

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
In the Matter of the Application of

Index No. 161989/2023
(Motion Seq. No. 1)

JOBS TO MOVE AMERICA,

Petitioner,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY,
NEW YORK CITY TRANSIT

Respondent.

For a Judgment Pursuant to Article 78 of
the CPLR

-----X

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS'
ANSWER AND IN OPPOSITION TO THE PETITION**

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Respondents METROPOLITAN TRANSPORTATION AUTHORITY (“MTA”) and NEW YORK CITY TRANSIT AUTHORITY (“NYCTA”), sued here as “NEW YORK CITY TRANSIT” (hereinafter collectively as “Respondents”) respectfully submit this memorandum of law in support of their Answer and in opposition to the Petition by Jobs to Move America (“JMA”) pursuant to Civil Practice Law and Rules (“CPLR”) 7804(e).

PRELIMINARY STATEMENT

JMA has brought this Article 78 petition seeking an order directing Respondents to produce the following four categories of documents in response to its FOIL request made on February 23, 2023 (the “2023 FOIL Request”):¹

- a. Notice of award with unredacted Contract and United States Employment Plan (“USEP”) worksheets;
- b. Interim USEP reports (annual, semi-annual, quarterly reports, action plans);
- c. Notices of USEP non-compliance; and
- d. Audits of USEP non-compliance.

The documents requested in the 2023 FOIL Request are related to the Contract Number R34211 between NYCTA and Kawasaki Rail Car, Inc. (“KRC”) to purchase 535 new subway cars (hereinafter the “Contract R211”), which the USEP is part of.

JMA had previously submitted two other FOIL requests in 2018 and 2019 seeking nearly indistinguishable records from those sought in the 2023 FOIL Request. As of June 7, 2021, JMA’s 2018 and 2019 FOIL requests seeking substantially similar records were concluded. JMA neither appealed MTA’s FOIL responses within 30 days pursuant to Public Officers Law § 89(4), nor challenged it within four months pursuant to CPLR

¹ While the 2023 FOIL Request originally requested eight categories of records, only four are disputed. The other four request categories were not included in the Petition and those are deemed satisfied administratively.

217(1) and 7804. Instead, JMA simply submitted another request in early 2023, which identified eight categories of records related to Contract R211, largely overlapping with those previously requested.²

Also, the requested records contain “trade secrets” or commercially sensitive information if disclosed “would cause substantial injury to the competitive position” to KRC and its subcontractors and suppliers under Public Officers Law § 87(2)(d). The USEP reports sought by Petitioner detail KRC’s cost and pricing information for designing, constructing, testing and delivering subway cars at various timeline, and were properly withheld as commercially sensitive information. KRC and some of its subcontractors and suppliers deem this USEP information so secretive, that they restrict access within their own organizations, guarded disclosure of it to each other, and required additional confidentiality agreements for each of the MTA internal audit team who analyzed it.

Any audit of the USEP has only been done with the MTA internal audit team protected with non-disclosure agreements, and are also evaluative and deliberative intra-agency material exempt from disclosure under Public Officers Law § 87(2)(g). Lastly, MTA has explained that there is no record of USEP non-compliance and has already provided Contract R211 since 2018, which renders moot items a and c demanded in the Petition.

SUMMARY OF FACTS

The material facts are set forth in Respondents’ accompanying Answer, Affirmation of Yohance Bowden, MTA FOIL Officer (“Bowden Affirm.”), Affidavit of

² Even after JMA filed this Petition, on December 14, 2023, its “co-founder and executive director” Madeline Janis filed yet another FOIL request identical to the 2023 FOIL Request and including the same duplicate record categories from the 2018 and 2019 FOIL requests.

Gregorio Lopez, MTA Audit Services Audit Director (“Lopez Affid.”), Affidavit of Ken Takeda, KRC’s Manager of Contracts/Marketing (“Takeda Affid.”), Affidavit of Atsushi Maemura, Fuji Electric Corp. of America’s (“Fuji”) CEO and President (“Maemura Affid.”), and are summarized below.

