

The Office addresses complaints, emerging and systemic issues related to programs and services provided or administered by the Veterans Affairs Canada, as well as systemic issues related to the Veterans Review and Appeal Board.

The Veterans Ombudsman is an independent and impartial officer who is committed to ensuring that Veterans and other clients of Veterans Affairs Canada are treated fairly. The Ombudsman measures fairness in terms of *adequacy* (Are the right programs and services in place to meet the needs?), *sufficiency* (Are the right programs and services sufficiently resourced?), and *accessibility* (Are eligibility criteria creating unfair barriers, and can the benefits and services provided by Veterans Affairs Canada be accessed quickly and easily?).

In accordance with the *Veterans Bill of Rights*, Veterans and all other clients of Veterans Affairs have the right to:

- Be treated with respect, dignity, fairness and courtesy.
- Take part in discussions that involve them and their family.
- Have someone with them for support when they deal with Veterans Affairs.
- Receive clear, easy-to-understand information about programs and services, in English or French, as set out in the *Official Languages Act*.
- Have their privacy protected as set out in the *Privacy Act*.
- Receive benefits and services as set out in published service standards and to know their appeal rights.

They have the right to make a complaint and have the matter looked into if they feel that any of their rights have not been upheld.

¹ Order in Council P.C. 207-530, April 3, 2007.

REPORT SUMMARY

Veterans' Right to Disclosure: A Matter of Procedural Fairness is the third in a series of four reports on procedural fairness issues related to the various steps in the disability benefits process, from initial application for disability pensions and disability awards to adjudication by Veterans Affairs Canada and final appeal at the Veterans Review and Appeal Board.

This report contains the results of the Veterans Ombudsman's examination of the front end of the disability benefits process, namely the application process. The objective was to determine if the process to prepare the application package that disability adjudicators use to render decisions is compliant with the legislation and the principles of procedural fairness.

The principles of procedural fairness of relevance to the application process are those that pertain to applicants' right to a fair hearing and their participation rights. When fulfilled, these rights ensure that applicants are aware of the information that will be considered by adjudicators (the right to disclosure), and are given the opportunity to provide their own information and challenge the information available to adjudicators. Adjudicators, on the other hand, are to remain unbiased and to consider only relevant information to the claim (the right to a fair hearing).

After receiving an application, the Department obtains the applicant's service and health records directly from the custodians of the records (Library and Archives Canada, the Canadian Forces and the RCMP). Although the legislation requires applicants to substantiate their claim, the Department relies on records obtained from custodians rather than those submitted by applicants. Employees screen the records to select documents relating to the application. These selected documents are then sent to disability benefits officers who 'flag' documents they believe to be most relevant to the application. Flagging is done to relieve adjudicators from the burden of examining all selected documents. The application package, containing all selected documents, those that are flagged and those that are not, is then sent to disability adjudicators for decision-making.

The Veterans Ombudsman notes that there are no provisions in the application process to provide applicants with copies of documents that will be forwarded to adjudicators. By not disclosing the information, applicants are denied the opportunity to provide their own information, for example, by noting or supplying missing information or to challenge information that will be reviewed by adjudicators. The failure to disclose information and the practice of not considering records provided by applicants also infringes applicants' obligation to substantiate their claim, as specified in the legislation.

The practice of 'flagging' documents is also of concern to the Ombudsman. Disability benefits officers do not have the delegated authority to make decisions on applications, yet by drawing attention to specific information, they are making decisions pertaining to the relevance of evidence, which may influence adjudicators. This may introduce bias into the adjudication process.

For these reasons, the Veterans Ombudsman finds that the current process is procedurally unfair:

Veterans and serving members of the Canadian Forces and the RCMP should not be kept in the dark when it comes to their own application for disability benefits. They have the right to know what information is considered by decision-makers, and they should be able to challenge that information and provide their own.

It is reasonable for Veterans Affairs Canada to retrieve the needed information in support of applications, but administrative practices, as much as they might aim for increased effectiveness, should never stand in the way of Veterans' and serving members' rights to participation and to a fair hearing. While disclosure of information may require a bit more time at the beginning of the process, the overall process will be more efficient by reducing the need for reviews and appeals.

VETERANS OMBUDSMAN'S RECOMMENDATIONS

RECOMMENDATION 1 – That Veterans Affairs Canada modify the current procedure to retrieve service and health records by providing applicants with a copy of the records and all other information that will be considered by adjudicators in making decisions on disability benefit applications, along with a notice advising applicants of the importance of reviewing the information and notifying the Department of any errors or omissions.

RECOMMENDATION 2 – That Veterans Affairs Canada clarify how service and health records required to process disability benefit applications will be obtained and by whom; and that this be included in a policy available to applicants.

RECOMMENDATION 3 – That Veterans Affairs Canada more clearly inform applicants of its intent to retrieve service and health records upon receipt of the application, and the types of records that will be retrieved, and notify applicants that, notwithstanding the actions deemed to be authorized by the consent form, applicants remain responsible for the accuracy of the information.

RECOMMENDATION 4 – That service and health records recovered by Veterans Affairs Canada in support of disability benefit applications be sent directly to disability adjudicators intact and without input by employees who do not have the delegated authority to render decisions on applications.

PURPOSE OF THE REVIEW

Veterans Affairs Canada (the Department) administers a number of programs providing services and benefits to Veterans² and serving members of the Canadian Forces and the RCMP. One of the largest is the disability benefits program, which compensates Veterans and serving members for a service-related disability through the provision of disability pensions under the *Pension Act*³ and disability awards under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.⁴

Administrative decision-makers perform their duties according to legislated mandates. Their decisions, which affect the rights or interests of citizens, are held to standards of procedural fairness. These standards mean that processes⁵ leading to a decision must be fair, reasonable, lawful and respectful of applicants' rights. In the case of Veterans Affairs Canada, upholding and translating the principles of procedural fairness into practice protects the rights of Veterans and enhances their confidence in the disability benefits process.⁶

Since the Ombudsman's Office began receiving complaints in 2008, roughly 20 percent of them have concerned disability benefit decisions from Veterans Affairs Canada. In reviewing those cases, the Ombudsman identified a number of procedural fairness issues related to the various steps within the disability benefits process (application, adjudication, review and appeal).

