



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

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July 22, 2016

*Via electronic mail:*

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RE: FOIA Request for Review – 2014 PAC 31664

Dear Mr. Kahn, Mr. D'Alba, Ms. Angelucci, Ms. Bevan, and Ms. Dumont:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons stated below, the Public Access Bureau concludes that the Chicago Transit Authority's (CTA) response to Mr. Jaime Saucedo's FOIA request: (1) properly withheld the percentages of railcar components manufactured domestically or in foreign countries that are listed within the "Post-Delivery Buy America Audit for the Chicago Transit Authority (CTA) Project 16796G for Professional Services Consultant on BAA Post-Delivery for AC Propulsion Railcars" (Post-Delivery Audit) where the suppliers are companies other than Bombardier Transit Corporation (Bombardier); (2) improperly withheld the percentages of components supplied by Bombardier; (3) properly withheld the percentages and corresponding subcomponents within the accompanying "CTA (Contract 076) Buy America Compliance Certificates" (Certificates); and (4) improperly withheld the "Description of Work Final Assembly Requirements" (Description of Work) in the Post-Delivery Audit.

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## BACKGROUND

On July 19, 2010, CTA contracted with PB Americas, Inc. (Consultant) to conduct a post-delivery Buy America audit on railcars that CTA purchased from Bombardier.<sup>1</sup> On November 2, 2010, Bombardier and Consultant entered into a non-disclosure agreement that prohibited Consultant from disclosing "Confidential Information to any person other than CTA and its permitted personnel that needs to know for the purpose of the above mentioned Audit."<sup>2</sup> "Confidential Information" means "[Bombardier's] financial records and books relating to the [railcar] Contract[,] \* \* \* the records concerning [Bombardier's] suppliers for said Contract[,] and \* \* \* any other documents or information, disclosed to the Consultant orally or in writing[.]"<sup>3</sup> Consultant submitted the Post-Delivery Audit to CTA on January 12, 2011.

On May 16, 2013, Mr. Saucedo, on behalf of the Los Angeles Alliance for a New Economy (LAANE), submitted a FOIA request to the CTA seeking, among other records, the "Post Award/Delivery Buy America Compliance Certification."<sup>4</sup> Subsequently, Mr. Saucedo clarified that his request included the Post-Delivery Audit and Certificates, which are the records at issue here.<sup>5</sup> On August 12, 2014, CTA provided Mr. Saucedo with the Post-Delivery Audit and Certificates but redacted certain information under section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g) (West 2012)). On October 6, 2014, attorneys for the Jobs to Move America Coalition (Coalition) submitted this Request for Review disputing the applicability of that exemption.<sup>6</sup>

On November 7, 2014, the Public Access Bureau sent a copy of the Request for Review to CTA and asked for unredacted copies of the responsive records for our confidential review, together with a detailed explanation of the factual and legal bases for its assertion of section 7(1)(g) of FOIA. On November 19, 2014, CTA provided this office with the unredacted

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<sup>1</sup>Post-Delivery Audit at 1.

<sup>2</sup>Non-Disclosure Agreement between Bombardier and Consultant (November 2, 2010), ¶5.

<sup>3</sup>Non-Disclosure Agreement between Bombardier and Consultant (November 2, 2010), ¶ 1.

<sup>4</sup>E-mail from Jaime Saucedo to FOIA, [Chicago Transit Authority] (May 16, 2013).

<sup>5</sup>Letter from Brigett R. Bevan, Freedom of Information Officer, Chicago Transit Authority, to Jaime Saucedo, Los Angeles Alliance for a New Economy (August 12, 2014), at 1.

<sup>6</sup>Letter from Joel D'Alba and Margaret Angelucci, Asher, Gittler & D'Alba, and Andrew Kahn, Davis Cowell & Bowe, Attorneys for Coalition, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (October 6, 2014). The Coalition includes the NAACP, AFL-CIO, LAANE and other groups (e-mail from Andrew Kahn, Davis, Cowell & Bowe, to bevan@transitchicago.com and foia@transitchicago.com (May 12, 2014)).

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Post-Delivery Audit and Certificates. In addition, Ms. Sandrine Dumont, Legal Advisor to Bombardier Transportation Americas, submitted a response letter asserting that the redacted sections are exempt from disclosure pursuant to section 7(1)(g) of FOIA because disclosure may cause competitive harm to Bombardier or some of its affiliates. On January 12, 2015, the Coalition replied by disputing that disclosure of the redacted information could cause competitive harm.