MTA is a public benefit corporation established for the “continuance, further development and improvement of commuter transportation and other services.” Pub. Auth. Law § 1264. The NYCTA, MTA’s affiliate, is also a public benefit corporation that operates the New York City subway, bus, paratransit, among other transit services. Pub. Auth. Law § 1202. After extensive bidding process, on February 16, 2018, NYCTA and KRC entered Contract R211. Bowden Affirm. ¶ 6, and Exhibit A for Contract R211.

a. JMA’s Four FOIL Requests Regarding Contract R211 and Failure to Timely Seek Judicial Review for Prior Requests Duplicating its Current One

Less than a month after Contract R211 was signed, on March 12, 2018, JMA submitted its first FOIL request about the contract (FOIL Request No. 22575, hereinafter referred to as “2018 FOIL Request”), demanding KRC’s proposal submission, fully executed contract among other related “documents/communications”. *Id.* ¶ 5. On May 21, 2018, Respondents provided JMA with the fully executed Contract R211 and MTA staff summary, but withheld bidding proposals and internal documents/communications related to Contract R211. *Id.* ¶ 6. MTA FOIL Team later supplemented responsive records including consulting service contract, staff summary, and the “Buy America Pre-Award Certification.” *Id.* ¶ 9. JMA did not file an Article 78 proceeding challenging the 2018 FOIL Request within the applicable time limit. *Id.* ¶ 19.

On June 18, 2019, JMA submitted another FOIL request (FOIL Request No. 24386, hereinafter referred to as “2019 FOIL Request”), again demanding the proposal

submission and “related forms, scoring documents, memos, communications, drafts, summaries, presentations, or recordings” concerning Contract R211. *Id.* ¶ 8. The 2019 FOIL Request also demanded USEP reports. *Id.* MTA FOIL Team produced responsive records and initially denied the USEP reports based on Public Officers Law §§ 87(2) (c) and (d), but on June 7, 2021, MTA FOIL Team revised its response and provided redacted USEP reports based on Public Officers Law § 87(2)(d). *Id.* ¶¶ 9-17. JMA again did not file an Article 78 proceeding challenging the response to the 2019 FOIL Request within the applicable time limit. *Id.* ¶ 19.

Instead, on February 23, 2023 (almost 21 months after June 7, 2021 when the 2018 FOIL Request and 2019 FOIL Request were concluded), JMA submitted the 2023 FOIL Request, seeking eight categories of records that are substantially similar to those requested in 2018 and 2019. *Id.* ¶ 20. Specifically, Contract R211 was first produced on May 21, 2018, and then produced again on June 27, 2023. *Id.* ¶¶ 6, 24, 32. The proposal submissions, redacted USEP reports and other USEP correspondence and records were first responded to on March 12, 2021, additionally on June 7, 2021, and for the third time on June 27, 2023. *Id.* ¶¶ 9, 17, 24, 31, 33. Respondents withheld internal audit records based on Public Officers Law §§ 87(2)(d) and (g). *Id.*, ¶ 40.

JMA filed this Article 78 petition on December 18, 2023, around the same time its “co-founder and executive director” Madeline Janis³ submitted yet another FOIL request on December 14, 2023, demanding substantially similar records as the 2018 and 2019 FOIL requests, and nearly identical records as the 2023 FOIL request. *Id.*, ¶¶ 46-49.

³ <https://jobstomoveamerica.org/people/madeline-janis-esq/>

b. MTA Internal Audits Are Inter-and-Intra-Agency Materials While USEP Reports Are Trade Secrets and Confidential Commercial Information that Would Likely Result in Substantial Competitive Injury to KRC If Disclosed