The Ombudsman notified the Department in October 2010 of his intention to investigate broad issues of procedural fairness related to the administration of the disability benefits program.

In his report *Veterans' Right to Know Reasons for Decisions – A Matter of Procedural Fairness*,⁷ the Ombudsman addressed the issue of providing adequate reasons for decisions in letters issued by Veterans Affairs Canada. In his report *Veterans' Right to Fair Adjudication*,⁸ the Ombudsman addressed issues pertaining to the review and appeal process.

This report addresses issues related to the Department's application process, which is the first step in the disability benefits process, by examining the policies and procedures in place to receive applications, retrieve the service and health records and prepare the application file that will be used by the disability adjudicator to make a decision.

² For the purposes of this report, "Veterans" also refers to family members and survivors.

³ *Pension Act* (R.S.C., 1985, c. P-6).

⁴ *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (S.C. 2005, c. 21).

⁵ In this report, the term "process" refers to a series of steps, or procedures to achieve an end-result.

⁶ The term "disability benefits process" in this report refers to the framework (policies and administrative procedures) in place to process applications for disability pensions and disability awards under the governing legislation, from initial application to adjudication and final appeal.

⁷ Office of the Veterans Ombudsman, *Veterans' Right to Know Reasons for Decisions – A Matter of Procedural Fairness*, 2011.

⁸ Office of the Veterans Ombudsman, *Veterans' Right for Fair Adjudication*, 2012.

The purpose of this review was to determine whether the steps and procedures within the Department's application process are compliant with the legislation and procedurally fair in regards to Veterans' participation rights and the right to a fair hearing, including the right to be aware of the information that will be considered by adjudicators (the right to disclosure); the right to provide their own information and to challenge the information available to decision-makers; and the right to determine the relevance of information provided to adjudicators.

METHODOLOGY

To provide a framework for this review, the Ombudsman used a set of guidelines applicable to procedural fairness in public sector decision-making to evaluate the Department's procedures for processing applications for disability benefits.

These guidelines were developed following a review of the common law applicable to administrative decisions and decision-making in Canada and a literature review on topics such as principles of procedural fairness, procedural fairness in public sector decision-making and best practices for statutory decision-makers. The methodology also included:

- A review of complaints to the Ombudsman related to disability benefits;
- A review and analysis of legislation and regulations related to the mandate of Veterans Affairs Canada and the administration of the disability benefits program;
- An analysis of the appeal system for disability benefits, including the policies, practices and procedures of the Veterans Review and Appeal Board;
- A review of evaluation, audit and performance reports related to disability benefits carried out by Veterans Affairs Canada or other organizations;
- A review of the Department's policy and procedures guides and manuals provided to employees who process applications for disability benefits;
- Telephone interviews with three disability benefits officers (formerly, pension officers) and three pension assistants; and
- Consultation with the Royal Canadian Legion.

DISABILITY BENEFITS FOR VETERANS

LEGISLATIVE FRAMEWORK

The framework for applying for, processing, and deciding disability benefits is extensively detailed in legislation. The majority of disability benefits are provided for by one of two legislative authorities.⁹ The first is the *Pension Act* which prescribes long term monthly disability pensions.¹⁰ The second is the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, also referred to as the New Veterans Charter, which provides lump sum disability awards.

Both Acts are interpreted in more detail through regulations. The *Award Regulations*,¹¹ created under the authority of section 91 of the *Pension Act*, and the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*,¹² created under the authority of section 94 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, more precisely set down such things as how applications for disability benefits are to be made, what information is to be provided with applications, and requirements of the Department in administering and processing applications. Both Acts also provide for avenues of review and appeal if an applicant is dissatisfied with the Department's decision.

OVERVIEW OF THE DISABILITY BENEFITS PROCESS

Before discussing in greater depth the application process, it is useful to briefly summarize the various steps in the overall disability benefits process (application, adjudication, review and appeal).

- 1) **Application for a disability pension or award** is made to the Department with the assistance of a disability benefits officer (formerly, pension officer).
- 2) **First-level adjudication** – adjudication of the application in terms of entitlement and assessment¹³ by a disability adjudicator (formerly, pension adjudicator).

⁹ Exceptions include disability benefits for the RCMP, which are administered by Veterans Affairs Canada under separate legislative authority.

¹⁰ Under the *Pension Act*, a one-time lump sum payment is awarded if the rate of pension payable is between 1% and 4%.

¹¹ *Award Regulations* (SOR/96-66).

¹² *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations* (SOR/2006-50).

¹³ The entitlement decision pertains to the relationship between a disability and the applicant's service. If it is established that a relationship does exist, partial or full entitlement is expressed on a fifths scale, from 1/5 (minimal link between disability and service) to 5/5 (disability arises fully from service). The assessment decision pertains to the degree of severity of the disability and its impact on the applicant's quality of life, expressed on a percentage scale, from 0 to 100 percent. The rate of disability benefit payable is obtained by multiplying the entitlement figure, expressed in fifths, by the assessment figure, expressed as a percent.

