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October 24, 2017

VIA EMAIL

Ms. Joo Chung
Director of Oversight and Compliance
ODCMO Directorate for Oversight and Compliance
4800 Mark Center Drive
ATTN: DPCLTD, FOIA Appeals, Mailbox #24
Alexandria, VA 22350-1700

Re: **Freedom of Information Act Appeal: Case Number 17-F-0594**

Dear Ms. Chung:

Pillsbury Winthrop Shaw Pittman (“Pillsbury”), hereby appeals the September 19, 2017 final response made by the Department of Defense, OSD, and its OSD component, the Defense Human Resources Activity (“DHRA” or the “Agency”) regarding Pillsbury’s February 22, 2017 Freedom of Information Act (“FOIA”) request.

We request that your office direct DHRA to produce all responsive documents properly releasable under FOIA and to revise their final response to the referenced FOIA request to provide sufficient information to permit a court to determine compliance with FOIA. This appeal is timely filed within 90 days of the September 19, 2017 final response. Our FOIA request and the FOIA office’s final response are attached hereto for your reference. See Exhibit A attached hereto.

I. **BACKGROUND**

Our FOIA request concerns the collection and analysis of data and information and the determinations made based upon that data and information to establish the 2017 Basic Allowance for Housing (“BAH”) for Military Housing Areas (“MHAs”) in New Jersey and Pennsylvania. As set forth in the referenced FOIA request, the MHA’s covered by the FOIA request are: NJ 200, NJ 201, NJ 203, NJ 204, PA 248, PA 249, and PA 255. We note that the methodology and process for determining the BAH, in all MHAs, and the confidence level that is to be established in determining the BAH, is governed by the BAH Primer, a public document. A copy

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of the most recent version of the BAH Primer is attached hereto as Exhibit B. The BAH Primer implements the governing statute, 37 U.S.C. § 403.

The Department of Defense (“DoD”) is required by statute to determine the BAH in all MHAs:

The Secretary of Defense shall determine the costs of adequate housing in a military housing area in the United States for all members of the uniformed services entitled to a basic allowance for housing in that area. The Secretary shall base the determination upon the costs of adequate housing for civilians with comparable income levels in the same area.

37 U.S.C. § 403. The BAH program is run by the Defense Travel Management Office (“DTMO”), a component of DHRA. DTMO defines the BAH as “a US-based allowance prescribed by geographic duty location, pay grade, and dependency status. It provides uniformed service members equitable housing compensation based on housing costs in local civilian housing markets within the United States.”¹ See Exhibit C.

DTMO uses contractor services, at least in part, to collect and provide rental housing cost data for approximately 370 separate housing markets in the United States, identified as Military Housing Areas (“MHAs”). An MHA includes rental markets surrounding a duty station or a metropolitan area. DTMO uses data provided by the contractor to establish housing allowances, or BAH rates, for service members living in rental housing within an MHA. DTMO also collects and analyzes data from other sources, and relies on active participation from Military Housing Offices (“MHOs”) located in the MHAs. The 2017 BAH Data Collection Process Guide, which was prepared by the current contractor, states the following: “MHOs, familiar with the intricacies of the rental housing market surrounding their respective installations, help the BAH contractor, Robert D. Niehaus, Inc. (RDN), collect and review the rental data that will directly impact the determination of fair and accurate BAH rates.” See Exhibit D at 1-1, attached hereto. All of the data is sourced from publicly available data. DTMO is responsible for collecting and analyzing sufficient data to comply with the requirements of the BAH Primer, which it publishes on its website.

According to the BAH Primer, which provides a detailed overview of how housing allowances are to be determined, the BAH program evaluates data from multiple sources, including local newspapers, real estate rental listings, apartment and

¹ <http://www.defensetravel.dod.mil/site/bah.cfm>

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real estate management companies, local Government housing offices, and Fair Market Rates published annually for all counties by the Department of Housing and Urban Development. The program analyzes six standard housing profiles when determining BAH rates: 1) 1 Bedroom Apartment; 2) 2 Bedroom Apartment; 3) 2 Bedroom Townhouse/Duplex; 4) 3 Bedroom Townhouse/Duplex; 5) 3 Bedroom Single Family Detached House; and 6) 4 Bedroom Single Family Detached House. Significantly, the BAH program is required to gather sufficient data to achieve a “95% statistical confidence level that the estimated median rent is within 10% of the true median rent” in each MHA. Exhibit B at Section 5. This of course cannot be achieved without analyzing the data, and ensuring that sufficient data is gathered to support such a confidence level.