The rolling stock is capital-intensive, requiring significant investments in manufacturing facilities, research and development, and technology upgrades. This high upfront cost in addition to stringent safety, environmental, and technical regulations imposed by various governmental and international bodies can be barrier for new entrants and smaller companies looking to enter or expand in the market.⁴ There are only about a dozen rolling stock manufacturers globally, with complex supply chain network ranging from breakage to telecommunication system. Takeda Affid. ¶¶ 7-8. With the merger of major rolling stock manufacturers Alstom and Bombardier in January 2021,⁵ there are only a dozen rolling stock manufacturers left in the North America market, including KRC. *Id.* ¶ 8. As one of the rolling stock manufacturers, KRC faces intense global competition, particularly for skilled labor, its cost structure, ability to obtain and retain personnel, and its capacity to participate in new bidding contest at a given time are all closely guarded commercially sensitive information, and its supply chain is a cumulative product of decades of give-and-take relationship building in the industry. *Id.* ¶¶ 10-11.

Article 1026 of Contract R211 provides that KRC and its subcontractors and suppliers must submit USEP worksheets “semi-annually” for a period of four years, after which reporting shall be on an annual basis.” See Exhibit A attached to Bowden Affirm. A sample USEP worksheet is attached to Contract R211 attachment 19, which requests detailed, job-specific information on the man-hours, hours worked, and fringe benefits that

⁴ [Rolling Stock Market Size & Share, Growth Trends Report, 2023-2032 \(gminsights.com\)](#), published August 2023

⁵ <https://www.alstom.com/press-releases-news/2021/1/transformational-step-alstom-completion-acquisition-bombardier>

KRC and its subcontractors and suppliers expend to execute the project at each specific time frame. *Id.* This is not only an overview or projection of monthly full-time cost per employee, but calls for detailed information that covers hourly pay rate, job duration, specific skill of all aspects of KRC and its subcontractors and suppliers' labor costs, including "direct project management", "production engineering", "carshell assembly", "truck parts fabrication", "installation of systems (HVAC, propulsion, brakes, aux, electric, etc.)", "qualification testing", and "warranty management." *Id.* Fuji, which designs and manufactures door operating systems for Contract R211, provides that the USEP reports and its audits could be used to "extrapolate throughput and profitability, and potentially capacity, which would afford those competitors a competitive advantage in future bidding opportunities on the small number of future projects." Maemura Affid. ¶ 24.

Contract R211 was the first time KRC has USEP requirements, it has never submitted information in the level of detail previously, and does not have any other current contract with such requirement. Takeda Affid. ¶ 16. Such information is so commercially sensitive even within KRC, that the information is compartmentalized and accessible only by a limited number of personnels. *Id.* ¶¶ 21-22. If disclosed, this will enable KRC's competitors to determine with precision "market intelligence regarding profitability, pricing strategies, manufacturing process, capacity to undertake new projects, industry relationships, and other aspects of KRC's inner workings." *Id.* ¶ 20. Specifically, "disclosure of information regarding the number and staffing of work stations can reveal manufacturing/assembly processes that give KRC a competitive advantage in the market." *Id.* ¶ 16. And such public disclosure would cause substantial injury to KRC or its subcontractors and suppliers' competitive position, as it would allow competitors to "more

accurately predict and undercut KRC's project bids and potentially drive it out of the market." *Id.* ¶¶ 26-33.

Article 1026 of Contract R211 also provides that the USEP is subject to an MTA audit. See Exhibit A attached to Bowden Affirm. MTA Audit Services ("MTAAS"), which provides assurance and advisory services to MTA for assessing effectiveness of risk management and counseling operational improvement, conducts the internal audits of USEP for Contract R211. Lopez Affid. ¶¶ 2-6. Because the USEP information was extremely sensitive, each of the MTAAS audit team who reviewed it entered into a separate non-disclosure agreement in advance, and KRC and its subcontractors and suppliers guarded disclosure of the USEP information to each other during the internal auditing process. *Id.* ¶¶ 11-15. Based on the expectation of confidentiality, KRC and its subcontractors and suppliers provided detailed walkthrough of the process of capturing, measuring and monitoring the reportable labor hours and costs in the USEP information. *Id.* ¶¶ 7-9. The MATAS audit team then limited distribution of the internal audit records to itself and the MTA contract administration team for advisory purposes. *Id.* ¶ 16.