3) **Redress options** – applicants who exercise their appeal rights can obtain legal representation at no cost from the Bureau of Pensions Advocates, which is a nation-wide organization of lawyers within Veterans Affairs Canada. The redress options are:

- **Departmental review** – the Department may confirm, amend, or rescind the adjudicator’s decision if an error with respect to any finding of fact or interpretation of law has occurred or, on application, if new evidence is presented.¹⁴
- **Review hearing before the Veterans Review and Appeal Board** – the Board has exclusive jurisdiction to review decisions (first-level decision and departmental review decision) of the Department.¹⁵ The review hearing is the only time in the process when applicants may appear and testify about the facts of their application. Review hearings are normally conducted by two Board members. On its own motion, the Board may also reconsider its decisions if an apparent error of fact or law has occurred.¹⁶
- **Appeal hearing before the Veterans Review and Appeal Board** – an applicant who is not satisfied with the result of the review hearing may appeal to the Board.¹⁷ While the legislation does not permit applicants to testify in person again, they may submit written statements and new evidence. The appeal hearing is an additional opportunity for the applicant’s representative to make arguments before three different Board members.
- **Reconsideration before the Veterans Review and Appeal Board** – on its own motion, the Board may also reconsider its decisions on appeal if an apparent error of fact or law has occurred, or, on application, if the applicant alleges that an error of fact or law was made or has new evidence for the Board to consider.
- **Application for judicial review to the Federal Courts** – if the applicant remains unsatisfied, he or she may seek judicial review on application to the Federal Court, and subsequently to the Federal Court of Appeal. Since the Bureau of Pensions Advocates is not mandated to represent applicants in the Federal Courts, applicants must either represent themselves or secure legal counsel at their own expense.

¹⁴ Pursuant to section 82 of the *Pension Act* or section 84 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.

¹⁵ Pursuant to section 84 of the *Pension Act* and Section 18 of the *Veterans Review and Appeal Board Act*.

¹⁶ Pursuant to section 23 of the *Veterans Review and Appeal Board Act*.

¹⁷ Pursuant to section 26 of the *Veterans Review and Appeal Board Act*.

VETERANS' RIGHTS IN THE DISABILITY BENEFITS PROCESS

Policies and procedures developed by Veterans Affairs Canada to administer the disability benefits program must comply with both legislative requirements and the principles of procedural fairness.

Veterans have a number of rights embodied in the legislation, which must be respected. In addition, the actions and operations of governments and government agencies are governed by administrative law. Over the years, administrative law has developed a set of standards that govern what statutory decision-makers must do according to their legislated authorities and how they must discharge their rights and responsibilities. One of these responsibilities is to respect the principles of procedural fairness when making decisions.

Procedural fairness concerns the affected party's rights during the deliberation of a decision before a statutory decision-maker. These rights flow from two principles of natural justice: the right to be heard (*audi alteram partem*) and the right to be judged impartially (*nemo iudex in sua causa*). In Canada, these rights are provided by the common law and specific legislation that empowers a statutory decision-maker.

The basic principles of procedural fairness¹⁸ can be summarized as follows:

Participation Rights

- The person affected is aware that a decision will be made;
- The person affected is aware of the information that will be considered when the decision is made (the right to disclosure);
- The person affected is given the opportunity to provide his or her own information and to challenge the information available to decision-makers.

The Right to a Fair Hearing

- The decision-maker is unbiased;
- The decision-maker considers all relevant information and nothing irrelevant when making the decision.

The Right to Reasons for the Decision

- The person affected is notified of, and provided reasons for the decision.

¹⁸ See for example Supreme Court of Canada cases (<http://www.scc-csc.gc.ca>) setting down requirements for procedural fairness.

APPLICATION PROCESS

For the purposes of this review, the application process refers to all steps and procedures to prepare the application package that will be relied upon by disability adjudicators to make a decision. These steps, which include filing an initial application, retrieving the service and health records and identifying the relevant information to the claim, are the same for disability pensions and disability awards.

LEGISLATIVE REQUIREMENT

Veterans who believe they qualify for disability benefits must submit an application to the Department. Applications must conform to legislated requirements that clearly place the onus on applicants to substantiate their claims.

Section 3 of the *Award Regulations* (pursuant to Section 91 of the *Pension Act*) stipulates that:

An applicant for an award shall provide the Minister with

- (a) any documentation necessary to substantiate the applicant's claim;*
- (b) information on the applicant's domestic status;*
- (c) any other relevant information; and*
- (d) an affidavit or statutory declaration attesting to the truth of the information provided.*

Sections 48 and 49 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations* stipulate that:

48. An application for compensation under Part 3 of the Act shall be made in writing and shall include

- (a) a declaration attesting to the truth of the information provided; and*
- (b) at the request of the Minister, any information or documents that are necessary to enable the Minister to assess whether an applicant is eligible for compensation or the amount of compensation payable.*

49. An application for a disability award shall include

- (a) medical reports or other records that document the member's or veteran's injury or disease, diagnosis, disability and increase in the extent of the disability.*

INITIAL APPLICATION

The first step in applying for disability benefits is for the Veteran or serving member of the Canadian Forces or the RCMP to contact Veterans Affairs Canada by phone, in person at one of the Department's district offices in various parts of the country, or by downloading the application form from the Department's Web site. In practice, few applications are submitted without first contacting the Department's call centre or a district office. Irrespective of how applicants obtain application forms, their completed application will first be sent to the nearest district office for processing by a disability benefits officer.

It is important to note that, on 26 July 2012, Veterans Affairs Canada announced a new partnership with Service Canada that provides access to the Department's programs and services through Service Canada locations. This includes obtaining and submitting applications for disability benefits. The impact of this initiative on the process is not yet known due to the short period of time it has been in effect.