The Defense Travel Management Office website publishes “Frequently Asked Questions”² (the “DTMO FAQs”) and answers concerning how BAH is established. See Exhibit E. Excerpts from these FAQs are set forth below:

17. What is the source of BAH rental data?

Current, valid rental costs are crucial to accurate BAH rates. We use data from multiple sources to provide a "checks and balances" approach. This ensures reliability and accuracy. We obtain current residential vacancies from local newspapers and real estate rental listings. We also contact apartment and real estate management companies to identify units for rental pricing. We consult with real estate professionals in each MHA to confirm market rental prices and obtain additional data. Where available, we also contact fort/post/base housing referral offices and installation leadership. We tap the local housing office knowledge and gain insights into the concerns of our members. Current, up-to-date rental information from telephone interviews and the internet is utilized from contacts provided by the local housing offices. Properties are subjected to additional screening and validation processes.

18. What steps do you take to ensure reliability and accuracy of the data?

In selecting specific units to measure, a multi-tiered screening process is employed to ensure that the units and neighborhoods selected are appropriate. Every property to be used is verified by telephone to ensure the correct rent and address are captured. The property address is mapped to ensure it falls within the boundaries of the housing area being sampled. In order to avoid sampling high-crime or other undesirable neighborhoods, Military Housing Offices (MHO) have the ability to exclude certain

² <http://www.defensetravel.dod.mil/site/faqbah.cfm#Q25>

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areas from data collection. In areas where the MHO has not identified exclusions, an income screening process, to identify appropriate neighborhoods, is used. For example, 3- and 4-bedroom single-family units are priced to set the rates for senior enlisted/officers, so 3- and 4-bedroom single family units are selected in neighborhoods where the typical civilian income is in the same range as senior enlisted/officers. When 1-bedroom apartments (junior single enlisted) neighborhoods are priced, focus is on where the typical civilian income is consistent with the income level that is typical for these grades. For comparison purposes, civilian salary equals the sum of military basic pay, average BAH, BAS, plus the tax advantage of the untaxed allowances.

19. What housing costs are used to set BAH rates?

BAH rates are computed using current median market rents and average local expenditures on utilities (electricity, water, sewer, and heating fuel) in each local market area, and will fluctuate as those costs change.

20. How often do you collect housing data?

The data is collected annually, in the spring and summer when housing markets are most active.

21. What types of residences do you include in your data collection?

The data include apartments, town homes/duplexes, as well as single-family rental units of various bedroom sizes.

In sum, all available information clearly and consistently describes the data collection and analysis that is undertaken to establish BAH rates annually. The FOIA requests at issue here concern only the collection of this data, the evaluation of data, and the recommendations that were based upon that data. The FOIA requests do not request anything related to how the Department of Defense implements the BAH rates ultimately adopted. This process is governed by the Joint Travel Regulations (1 October 2017).³ See Exhibit F.

On February 22, 2017, we submitted a FOIA request for documents related to the collection of data, the evaluation and analysis of data, and the calculation of the BAH by DTMO or its contractor, for certain MHAs in 2017.