c. JMA Has Repeatedly Received Contract R211, and Was Informed that There Is No Record of USEP Non-Compliance

As previously stated, all 369 pages of Contract R211 has been produced first on May 21, 2018 and again on June 27, 2023. Bowden Affirm. ¶¶ 6, 24, 31. JMA has even openly published Contract R211 in its website since at least 2020.⁶ When Contract R211 was produced again on June 27, 2023, the following redactions were applied based on Public Officers Law § 87(2)(b), and JMA has not articulated any explanation why the de

⁶ <https://jobstomoveamerica.org/wp-content/uploads/2020/01/MTA-Kawasaki-Contract-R34211.pdf>

minimis redactions for personal privacy have impeded its ability to review the record produced.:

- (1) on page 183 to shield KRC's chief operating officer's residence, and
- (2) on page 224 to shield KRC's Employer Identification No.

In his August 10, 2023 letter, MTA FOIL Appeal Officer responded to Item 8 of JMA's 2023 FOIL Request ("All records of non-compliance by Kawasaki or a subcontractor(s)/supplier(s) with the USEP, including but not limited to reports to NYCTA's Vendor Performance Unit as set forth in Contract Article 1026 paragraph E") confirming that responsive records "do not exist, rendering this portion of your appeal moot." Bowden Affirm. ¶ 42.

ARGUMENT

I. JMA CANNOT BELATEDLY RESURRECT ITS 2018 FOIL REQUEST AND 2019 FOIL REQUEST THROUGH THE 2023 FOIL REQUEST SEEKING SUBSTANTIALLY SIMILAR RECORDS

a. JMA Failed to Timely Seek Judicial Review of Its 2018 and 2019 FOIL Requests Seeking Substantially Similar Records

A CPLR Article 78 special proceeding provides a means of judicial review of government agency determinations, including those under FOIL. CPLR 7801. However, the Court has consistently rejected "belated attempt to challenge respondents' previous responses to petitioner's requests" when it is seeking "substantially similar" records. *Mixon v. McMahon*, 2023, N.Y. App. Div. LEXIS 1261, *2 (3d Dept. 2003); *Matter of McGriff v. Bratton*, 293 A.D.2d 401, 402 (1st Dept. 2002) ("Belated judicial review of that denial cannot be based on petitioner's second request for the same information, albeit more detailed.").

JMA's 2018 FOIL Request and 2019 FOIL Request sought substantially similar records to those at issue in the 2023 FOIL Request, such as KRC's bid proposal, Contract R211, documents/communications related to Contract R211, and USEP reports. Bowden Affirm. ¶¶ 35-38. MTA FOIL team provided Contract R211 to JMA on May 21, 2018, provided additional responsive records on March 12, 2021, and concluded the 2018 and 2019 FOIL requests on June 7, 2021 with production of additional responsive documents, including redacted USEP reports. *Id.* ¶¶ 6, 9, 11, 17. Pursuant to CPLR 7804, JMA could have, but did not, submitted an administrative appeal and sought judicial review within the time limits following June 7, 2021, when the two prior FOIL requests were concluded. *Id.* ¶ 18-19. JMA should not be permitted to have a second bite at the apple by submitting a new FOIL request for the similar sets of materials, as it would render the time limitations set out in FOIL and CPLR 217 meaningless. *Matter of Van Steenburg v. Thomas*, 242 A.D.2d 802, 803 (3d. Dept. 1997), *lv denied* 91 N.Y.2d 803 ("petitioner was deemed to have exhausted his administrative remedies, thereby enabling him to seek judicial review of the denial thereof and commencing the four-month Statute of Limitations period for a CPLR article 78 proceeding").