Pursuant to section 81(3) of the *Pension Act*, the role of the disability benefits officer is to counsel and assist applicants and potential applicants in completing their application for disability benefits.¹⁹ The disability benefits officer also has administrative responsibilities once an application has been submitted, which include verifying the application for completeness, ordering service and health records, and following up with the applicant and their medical practitioners for supplementary information. Throughout the application process, the disability benefits officer can be said to act as the Department's coordinator for matters relating to the application.

Under the *Department of Veterans Affairs Act*²⁰ and the *Privacy Act*,²¹ the Department has the authority to collect relevant personal information necessary to make a decision.

INITIAL RETRIEVAL OF SERVICE AND HEALTH RECORDS

Throughout a member's career, numerous records are collected, including records of enlistment, duty assignments, medical and health reports, and fitness and personnel evaluations. Veterans Affairs Canada refers to these records as *Service and Health Records* or *SHRs*. Depending on the applicant's service and medical history, service and health records may be extensive.

These records are essential when making an application for disability benefits as they are used to determine entitlement by establishing a relationship between service and the disability. One of the first things done by the disability benefits officer when he or she receives an application for processing is to request the applicant's SHRs. The Department assumes the authority to take this step through a release/consent²² included with the application form.

¹⁹ Counselling is provided for under the *Pension Act*, section 81(3). There is no such provision under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (New Veterans Charter).

²⁰ *Department of Veterans Affairs Act* (R.S.C., 1985, c. V-1).

²¹ *Privacy Act* (R.S.C., 1985, c. P-21).

²² Form PEN 860e (2012-04) *Authority to Release Medical/Service Information* has recently been replaced by form PEN 923APe (2012-06) *Consent for Veterans Affairs Canada to Collect Personal Information from Third Parties*.

Service and health records are kept at Canadian Forces Bases for still-serving or recently released Canadian Forces members, at Library and Archives Canada if the Veteran has been released for some time, or at RCMP Headquarters for former and serving members of the RCMP.²³

If service and health records are held at Library and Archives Canada, the applicant's complete records are first sent to the Department's Outside Documents Unit.²⁴ The Unit screens the records to select only service and medical documents relating to the application. This search relies on a list supplied to clerical staff detailing documents that should be looked for and retrieved (refer to Appendix 1). Only these documents are extracted, copied and forwarded on to the disability benefits officer.

If service and health records are held on a Canadian Forces Base, documents are screened on site either by Canadian Forces or Department personnel.²⁵ Records held at RCMP Headquarters are sent to the Department's Outside Documents Unit. Screening of documents on Canadian Forces Bases and by the Department's Outside Documents Unit is done using a checklist.

Selected documents resulting from the screening procedure are then copied and forwarded to disability benefits officers located in district offices.

The Department's practice is for its employees to retrieve service and health records directly from custodians of records, even if the applicant has submitted some or all of these records with his or her application. In some cases, applicants may be told that the Department will not accept these records even if they are submitted.

Under the current procedure, the full set of records retrieved from custodians, or those selected from the full set for purposes of processing the application are not disclosed to applicants.

²³ For ease of reference and economy of language, these locations are referred to as custodians of records, or custodians.

²⁴ Veterans Affairs Canada has recently introduced a partnership with Public Works and Government Services Canada (PWGSC) whereby service and health records that are requested from Library and Archives Canada are then forwarded to a PWGSC facility in Quebec to be scanned and uploaded to the Department's Client Service Delivery Network (CSDN).

²⁵ The Department makes clerical staff available for this purpose at some Canadian Forces Bases where limited resources could result in delays in retrieving records.

PROCESSING OF SERVICE AND HEALTH RECORDS BY DISABILITY BENEFITS OFFICERS

Once the selected documents from applicants' service and health records are sent to the disability benefits officer,²⁶ he or she reviews the documents to identify those that are relevant to the application, using a procedure termed "flagging". The rationale for flagging was described in a departmental business process, dated October 2011²⁷ as follows:

The DBO [disability benefits officer] should use the client's basis of claim to focus their document review, rather than conducting a detailed chronological search of the entire set. A more focused review of the documentation will help achieve a balance between timeliness and perfection to improve on client service delivery.

This process document was updated in July 2012, and now reads:

The DBO [disability benefits officer] should use the applicant's basis of claim to focus their document review.

The purpose of flagging, as inferred from this rationale, is to pre-screen the selected documents at the initial processing point so as to relieve adjudicators from the burden of examining all selected documents.

The business process gives numerous examples of how flagging might be performed, but the essence of the procedure is that only records within a period relevant to the claim, or appearing to specifically relate to the disability, are to be flagged. The main steps to flag documents are summarized below:

The DBO [disability benefits officer] should focus on flagging/stamping documents such as the CF 98 to support accident/injury, the first manifestation of the claimed condition and other documents related to the applicant's statement of claim.

The [disability benefits officer] should limit their review of records that document ongoing complaints or treatments, prolonged or repeat hospitalizations. The pertinent information can be found in case history or discharge summaries.

The [disability benefits officer] should flag/stamp the first record of medical diagnosis of the claimed condition. It is not necessary to flag/stamp subsequent complaints/treatments for the same condition.

²⁶ In certain cases, disability benefits assistants provide support to disability benefits officers in the processing of service and health records.

²⁷ Department of Veterans Affairs, *Disability Benefits Unit: How to Process Disability Benefits Applications*, October 2011, updated July 2012.

As with the previous step, documents forwarded by the disability benefits officer to the adjudicator are not disclosed to the applicant, nor is the applicant advised of the documents flagged for the adjudicator's attention.

ANALYSIS

In reviewing the Department's application process and procedures, a number of issues were identified. These concern the initial recovery of service and health records and subsequent processing of those files prior to delivery to the adjudicator. These processes and procedures give rise to two main issues:

1. Processes and procedures interfere with, and in some cases compromise the applicant's ability to comply with legislative requirements that they must substantiate their claim for disability benefits.
2. Processes and procedures deny procedural fairness to the applicant, specifically in that they deny participation rights with respect to information considered by decision-makers adjudicating their claim.