³ <http://www.defensetravel.dod.mil/Docs/perdiem/JTR.pdf>

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Specifically we requested the following documents:

1. Documents sufficient to show all anchor points, anchor point descriptions, formula used to determine differences in each paygrade and housing type based on anchor points used, and the local median housing costs for each anchor point used to determine each 2017 BAH in each of the NJ-PA MHAs.
2. Copies of all data or information (from any source) relied upon by DTMO to determine each 2017 BAH in each of the NJ-PA MHAs.
3. All documents that show the source of all housing rental data by address or location, description and information on the validity of the rental data, the dates and means by which it was gathered, and the "availability" of the rental housing used to determine each 2017 BAH in each of the NJ-PA MHAs.
4. Copies of all analyses or discussion of any changes to each BAH from 2016 to 2017 in each of the NJ-PA Localities.
5. All documents that relate to validating the adequacy and reliability of the data relied upon to determine each 2017 BAH in each of the NJ-PA MHAs.
6. All documents containing the information provided by each fort, post, or base housing office in the NJ-PA MHAs related to determining each 2017 BAH in each of the NJ-PA MHAs and correspondence related to such information.
7. All documents showing the analyses and calculations performed to determine that each 2017 BAH in each of the NJ-PA MHAs is based on data sufficient to attain, for each type of housing unit, a 95% statistical confidence that the estimated median rent is within 10% of the true median rent in each of the NJ-PA MHAs.
8. Copies of all quality assurance data or information collected during on-site evaluations performed during 2016 in each NJ-PA MHA and any analysis of such data or information.

DHRA, of which DTMO is a component part, purportedly found 11 documents, totaling 842 pages, deemed to be responsive to our FOIA request. Of the 842 pages, 770 pages were withheld based on FOIA Exemption 4, leaving only 72

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pages to be disclosed, comprising documents 1 and 11. It is important to note that document 1 is the exact same copy of the BAH Primer which we included as an attachment to our original FOIA request. Documents 2 through 10 were withheld in their entirety. The Agency failed to provide descriptions of the documents withheld, and only gave a boilerplate reference to the statutory language in FOIA for why these documents were withheld or redacted under Exemption 4. The Agency neither explained nor provided any justification to support its reliance on Exemptions 4. Only conclusory references to the exemption were noted in the FOIA response. Given that the data requested is publicly available data, and the analysis of such data is required by both the BAH Primer and statute, for example, and a determination on 2017 BAH rates was completed almost a year ago, the Agency's reliance on these Exemptions, without explanation, is unreasonable.

Significantly, the Agency provided no data or analyses and no substantive documents whatsoever that relate to how the BAH was determined for the relevant MHAs, as requested in the FOIA requests cited above. Remarkably, the Agency claims that information responsive to requests 7 and 8 does not exist, even though such information must exist since it is necessary to establish BAHs for the relevant MHAs, and those BAHs have been established. The only request to which the Agency partially responded is FOIA request number 4 above. Even though the Agency provided some documents purporting to be responsive to our requests, the information that was provided is not responsive. It therefore appears that all responsive documents have been withheld, although the Agency failed to adequately describe any of the withheld documents. In other words, the Agency's final response to the FOIA requests did not respond individually to each FOIA request, nor provide any basis for not responding to each FOIA request, other than reciting boilerplate and conclusory language for relying on Exemption 4, and claiming that responsive information does not exist. However, it is not possible that responsive documents do not exist, unless DHRA and DTMO did not collect or evaluate data, or recommend any BAH rates, as required by the BAH Primer and statute, the Defense Travel Regulation, as represented in the DTMO FAQ, and the contract it entered into with RDN.

In sum, the Agency's withholding of responsive documents and its failure to articulate any basis for asserting a relevant exemption should reasonably be addressed in this appeal. To the extent it is not, the Agency will be required to do so in court. A court will not only require the Agency to demonstrate that its search was "reasonably calculated to uncover all relevant documents," but will also require the Agency to provide a Vaughn index, in which the Agency must explain the search method and process, identify all discovered documents, explain what records have been withheld, and provide justification for the withholding. *Weisberg v. U.S. Dep't of Justice*, 705

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F.2d 1344, 1351 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

II. ARGUMENT

FOIA favors disclosure, and as such, the burden is on the Government to prove that any withholding of records is covered by one of the nine exemptions. For the reasons discussed below, DHRA misapplied Exemption 4 in response to our request, and inappropriately withheld responsive documents that should have been disclosed. DHRA should therefore be required to reassess its decision and disclose all relevant documents responsive to our request.

