1. I refer to your email, dated 2 June 2011, in which you requested access, under the Freedom of Information Act 1982 (FOI Act), to:

"...specifically all submissions, reports or briefs to the secretary and minister on the use of Scherger RAAF base as a detention facility and the agreement/s reached with the Department of Immigration and Citizenship to that effect."

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

FOI decision maker

3. Mr Geoff Hay MVO, Director Customer Support Operations, Base and Customer Support Services Branch, Defence Support Group is the authorised decision maker, under the FOI Act, in relation to your request.

Documents identified

4. Mr Hay identified ten documents as matching the scope of your request. A schedule of documents is at Enclosure 1.
Material taken into account

5. In making his decision, Mr Hay had regard to:
   - the specific parameters of your request;
   - the content of the documents in issue;
   - relevant provisions in the FOI Act;
   - the guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the guidelines).

Decision

6. Mr Hay has decided to release eight of the identified documents with deletions in accordance with subparagraph 22(1)(a)(i) [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under sections 42 [documents subject to legal professional privilege] and 47F [public interest conditional exemptions – personal privacy] of the FOI Act. Material which is considered irrelevant to the request has also been removed in accordance with subparagraph 22(1)(a)(ii) of the FOI Act.

7. Mr Hay has decided to release the two remaining documents intact.

Section 22

8. Upon review of the identified documents, Mr Hay found that the documents identified as Items 1, 2, 3, 4, 5, 9 & 10 on the schedule of documents contained material which related to matters other than the use of RAAF Scherger as a detention facility. Mr Hay considered that this information would disclose information that would reasonably be regarded as irrelevant to the scope of the request and he has decided to remove the information in accordance with subparagraph 22(1)(a)(ii) of the FOI Act.

Exemption claims

Section 42

9. Mr Hay found that the document identified as Document 5 on the schedule of documents contained material relating to legal advice.

10. The guidelines require that Mr Hay consider each 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 the use or in connection with actual or anticipated litigation;
   - whether the advice given is independent; and
   - whether the advice given is confidential.
11. In this instance, Defence engaged the services of an external provider, in order to provide advice on a specific issue. Mr Hay established that a true solicitor-client relationship between the legal adviser, who holds a practicing certificate, was for the dominant purpose of providing advice to Defence on a specific issue.

12. Considering the advice was from an external provider, Mr Hay advised he was satisfied that it would be considered independent.

13. Mr Hay is also satisfied that Defence as the client has not waived privilege. While the advice has been disclosed to more than one person in Defence, this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed in paragraph 5.128 of the guidelines, which states *modern organisations often work in teams and several people may need to know about privileged communications*...

14. Mr Hay took into account the guidelines, in particular paragraph 5.134 which states that *if only part of a document contains material which is privileged under section 42, section 22 requires disclosure of the parts of the document which is not privileged*. In this case, the fact that legal advice was sought is not considered exempt under section 42 of the FOI Act and that information remains in the document, however the part of the document containing the ‘actual’ advice have been removed under section 42 of the FOI Act.

15. Taking all of the above into consideration, Mr Hay decided, in accordance with subparagraph 22(1)(a)(i) of the FOI Act, to remove some material from the documents identified as Document 5 on the schedule of documents as it is considered exempt under section 42 of the FOI Act.

**Public interest conditional exemptions claims**

**Section 47F**

16. Mr Hay found that the documents identified as Items 6, 9 & 10 on the schedule of documents contained the mobile telephone numbers of current Defence staff. Mr Hay considered that this information accords with subsection 47F(1) of the FOI Act as disclosure of the information would be considered unreasonable.

17. Subsection 47F of the FOI Act required that Mr Hay consider the following:

- the extent to which the information is well known;
- whether the person to who the information relates is known to be (or have been associated with matters dealt with in the document;
- the availability of the information from publicly accessible sources; and
- any other matters that the agency or Minister considers relevant.

18. Mr Hay is satisfied that the mobile telephone numbers of middle management within Defence would not be well known. Further, the owners of the mobile telephone numbers are not known to be associated with the use of RAAF Scherger as a detention facility. Mr Hay confirmed that Defence has not published the mobile telephone numbers of the officers involved, and would not without the express agreement of the person. Mr Hay advised that he did not consider there were any other relevant matters for consideration on this issue.
19. Based on the above, Mr Hay is convinced that the mobile telephone numbers are conditionally exempt under section 47F of the FOI Act.

