

19 October 2012

Dear

**Request for access to documents under the *Freedom of Information Act 1982***

1. I refer to your request dated 6 September 2012 made under the *Freedom of Information Act 1982* (Cth) (FOI Act) for access to the following information held by Defence Housing Australia (DHA):

*I seek access to information about the Defence Housing Authority's sponsorship agreement with the Canberra Raiders Sports Club Ltd and/or associated entities. I make this request under the auspices of the federal Freedom of Information Act 1982.*

*Specifically, I seek the value of money and/or goods or services that DHA has agreed to provide to the Raiders in 2013 and 2014.*

2. Receipt of your request was acknowledged on 6 September 2012. I wrote to you on 28 September 2012 extending the statutory deadline under section 15(6) of the FOI Act to 5 November 2012.
3. I am an officer authorised under section 23 of the Act to make decisions in respect of requests for access to documents. My decision and the reasons for that decision are set out below.

**Charges**

4. I have decided not to impose any charges for processing your FOI request.

**Decision on access**

5. I have identified the document 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), and it also contains material that is exempt under section 45 (material obtained in confidence).
7. The reasons for my decision are set out below.

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Email: [info@dha.gov.au](mailto:info@dha.gov.au) Internet: [www.dha.gov.au](http://www.dha.gov.au)  
ABN 72 968 504 934



### FOI Legislation

8. The FOI Act provides a general right of access to documents in the possession of Commonwealth agencies, subject to certain exceptions and exemptions provided under that Act.
9. Section 47 provides that a document is exempt if disclosure under the FOI Act would disclose:
  - (a) trade secrets (section 47(1)(a)); 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 (section 47(1)(b)).
10. Section 45 provides that a document is exempt if its disclosure under the FOI Act would found an action by a person for breach of confidence.
11. The relevant provisions of the FOI Act are set out in full at **Attachment B**.

### Material on which my findings of fact are based

12. I based my findings of fact on the following material:
  - the content of the identified document;
  - 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**);
  - advice from DHA staff whose duties relate more closely to the matters referred to in the document;
  - submissions made by the Canberra Raiders in response to third party consultation under section 27 of the FOI; and
  - submissions made by you in your FOI request.

### Reasons for decision

#### *Section 47(1)(a) – trade secrets*

13. The OAIC Guidelines relevantly provide (at paragraphs 5.170-5.173):

*5.170 The term 'trade secret' is not defined in the FOI Act. The Federal Court has interpreted a trade secret as information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown.*

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5.171 The Federal Court referred to the following test in considering whether information amounts to a trade secret:

- the information is used in a trade or business;
- the owner must limit the dissemination of it or at least not encourage or permit widespread publication;
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the secret.

5.172 Factors that a decision maker might regard as useful guidance but not an exhaustive list of matters to be considered include:

- the extent to which the information is known outside the business of the owner of that information;
- the extent to which the information is known by persons engaged in the owner's business;
- measures taken by the owner to guard the secrecy of the information;
- the value of the information to the owner and to his or her competitors;
- the effort and money spent by the owner in developing the information; and
- the ease or difficulty with which others might acquire or duplicate the secret.

5.173 Information of a non-technical character may also amount to a trade secret. To be a trade secret, information must be capable of being put to advantageous use by someone involved in an identifiable trade.

14. The Canberra Raiders competes with other football clubs and sporting codes in the sport advertising market. The document reveals the way in which the Canberra Raiders structures its partnership agreements with sponsors, including the types of advertising it provides for a commercial fee. This information is not publicly available, and is treated by the Canberra Raiders as being commercial-in-confidence. If the information were to come into the hands of competitor sporting teams, it could be used to undercut the Canberra Raiders' partnership agreements with current and potential sponsors. This would present a real and significant harm to the Canberra Raiders' ability to attract and secure sponsors, and consequently impact its financial viability.
15. I am satisfied that disclosure of the document would reveal trade secrets, and is, therefore, exempt under section 47(1)(a). In making this finding, I have had regard to submissions made by the Canberra Raiders in response to third party consultation under section 27.



**Section 47(1)(b) – commercially valuable information**

16. The document contains information relating to the terms of the sponsorship agreement between the Canberra Raiders and DHA, including sponsorship fees and marketing activities.
17. 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.
18. The OAIC Guidelines relevantly provide (at paragraphs 5.175-5.177):

*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.*

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19. In your FOI request, you make the following submission:

*Therefore, to exempt the value of the sponsorship agreement from release, you must be able to argue that public knowledge of its value would itself devalue the agreement. I would strongly dispute such as [sic] argument. For example, federal government agencies regularly disclose the value of their contracts to the Senate, in their annual reports and on the AusTender website. This practice devalues neither the contracts nor the work performed under them, nor does it undermine the relationship between agency and contractor.*