A. DHRA's Duty to Disclose

Agencies are under an affirmative obligation to disclose documents and records in response to FOIA requests. The Supreme Court has made it clear that FOIA's "strong presumption in favor of disclosure places the burden on the Agency to justify withholding any requested documents." *U.S. Dept. of State v. Ray*, 502 U.S. 164, 173 (1991). To that end, courts have held that FOIA "requires an Agency in possession of material it considers exempt from FOIA to provide the requestor with a description of each document being withheld, and an explanation of the reason for the Agency's nondisclosure." *Oglesby v. U.S. Dept. of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). In order to provide the requestor with a "realistic opportunity to challenge the Agency's decision," the court in *Oglesby* instructed that "[t]he description and explanation the Agency offers should reveal as much detail as possible as to the nature of the document." *Id.* Furthermore, the FOIA statute provides that, "In denying a request for records, in whole or in part, an Agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request." 5 U.S.C. § 552(a)(6)(F).

Here, DHRA's response to the FOIA request provided no details about the responsive documents other than to provide a conclusory boilerplate response that certain documents do not exist and other documents are being withheld based on Exemption 4 of FOIA. This is inadequate. The failure to explain the basis for nondisclosure, or the nature of withheld documents, or the application of the exemptions that purportedly prevent disclosure is contrary to FOIA requirements. DHRA has not met its burden to establish that Exemption 4 applies, and is unjustified in its withholding of responsive documents. DHRA cannot prevent a reasoned analysis of the merits of its decision to withhold responsive documents simply by failing to provide any justification for its action, as it has done here. Ultimately, a court will require evidence sufficient to evaluate the merits of DHRA's actions. It is

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in all parties' interest to foster reasoned decision-making at the administrative level, to avoid the cost and burdens of judicial review. Given the circumstances presented by this appeal, there is no reasonable justification for withholding not only any substantive document, but also withholding the facts that assumedly underpin the Agency's assertion of Exemption 4 on a blanket basis. Accordingly, given the absence of any basis for denying disclosure, all responsive documents should be provided.

Even assuming, *arguendo*, that any of DHRA's asserted FOIA exemptions might be appropriate, which is disputed, FOIA also requires that agencies disclose portions of responsive material that can be reasonably segregated from portions withheld under an appropriate exemption. FOIA provides the following:

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

5 U.S.C. § 552. Courts have held the following regarding an Agency's duty to disclose reasonably segregable portions of responsive documents:

FOIA focuses on information, not documents, and an Agency cannot justify withholding an entire document simply by showing that it contains some exempt material. The D.C. Circuit has long held that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions. Indeed, in light of this rule, categorical treatment raises doubt as to whether a document was properly reviewed for segregability.

Pinson v. U.S. Dep't of Justice, 202 F. Supp. 3d 86, 107 (D.D.C. 2016) (citations omitted) (internal quotation marks omitted). Here, DHRA's response indicates that while 842 pages were determined to be responsive to our FOIA request, the Agency only disclosed 72 of those pages, about 8.5% of all responsive material. By refusing to provide the withheld material, DHRA is not only claiming that all 770 withheld pages are non-disclosable under FOIA Exemption 4, but it is also claiming that not a single one of those 770 pages can be reasonably segregated and disclosed. The

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Agency's decision to withhold 770 pages of documents in their entirety, raises serious doubts as to whether a segregability review was even performed at all.

DHRA has not met its burden to establish that Exemption 4 applies, and is unjustified in its withholding of responsive documents, or at the very least, is unjustified in its failure to provide reasonably segregable substantive information. Indeed, the wholesale withholding of documents appears designed to frustrate review.