20. Mr Hay noted that conditionally exempt documents carry a public interest test. He considered section 11B of the FOI Act which sets down the factors favouring access and irrelevant factors when considering the public interest test.

21. Subsection 11B(3) states factors favouring access to the document in the public interest include whether access to the document would do any of the following:

(a) promote the object of this Act (including all the matters set out in section 3 and 3A);
(b) inform debate on a matter of public importance;
(c) promote the effective oversight of public expenditure;
(d) allow a person to access his or her own personal information.

22. Mr Hay considered that the public interest in promoting the objects of the Act have been satisfied as, in his opinion, merely removing mobile telephone numbers does not detract from public disclosure of government-held information. Mr Hay acknowledged that there is a public interest in the issue of detainee management in Australia, but removal of the mobile telephone numbers does not detract from informing debate on this matter.

23. Mr Hay considered that the final two considerations are not relevant in this instance as the documents do not deal with public expenditure or contain your personal information.

24. Mr Hay has had regard to subsection 11B(4) which sets out the irrelevant factors which must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest.

25. Taking all of the above into account, on balance, Mr Hay concluded that disclosure of the mobile telephone numbers would be contrary to the public interest.

26. Copies of relevant sections of the FOI Act are at Enclosure 2.

Payment of Charges

27. In our letter, dated 6 June 2011, the department estimated the cost associated with processing your request to be [redacted]. You agreed to pay charges for the administration of your request and paid the preliminary assessment deposit of [redacted] on 10 June 2011. Upon completion of your request, the actual amount for processing was calculated to be [redacted].

28. However, as explained in paragraph 9 of our letter, of 6 June 2011, the amount payable can only be more than the preliminary assessment if the decision is to release all of the documents requested in full. As such, the remaining balance is the difference between preliminary assessment of FOI charges [redacted] and the deposit you have already paid [redacted].
29. Accordingly you are required to pay [redacted] in order to finalise your request. Cheques or Money Orders should be made out to the ‘Receiver of Public Monies’ and forwarded to the address at the top of this letter. Credit card payments can be made by completing the form at Enclosure 3 and returning it to the FOI Directorate.

Rights of review


Further advice

31. Should you have any questions in regard to this matter please contact this office.

Yours sincerely

Theresa Stinson
Assistant Director
Freedom of Information

5 September 2011

Enclosures:
1. Schedule of documents
2. Relevant sections of the FOI Act
3. Credit Card payment form
## Schedule of Documents

**FREEDOM OF INFORMATION REQUEST NO. 327 /10/11**

<table>
<thead>
<tr>
<th>Item #</th>
<th>Date</th>
<th>File Reference</th>
<th>Author</th>
<th>Addressee</th>
<th>Document description</th>
<th>Decision</th>
<th>Pages</th>
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<td>11/03/2010</td>
<td>AF1763110</td>
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<td>MINDEF (SEN Faulkner)</td>
<td>MinSub Options for the use of Defence Facilities to house Irregular Maritime Arrivals</td>
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<td>MINDEF</td>
<td>MinRep RAAF Base Scherger and its use by Department of Immigration and Citizenship</td>
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<td>6</td>
<td>11/02/2011</td>
<td>AF6929830</td>
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<td>MINDEF</td>
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<td>Item #</td>
<td>Date</td>
<td>File Reference</td>
<td>Author</td>
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Section 22 of the FOI Act

Access to edited copies with exempt or irrelevant matter deleted

Scope

(1) This section applies if:
   (a) an agency or Minister decides:
       (i) to refuse to give access to an exempt document; or
       (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
   (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
       (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
       (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
   (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
       (i) the nature and extent of the modification; and
       (ii) the resources available to modify the document; and
   (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

(2) The agency or Minister must:
   (a) prepare the edited copy as mentioned in paragraph (1)(b); and
   (b) give the applicant access to the edited copy.

Notice to applicant

(3) The agency or Minister must give the applicant notice in writing:
   (a) that the edited copy has been prepared; and
   (b) of the grounds for the deletions; and
   (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.

(4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.
42 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.