PROCESS TO RETRIEVE RECORDS COMPROMISES APPLICANTS' ABILITY TO SUBSTANTIATE THEIR CLAIMS

One of the most important bodies of evidence before disability adjudicators is the applicant's service and health records. These are essential to connect service history with the disability condition underlying the application. In accordance with section 3 the *Award Regulations* and sections 48 and 49 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations* (New Veterans Charter), Veterans who apply for disability benefits are responsible for providing documentation necessary to substantiate their claims, including service and health records. In practice, however, the Department has taken on the responsibility of retrieving service and health records directly from Library and Archives Canada, the Canadian Forces and the RCMP, without providing applicants with a copy of the retrieved records.

Up until June 2012, the Department appeared to assume the authority for retrieving service and health records based on applicants' signature of the form *Authority to Release Medical/Service Information* (refer to Appendix 2), which was included with the application package. The wording on the release form included:

I hereby give permission for Veterans Affairs Canada (VAC) to have access to my personal information from the following sources:

Doctor/health professional, hospital and/or institution as it relates to my claim for disability benefits. Please provide name and address.

Service Health Records from the Department of National Defence – CF Health Services, Library and Archives Canada, RCMP Health Services or other source. Information may include complete health records (including the mental health, psychosocial, service and dental files), personnel and service records.

The release form also contained a “Privacy Notice” section, with the following text:

I understand that:

- *I have the right to withhold consent to the disclosure of my service health records;*
- *I have the right to receive a copy of such records upon request;*
- *I have the right to review my information and request corrections;*
- *this consent shall remain in effect for a period of two years from the date of signature or until my written revocation is delivered to VAC, whichever is less;*
- *any such revocation (withdrawal of consent) shall not affect disclosures made prior to the receipt of any such written revocation;*
- *the representative of VAC might not be a licensed health professional subject to the oversight of a health profession regulatory authority; and*
- *VAC staff are subject to the Privacy Act and all other legislation under their responsibility.*

Since June 2012, the consent was replaced with a new version²⁸ *Consent for Veterans Affairs Canada to Collect Personal Information from Third Parties* (refer to Appendix 3), which states:

I give my permission to Veterans Affairs Canada (VAC) to collect relevant personal information in support of my application/request for a VAC benefit, service, and/or a VAC program. . .

Records, relevant to my application/request, may be collected from the following persons/parties/institutions (applicant provides names and addresses) . . .

²⁸ The new version consolidated both the Authority to Release Service/Medical Information form and the Authority to Release Information – Compensation form into one form.

The following note appears at the bottom of the first page of the form:

Note: *If my service and health records are required, VAC has the authority to obtain them directly from the Department of National Defence, Library and Archives Canada, and/or the Royal Canadian Mounted Police (RCMP) Health Services, as applicable.*

The new consent form also contains a “Privacy Notice” section, with the following text:

. . . The Privacy Act also gives you a right of access to personal information about yourself under the control of the Department, as well as a right to challenge the accuracy and completeness of your personal information and have it changed as appropriate. . .

In the course of this review, interviews with Department operational staff confirmed that an application will not be processed unless this form is signed. We were also informed that operational practice is to not consider service and health records if they are supplied by applicants. Processing begins upon receipt of service and health records retrieved by the Department.

We requested a clarification of this policy from the Department, and received the following response to our enquiry:

In consultation with Central Operations Directorate, Program Policy and Department of Justice, Legal Services Unit I have confirmed the common practice of the Department has been to obtain the documentation to support disability applications directly from the record custodian, which in this case is Department of National Defence (DND).²⁹ The Department can accept a client’s copy of the SHRs but it is sound practice to obtain a copy directly from DND to ensure completeness and accuracy which is part of the Department’s responsibility to exercise due diligence in the decision making process. Verification of the authenticity of documentation to be relied upon is a necessary first step in the adjudication process. There is an overarching duty on a decision maker to obtain the best evidence available and in this instance, the best evidence comes directly from the records compiled by DND itself.³⁰

²⁹ The request for clarification made by the Office of the Veterans Ombudsman regarded the general policy on retrieval of service and health records. The response referencing those held only by the Canadian Forces was the Department’s interpretation of the request.

³⁰ National Program Manager – Disability Benefits, April 19, 2012.

The Veterans Ombudsman agrees that Veterans Affairs Canada must exercise due diligence in substantiating claims and recognizes that there are administrative advantages to both parties in having the Department assume responsibility for retrieving service and health documents, including speed and quality assurance.

However, it must also be recognized that the procedure to retrieve service and health records directly from custodians and the practice of not considering records from applicants in favour of documents retrieved by the Department has the effect of shifting the responsibility for providing essential evidence in support of a claim from the applicant, as intended in the legislation, to employees of the Department.

While the current retrieval procedure was put in place by the Department to accord with the principle that “*there is an overarching duty on a decision-maker to obtain the best evidence available*”, the fact remains that the legislation places an absolute duty on applicants to substantiate their claim. Furthermore, our analysis of the legislation governing disability benefits finds nothing that would bestow the status of legislation on this practice. It is an internal management process based on the Department’s own interpretation of how best to meet its administrative needs. As such, this practice cannot replace or interfere with the applicant’s obligation, as specified in the legislation.³¹

The Veterans Ombudsman is of the view that the Department should continue to retrieve service and health records from custodians but that changes to the procedure are required so as to not impede applicants’ ability to comply with their legislated obligation to substantiate their claim.