20. The Senate Order on Departmental and Agency Contracts requires government agencies that are subject to the *Financial Management and Accountability Act 1997 (Cth) (FMA Act)* to publish certain information relating to its contracts with a value of \$100,000 or more on their internet website.
21. The Senate Order does not apply to DHA as is a Commonwealth Government Business Enterprise (GBE) that operates under the *Commonwealth Authorities and Companies Act 1997 (Cth) (CAC Act)*. DHA is not directly funded by the Australian Government, and is required to operate in a commercial manner. This was recognised by the Australian Government when DHA was established, as reflected in the Explanatory Memorandum to the *Defence Housing Authority Bill 1987 (Cth)* which states that 'the Authority will be given maximum flexibility and commercial freedom to meet its objectives'.
22. As a GBE, DHA is also subject to the *Commonwealth Government Business Enterprise Governance and Oversight Guidelines 2011*<sup>1</sup>. Those guidelines state that 'a principal objective for each GBE is that it adds to its shareholder value', and that to achieve this, GBEs are required to 'earn at least a commercial rate of return'.<sup>2</sup>
23. DHA prepares its Annual Reports in accordance with the requirements of the CAC Act. Its Annual Report for 2010-11 was also prepared in accordance with the *Commonwealth Authorities and Companies (Report of Operations) Orders 2008 (Cth)*. As the sponsorship agreement with the Canberra Raiders was entered into during the 2011-12 financial year, DHA was not required to consider this at the time of the preparation and publication of the 2010-11 Annual Report.
24. DHA's Annual Report for 2011-12 has not yet been tabled in Parliament, but will be prepared in accordance with the *Commonwealth (Annual Reporting) Orders 2011 (Cth)*. However, I note that both the 2008 and 2011 versions of the Annual Reporting Orders contain provisions for information not to be included in Annual Reports if, in the opinion of Directors and with reasonable grounds, the information is commercially sensitive and would be likely to result in unreasonable commercial prejudice to the GBE. The relevant Orders are extracted at **Attachment C** for your reference.

<sup>1</sup> Available at <http://www.finance.gov.au/publications/governance-arrangements/index.html>

<sup>2</sup> *Commonwealth Government Business Enterprise Governance and Oversight Guidelines 2011* (October 2011), pgs 7-8







25. The contents of the document are not publicly available, and are only known by senior management of DHA and the Canberra Raiders. In particular, it is not known by DHA's competitors in the property and investor marketplace.
26. The main function of DHA is to provide housing and related services to members of the Defence Force and their families. To perform this function, DHA must be active in the Australian residential housing market. DHA acquires and develops land, and constructs, purchases and leases houses. DHA finances these activities by selling and leasing back dwellings through the Sale and Leaseback (SLB) program. The SLB program operates under commercial terms and competes for investor demand in commercial markets.
27. As a GBE operating on a commercial basis, DHA entered into the sponsorship agreement with the Canberra Raiders as a key part of its marketing strategy to drive investor demand in its SLB program. I am satisfied that the document contains information of a commercial value as the advertising and marketing activities under the agreement are expected to give DHA an advantage over its competitors in generating interest and demand in the SLB program.
28. I am also satisfied that there is a reasonable likelihood that the commercial value of the information in the document would be diminished or destroyed if it were to be disclosed. Release of the information would provide DHA's competitors with a benchmark against which they could leverage to access the investor marketplace by taking similar marketing measures, or to take steps that would otherwise undermine the competitive advantage that DHA expects it will obtain as a result of its arrangement with the Canberra Raiders. The release of the sponsorship fees in particular is likely to prejudice both DHA and the Canberra Raiders' ability to negotiate competitive sponsorship fees and terms in the future.
29. Further, as discussed above in relation to the section 47(1)(a) exemption, the disclosure of the information in the document could be used by competitor sporting teams to undercut the Canberra Raiders' partnership agreements, thereby adversely impacting on the Canberra Raiders' ability to secure sponsors on favourable terms.
30. Accordingly, I find that the document is exempt under section 47(1)(b). In making this finding, I have had regard to the third party consultation submissions made by the Canberra Raiders.

#### ***Section 45 – material obtained in confidence***

31. The OIAC Guidelines provide that the following five criteria must be satisfied to found an action for breach of confidence as a result of the disclosure of information (at paragraph 5.139):
  - *it must be specifically identified;*
  - *it must have the necessary quality of confidentiality;*
  - *it must have been communicated and received on the basis of a mutual understanding of confidence;*

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- *it must have been disclosed or threatened to be disclosed, without authority,*
  - *unauthorised disclosure of the information has or will cause detriment.*
32. As noted above, the contents of the document are not publicly available, and are only known to a small number of persons within DHA and the Canberra Raiders.
33. The document contains confidentiality provisions which require DHA not to disclose 'confidential information' (as defined under the agreement) to any third party. Sponsorship fees are specifically identified as designated confidential information under the agreement. In addition to the express provisions in the document, it was understood by both parties when entering into the agreement that the information was to be treated as commercial-in-confidence. Having regard to the commercial value of negotiated sponsorship fees which would be diminished or destroyed if disclosed (as discussed above in relation to the section 47(1)(b) exemption), the preservation of confidentiality is a matter of concern to both DHA and the Canberra Raiders. In its third party consultation submission, the Canberra Raiders confirmed that it objects to (and therefore does not authorise) the release of the information.
34. I am satisfied that disclosure of information in the document, namely sponsorship fees, would found an action for breach of confidence. I therefore find that this material is exempt under section 45 of the FOI Act.