### **Buy America Audits**

In accordance with the requirements of section 669 of title 49 of the Code of Federal Regulations (49 C.F.R. § 661), when purchasing railcars with Federal Transit Administration (FTA) funds, final assembly of the railcars must occur in the United States and the cost of the components and subcomponents produced in the United States must be at least sixty percent of the cost of all components. 49 C.F.R. § 661.11. To ensure compliance, FTA requires that the purchasing authority (here CTA) conduct a pre-award audit of a supplier's likely compliance and a post-delivery audit of a supplier's (here Bombardier's) compliance. 49 C.F.R. § 663. The pre-award audit is required before the entity receiving FTA funding may enter into a contract with a supplier. 49 C.F.R. § 663.21. The purpose of the pre-award audit is to weed out those suppliers incapable of complying with the Buy America and purchasing authority's requirements. After a contract is entered into between a supplier and purchasing authority, a post-delivery audit must be completed before a railcar's title is transferred to the purchasing authority. 49 C.F.R. § 663.31. The purpose of the post-delivery audit is to ensure the delivered railcars comply with the federal regulations and the purchasing authority's requirements.

### **DISCUSSION**

"All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2012); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 416 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2012).

Section 7(1)(g) of FOIA exempts from disclosure:

Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or commercial or financial information are furnished under a claim that they are proprietary, privileged or confidential, and that disclosure of the trade secrets or commercial or financial information would cause competitive harm to the person or

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business, and only insofar as the claim directly applies to the records requested.

"The term *trade secret* in the context of the FOIA has been interpreted to include information that (1) would either inflict substantial competitive harm or (2) make it more difficult for the agency to induce people to submit similar information in the future." (Emphasis in original.) *BlueStar Energy Services, Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 995 (1st Dist. 2007). Under the first prong, which is at issue here, "[p]arties opposing disclosure need not demonstrate actual competitive harm; instead, they need only show actual competition and a likelihood of substantial competitive injury in order to 'bring [that] commercial information within the realm of confidentiality.'" *New Hampshire Right to Life v. U.S. Department of Health & Human Services*, 778 F.3d 43, 50 (1st Cir. 2015) (quoting *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280, 1291 (D.C. Cir. 1983)).<sup>7</sup>

Citing section 7(1)(g), CTA, at the request of Bombardier, redacted from the Post-Delivery Audit and Certificates the following information at issue here:

- (1) The percentages set forth in the percentage columns of the Post-Delivery Audit on the pages entitled "Buy America Delivery Audit On Rail Vehicle Procurement For CTA Rail Car A" and "Buy America Delivery Audit On Rail Vehicle Procurement For CTA Rail Car B[.]"<sup>8</sup>
- (2) Fifteen Buy America Compliance Certificates in their entirety. However, in its response to this office, Bombardier agreed that the "name, address and subcomponents names of the suppliers" are not

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<sup>7</sup>Federal court interpretations of the exemption for trade secrets in the Federal FOIA are instructive in construing section 7(1)(g). See *Roulette v. Department of Central Management Services*, 141 Ill. App. 3d 394, 400 (1st Dist. 1986). The trade secret exemption in the Federal FOIA applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]" 5 U.S.C. §552(b)(4) (2012).

<sup>8</sup>Post-Delivery Audit. CTA, at the behest of Bombardier, also redacted all cost information. In a telephone conversation on November 20, 2015, Mr. Andrew J. Kahn, attorney for the Coalition, informed an Assistant Attorney General in the Public Access Bureau that the Coalition was not seeking a review of the redacted cost information. Accordingly, we will not address the cost redactions here. CTA also withheld from the Post-Delivery Audit two documents that were previously provided to the Coalition: (1) Post-Delivery Purchaser's Requirements Certification; and (2) Post-Delivery Buy America Compliance Certification (e-mail from Brigett R. Bevan, FOIA Officer, Chicago Transit Authority, to Andy Kahn (June 18, 2014)). Therefore we will not address those redactions either, but ask CTA to supply the Coalition with a copy of the Post-Delivery Audit containing those pages if it has not already done so.

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exempt from disclosure.<sup>9</sup> Bombardier has since stated that it would disclose the information in the "Source-Domestic or Foreign", "Currency of the PO", and the "Complete Address of location..." columns, if the "Subcomponent Name", "US %", and "Foreign %" columns can be withheld.<sup>10</sup>

- (3) The Description of Work in its entirety. However, Bombardier has agreed to provide this description except for the majority of the second paragraph (all but the first 13 words), the entire third paragraph, and the entire last paragraph.<sup>11</sup>

As mentioned above, Bombardier has provided this office with documentation demonstrating that the Post-Delivery Audit and Certificates were supplied to Consultant under claims of privilege and confidentiality.<sup>12</sup> It is undisputed that there is actual competition in the railcar market. The parties, however, disagree regarding whether disclosure of the records in question would cause competitive harm to Bombardier.