Moreover, nothing in the earlier version of the release form (PEN 860e, *Authority to Release Medical/Service Information*) provided to applicants to authorize access to their records, or any other information available to describe the application process, explained to them the implications of this policy. Nothing was said or implied in this statement that would have led the applicant to understand that the Department is to recover their service records, or that the applicant is discouraged or even barred from supplying their own. Of most concern, is the fact that nothing was said in the release form, or elsewhere in the application materials, to inform applicants that they remain fully responsible for any documents obtained by signing the release form.

The current release form (PEN 923APe, *Consent for Veterans Affairs Canada to Collect Personal Information from Third Parties*) is a slight improvement over the previous one in that an explicit note is included to inform applicants that their service and health records will be retrieved directly by the Department. We find, however, that the consent form is still deficient. The poor wording of the note to the effect that “*If my service and health records are required, VAC has the authority to obtain them . . .*” does not clearly state that signature of the consent form provides this authority. The ambiguity of the statement is such that it can also be read to suggest the Department already has this authority, for which no consent is required.

³¹ See for example *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)* [1995] 1 S.C.R.

PROCEDURAL FAIRNESS ISSUES

Denial of participation rights

The legislative conflict created by the Department's practice of directly retrieving service and health records is compounded by a related, larger issue, which is the denial of applicants' participation rights in the decision-making process.

As described earlier, these participation rights are:

1. The person affected is aware that a decision will be made;
2. The person affected is aware of the information that will be considered when the decision is made (the right to disclosure);
3. The person affected is given the opportunity to provide his or her own information and to challenge the information in the decision-makers' hands.

There is no provision in the process of retrieving, screening and flagging service and health records to provide applicants with copies of documents recovered from custodians and flagged by disability benefits officers prior to delivery to adjudicators. By not disclosing the information that will be reviewed by adjudicators, applicants are denied the opportunity to participate meaningfully in the decision-making process. This lack of knowledge means that applicants do not have the opportunity to provide their own information, for example, by noting or supplying missing information or to challenge information that will be reviewed by the adjudicator, nor do they have the ability to determine whether the adjudicator is only considering relevant information. For these reasons, the current practice is procedurally unfair.

Applicants are required to complete the document *Consent for Veterans Affairs Canada to Collect Personal Information from Third Parties* as part of their application for disability benefits. This document states that "The *Privacy Act* also gives you a right of access to personal information about yourself under the control of the Department, as well as a right to challenge the accuracy and completeness of your personal information and have it changed as appropriate." This does not remedy this denial of procedural fairness. In practice, at no time is the applicant notified when the Department has received the records from custodians or when selected documents from the original set are ready to be sent for further processing. Furthermore, by having to request documents under the *Privacy Act*, applicants would not receive them in time to verify their accuracy and completeness before adjudication.

The right to full disclosure is one of the principal components of a fair procedure. In this case, not only is the information retrieved not disclosed, but neither is the fact that it has been retrieved and put into the application package for adjudication purposes.³²

³² See for example, *Quebec (Attorney General) v. Canada (National Energy Board)*, 1994, S.C.R.159. Justice Labucci held that "The issue is not whether the facts disclosed were sufficient but whether disclosure was sufficient for the applicant's meaningful participation in the hearing."

Practice of flagging files may introduce bias

The Department's business process requiring disability benefits officers to examine service and health records and flag documents seemingly pertinent to the application also raises issues of administrative and procedural fairness.

The Department has structured the Disability Benefits Program such that certain functions required by the legislation are delegated to staff assigned. Authority to rule on applications has been delegated to disability adjudicators.³³ In that capacity, adjudicators act as a statutory decision-maker in that the decisions they reach fulfill the Department's legislative obligations to process applications for disability benefits and to communicate reasons for decisions. As delegated authority under the disability benefits legislation, this authority cannot be further delegated.

With the practice of flagging files, disability benefits officers act as if they have the delegated authority. By drawing attention to specific information in service and health records, disability benefits officers are making decisions pertaining to the relevance of evidence before them. Although all documents are then sent to the adjudication group for final decision, it is difficult to see how the adjudicator would not place more importance on flagged documents than on those that were not flagged. The practice of flagging files may introduce bias into the adjudication process for disability benefits by individuals who do not have the delegated authority to render decisions on applications.

Extent of service and health records retrieved could introduce bias

The focus of this part of our review was on the fairness of the Department's documentation requirements as enumerated in the screening list for the selection of service and health records (Appendix 1) routinely retrieved from custodians of service and health records.

We acknowledge that to some extent, many of the types of records requested will contain information essential to substantiating the applicant's claim and are unavoidable. In order for a process to be administratively fair and to respect the applicant's privacy, we believe that the Department should not request information and documentation beyond what it needs to assess eligibility for disability benefits.

With this in mind, we have concerns about the retrieval of non-medical records from the applicant's personnel folder that relate to psychological and fitness assessments, which are then included in the document set prepared for adjudication.

Section 109.1 of the *Pension Act* authorizes the Minister to request personal information "for the purpose of determining or verifying the member's service or medical history in order to determine eligibility for an award under this Act or a benefit under any enactment incorporating this Act by reference." Similarly, section 76(1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* stipulates that "An application ... compensation under this Act shall be made to the Minister ... and shall include any information that is required by the regulations to accompany the application." The Acts and accompanying Regulations place no limits on the kind of information that may be requested.

³³ Authority under the two Acts to adjudicate claims is delegated to the Department's Head Office only. Head Office includes the adjudication function.

This lack of restriction does not, however, permit the Department to cast a net for collection of information as widely as it likes. The authority to collect information to render decisions on disability benefit applications is given for the purposes of establishing service and medical eligibility and no further. Personnel records unrelated to these eligibilities may contain such things as performance evaluations, disciplinary actions, or other reports on performance or character that may be unrelated to the disability benefit application.