B. DHRA Failed to Perform an Adequate Search

Courts require agencies to perform FOIA searches that are "reasonably calculated to uncover all relevant documents." *See Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (recognizing that an Agency has a duty to conduct a reasonable search for responsive documents). Courts have frequently found Agency searches to be unreasonable when the Agency has failed to search files or databases where responsive records might have been located, and when the Agency improperly limited its search to certain record systems. *See Jefferson v. BOP*, No. 05-00848, 2006 WL 3208666, at *6 (D.D.C. Nov. 7, 2006) (finding search not reasonable when Agency searched only its central file system, where request warranted search of shared computer drives); *Oglesby* 920 F.2d at 68 (D.C. Cir. 1990) (holding that Agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested). While it is not possible to point to specifics as to why DHRA's search was not reasonably calculated to uncover all relevant documents, this is solely because DHRA failed to explain, in any detail, the method of the search. Courts have consistently held that when an Agency fails to sufficiently describe the search, there is no basis to determine that the search was adequate. *See Steinberg v. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994) (finding the description of the search inadequate when Agency failed to describe in any detail what records were searched, by whom, and through what process); *Maydak v. U.S. Dept. of Justice*, 254 F. Supp. 2d 23, 39 (D.D.C. 2003) (finding it inadequate when Agency does not describe retrieval methods or the various systems of records it maintains).

The fact that DHRA provided no substantive documents clearly indicates that its search was not reasonably calculated to uncover all relevant documents, which should be maintained in one place as these are documents required by statute and regulation to support a BAH determination. BAH rates have been established and are in effect. Thus, it is clear that the search was unreasonable because, even though our FOIA request provided specific information about the documents sought, DHRA failed to produce anything that was responsive to our requests, despite the clear evidence that documents in fact exist.

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There is no reason to believe that a search for such documents would be unreasonably arduous, given that the contractor is required to create a searchable database containing rental data, and other BAH-related data, that can be filtered by MHA. The solicitation provides that the contractor will:

Receive, collect, log, and store rental data from MHOs in a database that includes property, real estate professional and census tract exclusion information. The database shall:

- Be accessible by MHOs and DTMO
- Have the ability to query submitted data by quantity and quality
- Provide copies of maps for MHOs to use in identifying the MHA boundaries
- Allow MHOs to input property and real estate professional information
- Allow MHOs to select census tracts for exclusion

Exhibit G at Section 4. DHRA has thus failed to conduct an adequate search, and has failed to provide documents responsive to our request without justification.

Furthermore, not only did DHRA fail to provide relevant documents that DTMO assuredly possesses, DHRA did not provide descriptions of documents withheld, or explanations of how and why they decided to withhold them. Courts have found that when a request is clear as to the materials desired, an Agency fails to conduct an adequate search if the Agency does not search files that are likely to contain responsive records. *Truitt v. Dep't of State*, 897 F.2d 540, 544-46 (D.C. Cir. 1990). Our request was clear and specific, asking for documents pertaining to MHAs in New Jersey and Pennsylvania.

While the Agency failed to provide responsive documents to all requests, it specifically claimed that documents responsive to requests 7 and 8 do not exist. Requests 7 and 8 asked for the following:

7. All documents showing the analyses and calculations performed to determine that each 2017 BAH in each of the NJ-PA MHAs is based on data sufficient to attain, for each type of housing unit, a 95% statistical confidence that the estimated median rent is within 10% of the true median rent in each of the NJ-PA MHAs.
8. Copies of all quality assurance data or information collected during on-site evaluations performed during 2016 in each NJ-PA MHA and any analysis of such data or information.

Exhibit A.

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DHRA's response stated, "no documents of the kind you described in Items 7 and 8 could be identified," and then claimed that the search "could reasonably be expected to produce the requested records if they existed." Exhibit A. The data we requested must exist because according to the solicitation and the BAH Primer, DTMO is supposed to analyze data provided by the contractor to establish a BAH for each MHA. DTMO must have received and analyzed data for the MHAs we requested because a BAH has been established for each of the NJ-PA MHAs. According to the solicitation and the BAH Primer, DTMO is then supposed to analyze the data to establish a BAH for each MHA. The contract solicitation provides the following:

The Contractor shall:

4.1 Collect and analyze rental housing cost data for MHAs. Use standard methodology in collecting and analyzing data on a continuing basis to ensure data accuracy and compatibility.

