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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: **(Corrected) Freedom of Information Act Appeal: Case Number
17-F-0708**

Dear Ms. Chung:

Pillsbury Winthrop Shaw Pittman (“Pillsbury”), hereby appeals the September 6, 2017 revised final response made by Department of Defense, OSD, and its OSD component, the Defense Human Resources Activity (“DHRA” or “Agency”) regarding Pillsbury’s March 15, 2017 Freedom of Information Act (“FOIA”) requests. Please note that we submitted two separate FOIA requests on March 15, 2017¹, originally assigned reference numbers 17-F-0708 and 17-F-0710, respectively. The FOIA office consolidated our requests and responded to both requests under reference number 17-F-0708. We appeal the consolidated response and address the subject matter of both of our FOIA requests here.

We request that your office direct DHRA to produce all responsive documents properly releasable under FOIA. This appeal is timely filed within 90 days of the September 6 final response. Our two FOIA requests and the FOIA office’s consolidated final response are attached hereto for your reference. See Exhibit A attached hereto.

I. **BACKGROUND**

Our FOIA requests concern the collection and analysis of data and information and the determinations made based upon that data and information to

¹ While the final response letter incorrectly indicates that “both requests were dated January 28, 2016,” they were in fact dated March 15, 2017.

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establish the 2017 Basic Allowance for Housing (“BAH”) for a single Military Housing Area (“MHA”) in New Jersey, BAH NJ 204. 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 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.” See DTMO website, screenshot attached hereto as 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.

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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 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

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

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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 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.

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

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On March 15, 2017, we submitted FOIA requests for the information and data, including the Government's analysis thereof, used to calculate BAH rates in a single MHA: NJ 204. The FOIA request letters summarize the nature of the requests as follows: "[W]e request documents related to the collection of data, the evaluation of data, and the calculation of the [BAH] by [DTMO] or its contractor, for the BAH that will apply throughout 2017 in military housing area NJ 204." See Exhibit A, FOIA Request 17-F-0708. The specific requests at issue in this appeal are set forth below.

FOIA request 17-F-0708 requested the following documents:

1. Copies of the data and information prepared and submitted by any contractor or consultant to DTMO for the purpose of establishing the MHA NJ 204 BAH for 2017.
2. Documents that reflect the analysis of data and information requested in request 1 above.
3. A copy of all recommendations made by any contractor or consultant to DTMO or the Department of Defense related to the MHA NJ 204 BAH for 2017.

FOIA request 17-F-0710 requested the following documents:

1. Copies of the data and information relied upon by DTMO to establish the MHA NJ 204 BAH for 2017.
2. Documents that reflect the analysis by DTMO, or any Department of Defense personnel, of data and information requested in request 1 above.
3. A copy of the final determination or final decision of the MHA NJ 204 BAH for 2017.

The DHRA, of which DTMO is a component part, identified 165 pages of responsive material but determined that most of the documents – and any meaningful documents – would be withheld or redacted based on FOIA Exemptions 4 and 6. The Agency failed to provide descriptions of the documents withheld and only gave a boilerplate reference to the statutory language for why these documents were withheld or redacted under Exemptions 4 and 6. The Agency neither explained nor provided any justification to support its reliance on Exemptions 4 or 6. Only conclusory references to the exemptions 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.

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It is important to note that the Agency has now issued two final responses to these FOIA requests. On June 16, 2017 DHRA issued a first final response indicating that a number of responsive documents were being withheld pursuant to FOIA Exemptions 4 and 6, but failed to identify what documents were being withheld and why. The Agency issued a revised final response on September 6, 2017, allegedly containing additional information about the documents withheld and the rationale behind the nondisclosure. However, instead of clarifying what has been withheld and why, the Agency simply repeated back to us language from our requests, and added more boilerplate references to the FOIA statute. Compare Exhibits A and G.