The apprehension of bias arises in that review of these reports, unless essential to adjudicating certain claims, may lead adjudicators to form opinions or draw conclusions about the character of the applicant. In order for a process to be administratively fair, we believe that the Department should not request information and documentation beyond what it needs to assess eligibility for benefits.

CONCLUSION AND RECOMMENDATIONS

Veterans Affairs Canada is taking many steps to streamline its processes and improve service delivery. However, in striving for administrative efficiency, the Department must ensure that procedural fairness is ensured, and Veterans' rights are respected.

The purpose of this review was to determine whether the steps and procedures within the application process for disability benefits are compliant with the legislation and procedurally fair. In reviewing the procedures used by the Department to prepare the application package that is relied upon by adjudicators to render decisions, a number of issues of concern to the Veterans Ombudsman were identified.

First, the Department's procedure to retrieve applicants' service and health records directly from custodians of records (Library and Archives Canada, the Canadian Forces and the RCMP), and the practice of not considering records provided by applicants interfere with applicants' obligation to substantiate their claims, as specified in the legislation.

Second, by not providing applicants with copies of documents retrieved and submitted to disability adjudicators, applicants are denied their participation rights and the right to a fair hearing, including the right to be aware of the information that will be considered by adjudicators (the right to disclosure), the right to provide their own information and to challenge the information available to decision-makers, and the right to determine the relevance of information provided to adjudicators. For these reasons, the current practice is procedurally unfair.

Finally, the practice of 'flagging' documents by disability benefits officers, for the purpose of bringing to adjudicators' attention those documents within the service and health records seemingly relevant to the application, may introduce bias into the decision-making process by individuals who do not have the delegated authority to render decisions on applications.

Recognizing that there are administrative advantages to applicants and Veterans Affairs Canada in having the Department assume responsibility for retrieving service and health records, including speed and quality assurance, the Veterans Ombudsman is of the view that the Department should continue to retrieve service and health records with an amended procedure that is procedurally fair and does not impede applicants' ability to comply with their legislated obligation to substantiate their claim.

The Veterans Ombudsman makes the following recommendations

RECOMMENDATION 1 – That Veterans Affairs Canada modify the current procedure to retrieve service and health records by providing applicants with a copy of the records and all other information that will be considered by adjudicators in making decisions on disability benefit applications, along with a notice advising applicants of the importance of reviewing the information and notifying the Department of any errors or omissions.

RECOMMENDATION 2 – That Veterans Affairs Canada clarify how service and health records required to process disability benefit applications will be obtained and by whom; and that this be included in a policy available to applicants.

RECOMMENDATION 3 – That Veterans Affairs Canada more clearly inform applicants of its intent to retrieve service and health records upon receipt of the application, and the types of records that will be retrieved, and notify applicants that, notwithstanding the actions deemed to be authorized by the consent form, applicants remain responsible for the accuracy of the information.

RECOMMENDATION 4 – That service and health records recovered by Veterans Affairs Canada in support of disability benefit applications be sent directly to disability adjudicators intact and without input by employees who do not have the delegated authority to render decisions on applications.

APPENDICES

APPENDIX 1 – SCREENING LIST FOR THE SELECTION OF SERVICE AND HEALTH RECORDS

SERVICE	
<p>A. SERVICE PAPERS</p> <p>478 – Service Folder</p> <ol style="list-style-type: none"> 1) Identification Card 2) Unit Employment Record – Employment History Record 3) Discharge Certificate 4) Re-engagement Forms 5) Attestation/Enrolment plus Applications 6) Postings (Unit – HQ) <ul style="list-style-type: none"> - Record of Service Training Reports 7) Military Personnel Record Resume 8) Casualties 9) Personnel Selection Record 10) Confidential <ul style="list-style-type: none"> - Service Interview Summary 	<p>B. PSYCHOLOGICAL CONDITIONS</p> <p>Personnel Evaluation Report – Personnel Folder</p> <ol style="list-style-type: none"> 1) Conduct Sheets 2) Assessment Forms 3) Confidential Reports 4) Training Reports 5) Course Reports 6) Psycho-social File 7) Case Management

Source: Department of Veterans Affairs, *Digital Service Health Records (SHRs) – Desktop Procedures for Outside Documents*, 2011.

MEDICALS

C. MEDICAL PAPERS

2034 – Medical Folder and Surgeon
General Folder

- 1) Medical History – CF 2078
 - Medical Questionnaire
- 2) Postings from/to O.S.
 - Special Duty and Special Operations Declaration
- 3) Battle Casualty
- 4) Report of Injuries/Exposure (CF98)
 - Court of Inquiry
- 5) Clinical Report and Account
- 6) Medical Board/History
- 7) Record of Medical Exam (Enlistment, Annuals and Discharge)
- 8) Notification of Change of Medical Category
- 9) Field Medical Exam
- 10) Sick Bay Record Card
 - Medical Attendance Record
 - Emergency Reports
- 11) Morning Sick Reports
- 12) Admission Slip
- 13) Venereal Diseases Case Card/Sheet
- 14) Hospital/Sick List Record
- 15) Case History Sheet
- 16) Summary of Case History Sheet
- 17) Laboratory results
 - Blood work results etc.
 - Drug treatment/prescriptions
- 18) Treatment
 - Doctor's Orders
 - Physiotherapy Papers
 - Progress Reports
- 19) Clinical
 - Vital Signs
- 20) Bedside Notes
 - Nursing History