### **The Percentages Listed in the Post-Delivery Audit**

Bombardier argues that releasing the percentages redacted from the Post-Delivery Audit would cause it competitive harm by enabling competitors preparing bids for railcars to focus on using Bombardier's suppliers that provide the most U.S. content. Bombardier asserts that:

The percentage of US vs. foreign content for each supplier is often the result of some extensive commercial negotiations and discussions between Bombardier and its suppliers and in certain case[s], Bombardier will suggest some changes to the

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<sup>9</sup>Letter from Sandrine Dumont, Legal Advisor, Bombardier Transportation Americas, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 19, 2014), at 5.

<sup>10</sup>E-mail from Sandrine van den Bogaard Dumont, Legal Advisor, Contracts and Legal Affairs, Bombardier Transportation America, to Edie Steinberg, [Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (May 20, 2015), at ¶4.

<sup>11</sup>E-mail from Sandrine van den Bogaard Dumont, Legal Advisor, Contracts and Legal Affairs, Bombardier Transportation America, to Edie Steinberg, [Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (May 20, 2015), at ¶1 (and accompanying pages highlighting redactions).

<sup>12</sup>Non-Disclosure Agreement between Bombardier and Consultant (November 2, 2010).

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manufacturing print of some of its suppliers (including sometimes using Bombardier's other suppliers) in order to achieve a higher US content. Consequently, disclosing such percentages would cause competitive harm to Bombardier as it would reveal its manufacturing and US content strategy.<sup>[13]</sup>

The Coalition argues that the percentages are not confidential or proprietary because it has elsewhere obtained percentage information in several pre-award audits (including one in which Bombardier was audited), an interim audit, and at least one post-delivery audit. The Coalition's contention is unpersuasive, however, because: (1) those audits were not obtained under the Illinois FOIA; and (2) one public body's decision to disclose a record does not compel other public bodies to do the same.

The Coalition also provided two declarations supporting its position that the percentages are not proprietary. Mr. Larry E. Salci, an independent consultant serving clients in the rail industry and former president of Bombardier Corporation (US), declared that: (1) "the information contained in the [Post-Delivery Audit] of Bombardier is generally not proprietary information, excluding the detailed price information from suppliers or any defined proprietary technical information owned and utilized by suppliers and the car builder that is documented and used in bid proposals[;]" and (2) "[t]he percentage calculations for all major components and the verification of assembly cost percentages by the car builder relative to total vehicle cost are not useful information to competitors and should not be considered proprietary information or disadvantageous to Bombardier \* \* \* if provided."<sup>14</sup> Additionally, Ms. Linda Nguyen-Perez, a senior research/policy analyst for the Coalition, declared that "the overall percentage of domestic sourcing is not something agency officials outside California have in the past appeared to give any weight to in their decision making so long as it exceeds the 60% minimum, and hence the underlying percentage connected to a particular supplier to a bidder [sic] is even more irrelevant in competition between bidders[.]"<sup>15</sup> However, whether officials awarding contracts to railcar suppliers give any weight to percentages that exceed 60% and whether Bombardier would be disadvantaged in its own procurement activities are irrelevant to the essential question of whether competitors could use the final cost percentages from the Post-Delivery Audit to target Bombardier's suppliers providing the most U.S. content in order to formulate their own more competitive bids to public entities in the future, to Bombardier's disadvantage.

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<sup>13</sup>Letter from Sandrine Dumont, Legal Advisor, Bombardier Transportation Americas, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 19, 2014), at 5.

<sup>14</sup>Declaration of Larry E. Salci RE: BuyAmerica Audit Report on Bombardier/CTA (October 8, 2014), at 2.

<sup>15</sup>Declaration of Linda Nguyen-Perez in Support of Appeal (October 1, 2014), at ¶3.