4.1.1 Collect housing costs for specific types of rental units at each location to include separate data covering average utilities (i.e. electricity, gas, oil, water and sewer) and rental insurance.

4.1.2 Collect data representative of specific neighborhoods, as defined by sets of ZIP Codes and Census Tracts specified by the Government. All rental housing data shall be verified and apply to recent rentals only.

4.3 Provide analyzed data and support information, reports, and presentations using the latest version of Microsoft Office Suite (including: Access; Excel; MapPoint; PowerPoint; and Word), Census Boundary Bundle and Claritas mapping software. The software type and version may be changed if agreed to by both parties. **Submit data, information electronically to the Contracting Officer's Representative (COR).**

Exhibit G at Section 4 (emphasis added). The database is called the MHO Portal, and, according to Section 3 of the 2017 BAH Data Collection Process Guide, should contain much of the data we seek. See Exhibit D at Section 3.

Furthermore, in connection with request 7, in the BAH Primer DTMO states the following: "We gather enough data to attain a 95% statistical confidence that the estimated median rent is within 10% of the true median rent." Exhibit B at Section 5. In connection with request 8, the BAH Primer states: "As another quality assurance step, DoD and the Services conduct on-site evaluations at selected locations. These Reviews confirm the reliability and accuracy of the rental data. During these visits we

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also evaluate the criteria used for screening neighborhoods and areas.” *Id.* at Section 6.2. Given that the BAH Primer requires that DTMO use the data we requested when establishing BAH rates, the fact that DHRA was unable to find anything either means that the search was unreasonable, or that the Agency failed to follow the established procedures when determining the BAH rates.

Moreover, the Department of Defense is required by law to use the type of data we requested when determining BAH rates:

The Secretary of Defense shall determine the costs of adequate housing in a military housing area in the United States for all members of the uniformed services entitled to a basic allowance for housing in that area. The Secretary shall base the determination upon the costs of adequate housing for civilians with comparable income levels in the same area.

37 U.S.C. § 403. Therefore, it cannot be reasonably assumed that DHRA’s search was reasonable, or that the documents we seek do not exist, because establishing BAH rates for 2017 without analyzing data on comparable civilian housing would be inherently both arbitrary and capricious, and contrary to the law. Since the Government is generally entitled to an initial presumption that it acted reasonably, and given the requirement that the data and information sought must exist, it reasonably follows that the search by DHRA was inadequate.

In sum, it is clear that DHRA failed to conduct an adequate search for responsive materials, or at the very least, failed to adequately describe its search methods. We, therefore, request that the DHRA be directed to improve its search methods, and search again for documents responsive to our FOIA request, given the evidence that responsive documents exist.

C. DHRA Misapplied Exemption 4

DHRA’s final response states that documents 2 through 10 are being withheld based on FOIA Exemption 4. The various documents that were withheld were deemed to be responsive to requests 1 through 6, in which we requested the following documents:

1. Documents sufficient to show all anchor points, anchor point descriptions, formula used to determine differences in each paygrade and housing type based on anchor points used, and the local median housing costs for each anchor point used to determine each 2017 BAH in each of the NJ-PA MHAs.

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2. Copies of all data or information (from any source) relied upon by DTMO to determine each 2017 BAH in each of the NJ-PA MHAs.
3. All documents that show the source of all housing rental data by address or location, description and information on the validity of the rental data, the dates and means by which it was gathered, and the “availability” of the rental housing used to determine each 2017 BAH in each of the NJ-PA MHAs.
4. Copies of all analyses or discussion of any changes to each BAH from 2016 to 2017 in each of the NJ-PA Localities.
5. All documents that relate to validating the adequacy and reliability of the data relied upon to determine each 2017 BAH in each of the NJ-PA MHAs.
6. All documents containing the information provided by each fort, post, or base housing office in the NJ-PA MHAs related to determining each 2017 BAH in each of the NJ-PA MHAs and correspondence related to such information.

Exhibit A. DHRA determined that eleven documents totaling 842 pages of material were responsive to requests 1 through 6. However DHRA also claims that 770 pages of responsive material are being withheld pursuant to Exemption 4.