(3) A document is not an exempt document under subsection (1) by reason only that:
   (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
   (b) the information is operational information of an agency.

Note: For operational information, see section 54A.
47F Public interest conditional exemptions—personal privacy

General rule

(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

(2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
   (a) the extent to which the information is well known;
   (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
   (c) the availability of the information from publicly accessible sources;
   (d) any other matters that the agency or Minister considers relevant.

(3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

(4) Subsection (5) applies if:
   (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
   (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant’s physical or mental health, or well-being.

(5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:
   (a) carries on the same occupation, of a kind mentioned in the definition of qualified person in subsection (7), as the first-mentioned qualified person; and
   (b) is to be nominated by the applicant.

(6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
(7) In this section:

qualified person means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and,

without limiting the generality of the foregoing, includes any of the following:

(a) a medical practitioner;
(b) a psychiatrist;
(c) a psychologist;
(d) a counsellor;
(e) a social worker.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).
# Freedom of Information Request
## Credit Card Payment Form

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<td>Email Address:</td>
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<td>FOI Reference (if known):</td>
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<td>ABN Number (if known):</td>
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### Payment for:
(Please tick one box only)
- [ ] Deposit for charges
- [ ] Balance of charges

Enter your credit card details, sign below and return this form via email to FOI.Inquiries@defence.gov.au or by post to the address below.

- [ ] VISA
- [ ] MASTERCARD

Card Number: ____________

Expiry: ____/____  

Amount: $__________

Name on Card: ________________________________

Signature: ________________________________

Once invoice has been issued you will be contacted by the FOI Directorate for the CCV number to enable the processing of your payment online.

* Due to personal security reasons Defence will not accept this form via fax

Freedom of Information Directorate  
Department of Defence  
CPI-6-001  
PO Box 7910  
CANBERRA BC ACT 2600  
Tel: (02) 6266 2200  
www.defence.gov.au/foi
Freedom of Information – Your Review Rights

If you disagree with the decision made by the Department of Defence or the Minister under the Freedom of Information Act 1982 (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by Defence, or external review by the Australian Information Commissioner.

Internal review

If Defence makes an FOI decision that you disagree with, you can ask Defence to review its decision. Generally the review will be conducted by the FOI Directorate, however in some instances it will be referred to the area that made the decision, but it will be conducted by someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless you have sought an extension from Defence.

Defence must make a review decision within 30 days. Where Defence has not met its review obligation, you may then approach the Information Commissioner.

Internal review is not available if the Minister or the principal officer of the agency made the decision personally.

How to apply for internal review

You must apply in writing and should include a copy of the notice of the decision provided and the points to which you are objecting and why.

You can lodge your application in one of the following ways:

Post: Freedom of Information Directorate
Department of Defence
CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610

Fax: +61 2 6266 62112
Email: FOI.Inquiries@defence.gov.au

External Review

Do I have to go through the Defence’s internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the Defence internal review process gives Defence the opportunity to reconsider its initial decision and your concerns will most likely be addressed more quickly, without undergoing an external review process.

When can I go to the Administrative Appeals Tribunal (AAT)?

Under the revised FOI Act, you must seek external review through the Information Commissioner prior to applying to the AAT for such a review.

Making a complaint

You may make a complaint to the Information Commissioner about actions taken by Defence in relation to your application. The complaint needs to be in writing.
Contacting the Information Commissioner

Further information about the external review process or how to make a complaint to the Information Commissioner is available at the following:

Online: www.oaic.gov.au
Post: GPO Box 2999, Canberra ACT 2601
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au

Investigation by the Ombudsman

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the Information Commissioner, the Ombudsman will consult the Information Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate, the complaint, then all relevant documents and information must be transferred to the Information Commissioner.

The Information Commissioner can also transfer to the Ombudsman a complaint that could more appropriately be investigated by the Ombudsman. This could occur where the FOI complaint is only one part of a wider grievance about an agency’s actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

Defence FOI contacts

Freedom of Information Directorate
Department of Defence
CP1-6-001
PO Box 7910
CANBERRA BC ACT 2600

Ph: +61 2 626 62200
Fax: +61 2 626 62122

Email: FOI.Inquiries@defence.gov.au
Website: www.defence.gov.au/foi