Significantly, the Agency provided no data or analyses and no substantive documents whatsoever that relate to how the BAH was determined for MHA NJ 204, as requested in the FOIA requests cited above. Remarkably, the Agency claims that information responsive to request 3 of 17-F-0708 does not exist, even though the relevant publicly available contract solicitation requires that the contractor provide such recommendations. 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 6, 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 F.2d 1344, 1351 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

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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 Exemptions 4 and 6 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 Exemptions 4 and 6 of FOIA. This is inadequate. The failure to explain the basis for nondisclosure, or the nature of withheld documents, the number 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 Exemptions 4 and/or 6 apply, 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 in all parties' interest to foster reasoned decision making at the administrative level, to avoid the cost and burdens of judicial review. In the circumstances, there is no reasonable justification for withholding not

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only any substantive document, but also withholding the facts that assumedly underpin the Agency's assertion of Exemptions 4 and 6 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 165 pages were determined to be responsive to our FOIA request, the Agency failed to disclose most of those pages. By refusing to provide the withheld material, DHRA is not only claiming that all withheld pages are non-disclosable under FOIA Exemption 4 or 6, but it is also claiming that not a single one of those pages can be reasonably segregated and disclosed. The Agency's decision to withhold documents in their entirety raises serious doubts as to whether a segregability review was even performed at all.

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DHRA has not met its burden to establish that Exemption 4 or 6 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. Not only did DHRA fail to provide relevant documents that DTMO assuredly possesses, DHRA did not provide descriptions of documents withheld, or explanations as to how and why they decided to withhold them. Of the 165 pages of documents that were deemed responsive and provided to

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us, 132 pages were entirely redacted, leaving only 33 pages of unredacted and non-responsive information, all of which is publically available online.

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 only one MHA in New Jersey. Moreover, as to the contractor data requested, the solicitation that was incorporated into the contract issued to the contractor for the purpose of gathering data relevant to establishing the BAH rates specifically requires the contractor to provide rental data for each MHA, and to make that data available to DTMO. This is publicly available information that the contractor is paid to gather. See Exhibit H, attached hereto, Solicitation at Section 4. According to the solicitation and the BAH Primer, DTMO is then supposed to analyze the data to establish a BAH for each MHA. DTMO must have received and analyzed data for MHA NJ 204, because a BAH has been established for MHA NJ 204.

The Agency failed to provide responsive documents to all six requests, but specifically claimed that documents responsive to request 3 of 17-F-0708 do not exist. Request 3 of 17-F-0708 asked for the following:

3. A copy of all recommendations made by any contractor or consultant to DTMO or the Department of Defense related to the MHA NJ 204 BAH for 2017.

Exhibit A.

DHRA's response stated, "no documents of the kind you described in Item 3 of FOIA case 17-F-0708, 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 the solicitation that was incorporated into the contract specifically requires the contractor to provide DTMO with recommendations regarding the collection and analysis of data used to establish BAH rates. The solicitation provides that the contractor will: "Submit Audit reports that describe the results of the completed audits, including a log of meetings with housing professionals, a summary of the audit, and **recommendations** for further action." Exhibit H at Section 4. The solicitation also provides that the contractor will: "Provide an Annual Summary Report that details the data collection methodology used, all deliverables, data sources and quality check methods; and **provides recommendations** and industry best practices for improving MHO data collection processes." *Id.*

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While the FOIA request cited above does not request the contractor's methodology, it does request all recommendations as they may pertain (generally or specifically) to MHA NJ 204. Again, the FOIA requests at issue involve the data and recommendations, and the determinations related to the MHA NJ 204 BAH rates. A determination must be a reasoned determination sufficient for judicial review under the Administrative Procedures Act, 5 U.S.C. § 706. The BAH rates themselves say nothing about how they were determined, yet DHRA produced the BAH rates published on DTMO website, which are not responsive.

Furthermore, 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

Id. 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.

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

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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 responsive to requests 1 and 2 of 17-F-0708, and requests 1 and 2 of 17-F-0710 are being withheld based on FOIA Exemption 4. We requested the following documents in request 17-F-0708:

1. Copies of the data and information prepared and submitted by any contractor or consultant to DTMO for the purpose of establishing the MHA NJ 204 BAH for 2017.
2. Documents that reflect the analysis of data and information requested in request 1 above.