FOIA Exemption 4 exempts the disclosure of: “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). In order for Exemption 4 to apply, DHRA must show that the information withheld is: (1) trade secrets, or (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. *See National Parks & Conserv. Ass’n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974). In addition, to rely upon Exemption 4, DHRA must assert and demonstrate that the disclosure of the information and analysis provided by its contractors to perform their federal contracts would likely cause substantial harm to the competitive position of the contractor. *Id.*; *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir 1992) (en banc), *cert. denied*, 113 S. Ct. 1579 (1993). Since the FOIA requests seek public information, and analyses of the public information provided to the Government with the intent that DHRA rely on this information for its own recommendations and ultimately the decision-making that led to the BAH rates, on its face, this information does not satisfy the requirements of Exemption 4.

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Finally, it is important to note that much of the information we seek is not related to the contractor but the Agency, and concerns the Agency's evaluation and analysis of data. We seek to understand how the Agency used this data to determine housing allowances, or if the Agency used the data at all. Furthermore, as explained in the BAH Data Collection Process Guide, much of the data we requested was not actually collected by the contractor, but by Government employees in MHOs around the country. See Exhibit D. Therefore, to the extent that we seek records of the Agency's analysis and decision-making, as well as data that was collected by Government employees in MHOs, Exemption 4 does not apply to those documents, as they do not contain confidential information that would likely cause competitive harm, but were provided by other Government employees or created by the Agency itself.

1. Trade Secret

A trade secret for the purposes of Exemption 4 is defined as "a secret commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

The information we requested includes market rental data, and other similar public data that was used to establish the 2017 BAH in the MHAs cited above. There is nothing about the data that would fall under Exemption 4's definition of trade secret. And the evaluation process to be used with the data is stipulated by the BAH Primer, and is public.

2. Commercial or Financial Information, Obtained From a Person, and Privileged or Confidential

Given that the information requested is not trade secret information, in order to justify withholding responsive documents, DHRA must show that the information falls under the second category of Exemption 4. To be protected, the information must be commercial or financial, obtained from a person, and privileged or confidential. The information requested must meet all of these elements to justify an Agency's nondisclosure under Exemption 4, and therefore a showing that the information does not meet any one of the elements is sufficient to compel disclosure.

a. Privileged or Confidential Information

When confidential information is required to be given to the Government, that information may be deemed confidential if its disclosure is likely to: (1) impair

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the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Nat'l Parks*, 498 F.2d at 770. These are commonly referred to as the impairment prong and the competitive harm prong. Here, the impairment prong does not apply. Although information provided by a contractor may be required in the performance of the contract, contractors voluntarily enter into federal Government contracts and are compensated for their performance, and the Government acquires rights in all deliverables under the contract. The impairment prong of Exemption 4 requires that the Government make a showing that it will be impaired in its ability to acquire the information at issue in the future. There can be no such impairment here, since federal procurement regulations contemplate full and open competition, in circumstances applicable here, and offerors voluntarily compete for such contracts based upon their desire to do business with the Government and to be paid for their services. In sum, DHRA pays contractors to collect and supply public data, and to analyze such data. The BAH Primer states the following regarding the data collection effort: "We obtain current residential vacancies from local newspapers and real estate rental listings. We also contact apartment and real estate management companies to identify units for rental pricing." Exhibit B. Rental data is by its nature public as are utility rates, and other relevant data. Finally, courts have held that the impairment prong only applies in limited situations in which disclosure of the information will affect the reliability of the information. See *Critical Mass*, 975 F.2d at 878. The disclosure and analysis of publically available information cannot make such information less reliable in the future. This is a non-sequitur.