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After reviewing the Post-Delivery Audit, the declarations provided by the Coalition, and the arguments of the Coalition and Bombardier, we conclude that CTA met its burden of establishing a likelihood of substantial competitive injury to Bombardier if the percentages redacted from the Post-Delivery Audit as to *Bombardier's outside suppliers* were disclosed. In particular, competitors could exploit information about the parts and percentages of U.S. content costs that Bombardier's suppliers provide to reach agreements with those suppliers to the detriment of Bombardier. *See generally BlueStar Energy Services, Inc.*, 374 Ill. App. 3d at 995-96 (settlement agreement provided in confidence to government agency from an entity the agency regulates exempt from disclosure); *New Hampshire Right to Life*, 778 F.3d at 51 (where potential future competitor could take advantage of institutional knowledge contained in a manual and letter describing the manual, manual and letter exempt commercial information); *United Technologies Corp. v. U.S. Dept. of Defense*, 601 F.3d 557, 564 (D.C. Cir. 2010) (audit and documents regarding the audit containing proprietary information about manufacturing and quality control exempt from disclosure). However, CTA has not met its burden of establishing a likelihood of substantial competitive injury to Bombardier if the percentages redacted from the Post-Delivery Audit of the material *Bombardier itself supplies*, as Bombardier Transportation, were to be released. In contrast to information concerning outside suppliers that Bombardier's competitors may be able to use to reach agreements with those suppliers and ultimately submit more competitive bids, it is unclear how such information about Bombardier could be exploited by its competitors. This office also notes that because LAANE is no longer seeking the redacted price information, competitors could not potentially discern from the other portions of the records the per-unit cost that Bombardier is paying for each part. Accordingly, this office concludes that the percentages redacted from the Post-Delivery Audit with respect to Bombardier's suppliers may be withheld under section 7(1)(g) of FOIA, but that the percentages redacted from the Post-Delivery Audit as to the material Bombardier itself supplies are not exempt from disclosure. Therefore, we ask CTA to provide the Coalition with a copy of the Post-Delivery Audit without redacting the percentages relating to Bombardier Transportation.

### **The Buy America Compliance Certificates**

CTA originally withheld the Certificates in full. In its response to this office, Bombardier agreed that the "name, address and subcomponents names of the supplier" are not exempt from disclosure.<sup>16</sup> Bombardier has since informed this office that it would disclose the "Source-Domestic or Foreign," "Currency of the PO," and the "Complete address of location..." columns, as long as the "Subcomponent Name," "US %," and "Foreign %" columns can be

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<sup>16</sup>Letter from Sandrine Dumont, Legal Advisor, Bombardier Transportation Americas, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 19, 2014), at 5.

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withheld.<sup>17</sup> Based on the reasoning outlined above – that competitors may focus on using Bombardier's suppliers and the components they supply to maximize the amount of U.S. content for their own bids – this office concludes that the information redacted from the "US %," "Foreign %," and corresponding "Subcomponent Name" columns is exempt from disclosure under section 7(1)(g) of FOIA. Accordingly, we ask CTA to provide the Certificates to the Coalition, subject only to redaction of the information in the "US %," "Foreign %," and "Subcomponent Name" columns.

### **The Description of Work Final Assembly Requirements**

Lastly, CTA has not demonstrated that most of the redactions to the Description of Work are within the scope of section 7(1)(g). The majority of the redacted information is generic and does not appear to provide unique details of assembly or proprietary technical information that could reasonably be expected to cause Bombardier competitive harm if disclosed. It is no more descriptive than the minimum requirements for final assembly of railcars set forth in Appendix D of section 611.11 of title 49 of the Code of Federal Regulations (49 C.F.R. § 611.11, App. D). However, CTA may redact the cost of final assembly, excluding the cost of materials, from the final paragraph because disclosure of such information could cause competitive harm by enabling competitors to undercut Bombardier in future bids. Accordingly, this office asks CTA to provide the entire Description of Work to the Coalition, except for the cost provided in the final paragraph.

In summary, this office requests that CTA provide to the Coalition a copy of the Post-Delivery Audit, including the Post-Delivery Purchaser's Requirements Certification, Post-Delivery Buy America Compliance Certification, and the entire Description of Work, except for the cost provided in the final paragraph; provided, however, that CTA may redact the percentages column for all suppliers except Bombardier Transportation and the costs from the Post-Delivery Audit. We also ask CTA to provide the Coalition with a copy of the Certificates with redaction of only the information in the "US %," "Foreign %," and "Subcomponent Name" columns.

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<sup>17</sup>E-mail from Sandrine van den Bogaard Dumont, Legal Advisor, Contracts and Legal Affairs, Bombardier Transportation America, to Edie Steinberg, [Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (May 20, 2015), at ¶4.

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter closes this file. Please contact me at (312) 814-5201 or the Chicago address listed on the first page of this letter if you have questions.

Very truly yours,

A large black rectangular redaction box covers the handwritten signature of Edie Steinberg.

EDIE STEINBERG  
Assistant Attorney General  
Public Access Bureau

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