

2 April 2015

Mr s47F
s47F

Dear Mr s47F

1. I refer to your request of 3 March 2015 under the *Freedom of Information Act 1982* (FOI Act) in which you sought access to information, as below:

We request information on the following:

- *Awarded contract value for DHA Contract: DHA-CWB-100315-Civil & Associated Works RAAF Base Darwin*
- *The name of the successful contractor is not required.*

2. DHA acknowledged receipt of your request on 3 March 2015.
3. I am an officer authorised under section 23 of the FOI Act to make decisions in respect of request for access to documents.

Legislative background

4. The Act provides a right of access to information in the possession of Commonwealth agencies, limited only by exceptions and exemptions provided for in the Act.

Decision

5. I have identified a document falling within the scope of your request listed in the attached Schedule of Documents (Attachment A) as falling within the scope of your request.
6. I have decided to refuse access to the document under the FOI Act on the basis that it is an exempt document under section 47 (trade secrets and commercially valuable information) of the FOI Act.

Material on which my findings are based

7. I based my findings on the following material:
 - The content of the identified documents;
 - The relevant provisions of the FOI Act;
 - The guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (OAIC Guidelines);

HEAD OFFICE



- Advice from DHA staff whose duties relate more closely to the matters referred to in the document; and
- The content of your FOI request.

Reasons

8. Where the Schedule indicates an exemption claim has been applied to a document or part of a document, my findings of fact and reasons for deciding that the exemption provision applies to that document or part of the document are set out below.

9. Section 47 – Documents disclosing trade secrets or commercially valuable information.

10. Subsection 47 of the FOI Act provides:

(1) A document is an exempt document if its disclosure under this Act would disclose:

(a) trade secrets; or

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

11. Document 1 contains information relating to the contract price agreement for the Civil & Associated infrastructure works at RAAF Base Darwin, NT.

12. In determining whether the document is exempt under section 47(1)(b), I am required to consider:

- Whether the document contains information of a commercial value; and
- Whether there is a reasonable likelihood that the value would reasonably be destroyed or diminished through disclosure.

13. The Guidelines relevantly provide:

5.175 Whether information has a commercial value, and the extent of any destruction or diminution of the value, are questions of fact for the decision maker. Information has commercial value to an agency or to another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. That information may be valuable because it is important or essential to the profitability or the viability of a continuing business operation. The following factors may assist in deciding in a particular case whether information has a commercial value:

- *whether the information is known only to the person in question, or the extent to which it is known by others (information that is known to some but not all of the person's competitors may nevertheless have commercial value);*

- *whether the information confers a competitive advantage on the person against any competitors: for example, if it lowers the person's cost of production or allows it access to markets not available to competitors;*
- *whether a genuine 'arm's-length' buyer is prepared to pay to obtain that information;*
- *whether the information is still current or out of date (out of date information may no longer have any value);*
- *whether disclosing the information would reduce the value of the business, undertaking or organisation: perhaps as reflected in the price of its shares.*

5.176 *The investment of time and money is not in itself a sufficient indicator of information having a commercial value. Information can be costly to produce without necessarily being worth anything.*

5.177 *Even where information has commercial value, it is necessary to show that there is a reasonable expectation that its value will be destroyed or diminished by disclosure. This is not a necessary outcome of disclosure and a decision maker should have evidence to support a claim under this exemption.*

14. As part of the DHA Invitation to Tender – DHA-CWB-100315, applicants were notified at paragraph 9.3 that, *Tenders will be treated by DHA as commercial in confidence documents and DHA will undertake all reasonable steps to ensure Tenders are confidential except where disclosure is permitted under the Conditions of Tender or with the consent of the Tenderer.*
15. DHA is Government Business Enterprise (GBE). As a GBE, it is not directly funded by the Australian Government, and it is required to operate in a commercial manner. To ensure that DHA obtains the best value for money from the tender process in accordance with Government Procurement Guidelines, the contract value is kept confidential.
16. The information contained in Document 1 is commercially valuable to DHA and relates to the operation of a continuing commercial activity undertaken, that being the civil works at RAAF Base Darwin.
17. I am also satisfied that the content of Document 1 is not publicly available. The commercial value of the document is only known to a small number of staff at DHA and in particular, it is not known by competing companies for tenders. Release of the information would provide tenderers with a benchmark against which they could undermine the competitive process of tenders.
18. The release of this information would be a release to the world at large and as a result the commercial value of the information in the document would be diminished or destroyed if it were disclosed. Accordingly, I find that the document is exempt under section 47(1)(b).
19. Section 11A(5) of the FOI Act requires me to, nevertheless, give the applicant access to the information unless, in the circumstances access to it would at the time and, on balance, be contrary to the public interest. I have weighed the factors for and against the release of this information and

decided that it is not in the public interest to release it. The factors affecting my decision include that it is neither well known nor readily available from publicly accessible sources. I consider that there is a public interest in the protection of information which was provided to DHA in confidence.

Liability to pay charges

20. I have decided not to impose any charges.

Rights of review

21. If you do not agree with my decision in relation to the release of documents you are entitled to apply for an internal review of the decision. Information on your review rights is at Attachment B.

FOI Disclosure Log

22. IN accordance with the requirements of Section 11C of the FOI Act, Defence Housing Australia is required to publish, on its website, information released under the FOI Act within 10 working days of the applicant being given access to documents. Defence Housing Australia will also publish the decision notice, with any personal and business information deleted. The information published does not include personal information or the business, commercial, financial or professional affairs of any person if publication of that information would be unreasonable. Other information not published also includes that which the Australian Information Commissioner determines is unreasonable to publish.

Further information

23. Please do not hesitate to contact me if you have any questions about this matter.

Yours sincerely

s47F



Pip Sackley
Executive Officer