#### **Rights of review**

35. 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 and/or an external review by the Australian Information Commissioner. Information on your review rights is at **Attachment D**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ross Jordan', is written over a horizontal line.

**Ross Jordan**  
**Company Secretary**

#### **Attachments:**

- A. Schedule of Documents.
- B. Sections 45 and 47 of the *Freedom of Information Act 1982* (Cth).
- C. Section 20 of *Commonwealth Authorities (Annual Reporting) Orders 2011* (Cth) and section 13 of *Commonwealth Authorities and Companies (Report of Operations) Orders 2008* (Cth).
- D. Your review rights.

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FOI Request  
Schedule of documents

Item No.	Title/Description	Date	Author/Creator	Addressee	No. pages	Decision	Exemptions
1	Sponsorship Agreement – the Canberra Raiders Pty. Ltd. and Defence Housing Australia	18.06.12	The Canberra Raiders Pty. Ltd. and Defence Housing Australia Canberra	N/A	26	Exempt in full	Section 45 – clause 2.1 in document Sections 47(1)(a) and (b) – whole document



***Freedom of Information Act 1982 (Cth.)***

**45 Documents containing material obtained in confidence**

- (1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.
- (2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:
  - (a) a person in the capacity of Minister, member of staff of a Minister or an officer of an agency; or
  - (b) an agency, the Commonwealth or Norfolk Island.

**47 Documents disclosing trade secrets or commercially valuable information**

- (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.
- (2) Subsection (1) does not have effect in relation to a request by a person for access to a document:
  - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
  - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
  - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.

***Commonwealth Authorities (Annual Reporting) Orders 2011(Cth).***

**20 Disclosure requirements for GBEs**

*Changes in financial conditions and community service obligations*

The Annual Report of Operations for a GBE must include:

- a. an assessment of:
  - i. significant changes in its overall financial structure and condition over the financial year; and
  - ii. any events or risks that could cause reported financial information not to be indicative of future operations or financial condition; and
- b. dividends paid or recommended in relation to the financial year; and
- c. details of any community service obligations the GBE has, including:
  - i. an outline of actions the GBE has taken to achieve those obligations; and
  - ii. an assessment of the cost of fulfilling those obligations.

*Information that is commercially prejudicial*

However, information required by this clause 20 can be excluded if the directors believe, on reasonable grounds, that the information is commercially sensitive and would likely result in unreasonable commercial prejudice to the GBE. The annual report must state whether such information has been excluded.

***Commonwealth Authorities and Companies (Report of Operations) Orders 2008(Cth).***

**13 Disclosure requirements for GBEs**

- (1) Subject to subclause (2), and to the extent that they are not covered by clause 10 of this Schedule, the following matters must be included in the report of operations of a Commonwealth authority that is a GBE:
  - (a) an assessment of:
    - (i) any significant changes in overall financial structure and condition over the financial year; and



- (ii) any material events and uncertainties that would cause reported financial information not to be necessarily indicative of future operating results or financial condition;
- (b) the amount of dividends paid or recommended in relation to the financial year;
- (c) a description of any community service obligations, including:
  - (i) an outline of the strategies and policies that the GBE adopted to achieve those obligations; and
  - (ii) an assessment of the cost of those obligations over the financial year.
- (2) If the directors of the GBE believe, on reasonable grounds, that relevant information referred to in subclause (1) is commercially sensitive and, if it were included in the report of operations, would be likely to result in unreasonable commercial prejudice to the GBE:
  - (a) the information need not be included; and
  - (b) if the information is not included, the report of operations must state that some or all, as the case requires, of the information required has not been included.

## Freedom of information – Your review rights

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

### Internal review

If DHA makes an FOI decision with which you disagree, you can ask DHA to review its decision. The review will be conducted by a DHA officer at a more senior level than the original decision maker. There is **NO** charge for internal review.

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

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

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

### *How to apply for internal review*

You must apply in writing and should include a copy of the notice of the decision provided and the points to which you are objecting and why. You can lodge your application in one of the following ways:

Post: Company Secretary  
Defence Housing Australia  
26 Brisbane Avenue  
BARTON ACT 2600

Email: [fol@dha.gov.au](mailto:fol@dha.gov.au)

### External Review

*Do I have to go through DHA's internal review process first?*

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

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

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

### Making a complaint

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



#### *Contacting the Information Commissioner*

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

**Online:** [www.oaic.gov.au](http://www.oaic.gov.au)

**Post:** GPO Box 2999, Canberra ACT 2601

**Fax:** +61 2 9284 9666

**Email:** [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

#### **Investigation by the Ombudsman**

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

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

#### **Defence Housing Australia FOI contacts**

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**Ph:** +61 2 6217 8401

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