- 21) Diet Sheet
- 22) Specialist Consultants' Reports:
 - Psychologist reports
 - Heart & lung reports
 - Pulmonary Function Report
 - Urology reports etc.
 - Ophthalmology Papers
- 23) Consultants' Report
 - Out Patient Clinical Records
- 24) Audiograms
- 25) Consent to Operate
- 26) X-Ray
- 27) Specific Diagnostic Reports
 - Magnetic Resonance Imaging (MRI)
 - Computed Tomography (CT) Scans
 - Ultrasounds
 - Scopes
 - Pulmonary Function Reports/Tests (PFTs)
- 28) Electrocardiogram (ECG/EKG)
 - Treadmill tests
 - Electroencephalography (EEG)
- 29) Specific Diagnostic Reports
 - MRI
 - CT Scan
 - Ultrasounds
 - Scopes
 - Pulmonary Function Tests
- 30) Anaesthetic
- 31) Operative Reports
- 32) Pathological
 - Biopsy findings
 - Result of Operation
- 33) Hospital Discharge
- 34) Vaccination Immunization Summary
- 35) Drug Profile
- 36) Dentals – Dental Folder
- 37) No Dates

MEDICALS

D. ADDITIONAL MEDICAL PAPERS

- Autopsy reports
- Letters from specialists outside of the Department of National Defence
- Career Medical Review Board
- Medic-Alert Form
- Declaration of Inquiry or Illness During Service in Special Area
- Periodic Health Assessment
- Exposure Memos
- Enhanced Post Deployment Screening Questionnaire/Booklet
- Employment Limitations for Return to Work
- Notification of Change of Medical Employment Limitations
- Canadian Forces Express Program Form

APPENDIX 2 – FORM PEN 860E (2012-04)



Veterans Affairs
Canada

Anciens Combattants
Canada



Protected when completed.

Authority to Release Medical/Service Information

		CSDN ID	File No.
Family Name (required)	Given Name (required)	Middle Name	
Country (required)	Mailing Address (required)		
Province/State (required)			
Postal Code/ZIP (required)	Date of Birth (yyyy-mm-dd)		
Service No(s).			

I hereby give permission for Veterans Affairs Canada (VAC) to have access to my personal information from the following sources:

Doctor/health professional, hospital and/or institution as it relates to my claim for disability benefits. Please provide name and address.

Service Health Records from the Department of National Defence - CF Health Services, Library and Archives Canada, RCMP Health Services or other source. Information may include complete health records (including the mental health, psychosocial, service and dental files), personnel and service records.

Privacy Notice

The personal information on this form is collected under the authority of the *Pension Act*, the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, the *Veterans Health Care Regulations*, the *Royal Canadian Mounted Police Superannuation Act* and/or the *Royal Canadian Mounted Police Pension Continuation Act* for the purpose of administering disability benefits. Provision of the information is voluntary. Failure to complete any part of this form or submitting an incomplete form may result in delays.

The personal information collected on this form is protected from unauthorized disclosure by the *Privacy Act*. Service Health Records obtained by VAC may be disclosed to Public Works and Government Services Canada (PWGSC) solely for the purpose of creating a digital image of the record for use by VAC. No personal information will be retained or used by PWGSC.

For further information on the above statement, or to request access to your personal information under the control of the Department, contact the Access to Information and Privacy Coordinator's Office, Veterans Affairs Canada, PO Box 7700, Charlottetown, PE, C1A 8M9. Please quote Personal Information Bank number VAC PPU 215.

I understand that:

- I have the right to withhold consent to the disclosure of my service health records;
- I have the right to receive a copy of such records upon request;
- I have the right to review my information and request corrections;
- this consent shall remain in effect for a period of two years from the date of signature or until my written revocation is delivered to VAC, whichever is less;
- any such revocation (withdrawal of consent) shall not affect disclosures made prior to the receipt of any such written revocation; and
- the representative of VAC might not be a licensed health professional subject to the oversight of a health profession regulatory authority. VAC staff are subject to the *Privacy Act* and all other legislation under their responsibility.

Client/applicant's signature		Date (yyyy-mm-dd)	
Home telephone No.		Business telephone No.	

PEN 860e (2012-04)



Ce formulaire est disponible en français.

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APPENDIX 3 – FORM PEN 923APE (2012–06)



Veterans Affairs Canada / Anciens Combattants Canada



Protected when completed.

Consent for Veterans Affairs Canada to Collect Personal Information from Third Parties

		CSDN ID	File No.
Family Name (required)	Given Name (required)	Middle Name	
Country (required)	Mailing Address (required)		
Province/State (required)			
Postal Code/ZIP (required)	Date of Birth (yyyy-mm-dd)		
Service number(s) (required)			

Permission to collect my personal information

I give my permission to Veterans Affairs Canada (VAC) to collect relevant personal information in support of my application/request for a VAC benefit, service, and/or a VAC program.

Indicate the benefit/service/program: (see Table 1)

Note: Only those VAC benefits/programs, in Table 1, marked with an asterisk are applicable to RCMP Members.

Records, relevant to my application/request, may be collected from the following persons/parties/institutions.

If you list more than one name and you do not wish for their names and addresses to be disclosed with each of the others, check this box.

Name	Home telephone No.
Address	
Name	Home telephone No.
Address	

Check this box if you have received, are in receipt, or are applying for other compensation such as Workers' Compensation. Please indicate the source _____ and provide the reference number. _____

Note: If my service and health records are required, VAC has the authority to obtain them directly from the Department of National Defence, Library and Archives Canada, and/or the Royal Canadian Mounted Police (RCMP) Health Services, as applicable.

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Protected when completed.

Family Name (required)	Given Name (required)	CSDN ID	File No.
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I understand that my consent shall remain in effect until I write VAC and advise that my consent is no longer valid. If this happens, it does not affect the information VAC collected, used or shared while VAC had my consent.

I have read and understood the privacy notice statement on page 7.

Signature (required)	Date (yyyy-mm-dd)
Telephone No.	Alternate telephone No.

For office use only:
Please use the following space to provide additional instructions for the specific information required and/or additional direction on the collection.