Exhibit A. We requested the following documents in Request 17-F-0710:

1. Copies of the data and information relied upon by DTMO to establish the MHA NJ 204 BAH for 2017.
2. Documents that reflect the analysis by DTMO, or any Department of Defense personnel, of data and information requested in request 1 above.

Id.

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

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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.

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 MHA NJ 204, in addition to information related to the contracts with each contractor that DTMO used to collect and provide such data. There is nothing about the data, or the contracts to collect 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

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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 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

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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 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.

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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 the above-referenced FOIA requests.

D. DHRA Misapplied Exemption 6

In the Agency's final response, DHRA claims that its nondisclosure of documents responsive to request 3 of 17-F-0710 is pursuant to FOIA Exemption 6. In request 3 of 17-F-0710 we asked for the following:

3. A copy of the final determination or final decision of the MHA NJ 204 BAH for 2017.

Exhibit A. Again, DHRA has incorrectly applied a FOIA Exemption, since there is no adequate justification for why the documents we requested should be withheld based on Exemption 6

FOIA Exemption 6 allows an Agency to withhold information that is: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 requires DHRA to show that not only does the information withheld involve files of a personal, medical, or similar nature, but also that disclosure would clearly be an unwarranted invasion of personal privacy. Most significantly, we requested no such information. The identity of the business from which DHRA or a contractor sourced information, does not fall within Exemption 6, and to the extent covered by the FOIA requests, this information should be provided.

The Supreme Court has instructed that, "Exemption 6 does not protect against disclosure of every incidental invasion of privacy - only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 382 (1976). Furthermore, the 'personal privacy' element of this exemption applies only to actual people; courts have held that "corporations, businesses and partnerships have no privacy interest whatsoever under Exemption 6." *Washington Post Co. v. U.S. Dept. of Agric.*, 943 F. Supp. 31, 37 n. 6 (D.D.C. 1996). Therefore, to the extent that DHRA is relying on Exemption 6 to withhold information that affects the privacy of the contractor, or real estate rental companies that trade in public information, that reliance is inappropriate. Furthermore, redactions of the names and contact information for Government employees is inappropriate given that courts have determined that Government officials have no expectation of privacy regarding their names, work contact information, titles, grades, and salaries. *See FLRA v. United States Dep't of Commerce*, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992) (noting that performance awards containing names "have

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traditionally been subject to disclosure”); *Core v. United States Postal Serv.*, 730 F.2d 946, 948 (4th Cir. 1984) (finding no substantial invasion of privacy in information identifying names of successful federal job applicants); *Nat’l W. Life Ins. v. United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (discerning no expectation of privacy in names and duty stations of Postal Service employees).

In sum, there is no confidential information at issue here, and the analysis of information is statistical in nature, and does not involve specific personnel or persons. Rental data is not related to renters, and the only personal information at issue is entirely generic, related to the BAH rates applicable to different seniority levels or those categorized as individuals or families, not the names of personnel or family members. We have not requested any personal information whatsoever. And the names of Government decision makers are not confidential, and are routinely disclosed to ensure that decision-making can be tested as rational and reasonable, and in accordance with statutes and regulation and applicable directives. Moreover, Exemption 6 does not apply to businesses and other such entities, so any withheld information about the contractor, or about businesses from which the contractor collected data must be disclosed.

III. CONCLUSION

As discussed above, the Agency has failed to properly apply FOIA Exemptions 4 and 6 to the information requested in the above requests, and as such, the Agency’s reliance on Exemptions 4 and 6 to withhold documents responsive to our requests is inappropriate. Further, even if the Agency had any reasons for relying on these exemptions in the first instance, it has failed to explain any reasons in a way that 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 six requests, and especially in relation to request 3 of 17-F-0708, since the contract requires that these documents exist. We, therefore, request that the Agency disclose all documents responsive to our March 15 request, and that it conduct an adequate search to ensure that all such responsive documents are identified and provided. Based upon 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,



C. Joël Van Over

Enclosures