The second prong of the test requires a showing that disclosing the requested information will result in substantial competitive harm to whoever provided the information, in this case the contractor. To establish competitive harm, DHRA must demonstrate that the contractor faces both actual competition, and a likelihood of competitive injury. See *Gulf & Western Industries v. United States*, 615 F.2d 527 (D.C.Cir.1979). Not only has DHRA failed to show actual competition or likelihood of injury, it is unreasonable to assume that such harm could result here. As noted, the information requested is market rental data and other similar data that is publically available, and is therefore already available to any potential competitors. Its analysis is largely in its collation and any simple analysis is governed by Government requirements. There is no secret sauce. Furthermore, the data we are requesting is essentially worthless to the contractor or to any competitor given that the data the contractor collected cannot be used in the future because it relates to last year's rental market and has already been used to establish this year's BAH rates.

In relation to contracts with the federal Government, courts typically look at whether the release of cost or pricing or similar information that was provided by a contractor will allow a competitor to calculate the contractor's future bids, enabling

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the competitor to undercut or underbid the contractor. *See Boeing Co. v. U.S. Dept. of Air Force*, 616 F. Supp. 2d 40, 45 (D.D.C. 2009); *see Nat'l Parks*, 498 F.2d at 770 (finding a likelihood of substantial competitive harm when disclosure would potentially enable competitors to underbid); *see also Public Integrity v. Department of Energy*, 191 F. Supp. 2d 187 (D.D.C. 2002) (where Agency failed to show that information would be of substantial assistance to competitors in estimating and undercutting bidders' future bids). Here, none of the data that we have requested could be used by a competitor to compete against the current contractor. The information requested is not related to cost or pricing data, but publically available rental data that is simply collected using standard means.

Moreover, in order to satisfy this second prong, DHRA must show that harm caused by the release of information will flow "from the affirmative use of proprietary information by competitors." *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983). Market rental data and other public data is clearly not proprietary information. In addition, courts have frequently rejected claims of competitive harm when the claims were made solely by the Agency without input from the submitter of the information in question, in this case the contractor. *See Wiley Rein & Fielding v. U.S. Dep't of Commerce*, 782 F. Supp. 675, 676 (D.D.C. 1992) (rejecting competitive harm argument, and emphasizing that no evidence was provided to indicate that submitters objected to disclosure); *Newry Ltd. v. U.S. Customs & Border Prot. Bureau*, D.D.C. No. 04-02110, 2005 WL 3273975, at *4 (D.D.C. July 29, 2005) (rejecting competitive harm argument advanced solely by Agency). In DHRA's response, the Agency indicates that the determination to withhold information was made by "Mr. Correy Thomas, Information Governance Lead, an Initial Denial Authority for DHRA." See Exhibit A. There is no indication that the contractor is opposed to the release of this information, nor is there any evidence that DHRA contacted the contractor regarding this FOIA request, nor that the contractor has established any likely competitive harm with regard to virtually all relevant information requested.

Given that the information requested does not and cannot meet the requirements for nondisclosure under Exemption 4, the Agency must provide the documents requested in FOIA requests 1 through 6.

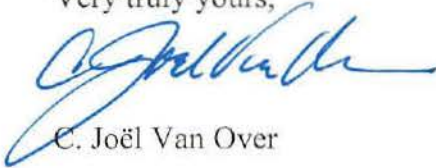
III. CONCLUSION

As discussed above, the Agency has failed to properly apply FOIA Exemption 4 to the information requested in requests 1 through 6, and as such, the Agency's reliance on Exemption 4 to withhold documents responsive to our requests is inappropriate. Further, even if the Agency had any reasons for relying on this exemption in the first instance, it has failed to explain any reasons in a way that

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would provide a requestor with a realistic opportunity to challenge the decision to withhold. The Agency has also failed to conduct an adequate search in relation to all eight requests, and especially in relation to requests 7 and 8, since the Department of Defense is required by law to rely on this data to establish a BAH, and the BAH primer requires not only that this data exist, but that they be made available to DTMO in a readily searchable format. We therefore request that the Agency disclose all documents responsive to our February 22 request, and that it conduct an adequate search to ensure that all such responsive documents are identified and provided. Based on the foregoing, it is clear that there is no justification for withholding any documents responsive to the FOIA requests here, and they should be provided promptly.

Very truly yours,

A handwritten signature in blue ink, appearing to read "C. Joël Van Over", is written over the typed name.

C. Joël Van Over

Enclosures