Perhaps recognizing that JMA is estopped from challenging its old requests via a new one, JMA's "co-founder and executive director" Madeline Janis submitted yet another FOIL request that is identical to the 2023 FOIL request and substantially similar to the 2018 and 2019 FOIL requests, around the same time that this Article 78 Petition was filed. Bowden Affirm. ¶¶ 46-49. However, these schemes cannot be used to subvert the statute of limitations that bar JMA from challenging Respondents' 2018 and 2019 FOIL responses. *Garcia v. Div. of State Police*, 302 A.D.2d 755, 756 (3d Dept. 2003) ("Here, petitioner's October 31, 2000

FOIL request is nearly identical to the September 1999 request, which, in turn, is a more specific list of the 1993 FOIL request. ... this CPLR article 78 proceeding constituted an improper attempt by petitioner to relitigate his prior CPLR article 78 proceeding and respondents' prior denial of his FOIL request.”).

b. JMA's Excuses for Its Untimely Challenge to the 2018 and 2019 FOIL Requests Are Unavailing

JMA claims that the 2023 FOIL Request sought “new records that did not exist when JMA submitted the prior requests.” JMA’s Memorandum of Law in Support (NYSECF Doc. No. 4) at 16. However, JMA conceded that it sought KRC’s bid proposal and Contract R211 in the 2018 FOIL Request and asked for the USEP reports in the 2019 FOIL Request. See footnote 4 at page 10 of the Petition (NYSECF Doc. No. 1). Simply because some of the terms used in the 2023 FOIL Request, such as “correspondence” are different than the terms used in the 2018 and 2019 FOIL requests, such as “communications”, does not mean JMA is not seeking substantially similar records here. Bowden Affirm. ¶¶ 35-38. JMA’s accusation about Respondents “mischaracterize[ing]” its FOIL requests is unavailing.

JMA also argues that “MTA failed to warn JMA of the need to take further action” concerning the 2018 and 2019 FOIL requests. JMA’s Memorandum of Law in Support (NYSECF Doc. No. 4) at 16. However, MTA FOIL Team concluded those two FOIL requests in its email to JMA dated June 7, 2021 that clearly states in the end: “This completes the response to your FOIL request.” Bowden Affirm. ¶ 18. The FOIL statute itself informs requesters of their right to an administrative appeal and to bring an Article 78 proceeding. Public Officers Law § 89(4). JMA failed to avail itself of those means of recourse for its 2018 and 2019 requests, and the 2023 FOIL Request and its current Article 78 are merely an attempt to seek belated judicial review of the prior requests for substantially similar

records. The Court should reject it as such. *Matter of Mendez v. New York City Police Dept.*, 260 A.D.2d 262, 263 (1st Dept. 1999) (denying FOIL challenge “as this demand apparently constituted nothing more than an effort to obtain reconsideration of the prior request without any change in circumstances.”).

JMA claims its failure to file a judicial challenge to the 2018 and 2019 requests was due to “MTA’s dilatory conduct ... as JMA reasonably believed that doing so would not only be costly and protracted, but futile.” JMA’s Memorandum of Law in Support (NYSECF Doc. No. 4) at 19.⁷ But it does not alter the applicability of the statute of limitations. JMA’s attempt to blame Respondents for its own failure to follow up also conveniently omits that it has received significant number of records it requested in the 2018 and 2019 FOIL requests. Bowden Affirm. ¶¶ 6, 9, 11, 17. That JMA made a business calculation not to timely challenge Respondents’ 2018 and 2019 FOIL responses cannot be attributed to Respondents. *Matter of Wilkerson v. Annucci*, 137 A.D.3d 1444, 1446 (3d Dept. 2016).

Lastly, JMA boldly claims that Respondents “waived any timeliness arguments by producing responsive documents” to the 2023 FOIL Request. JMA’s Memorandum of Law in Support (NYSECF Doc. No. 4) at 19.⁸ The practical reality is that MTA FOIL Team’s limited staff responded to 4,063 requests in 2023 alone (averaging more than 11 FOIL

⁷ Courts normally lack any power to extend a statute of limitations. CPLR 201. JMA cites *Simcuski v. Saell*, 44 N.Y.2d 442, 448-49 (1978) for the proposition that Respondents are estopped from raising the statute of limitations. *Simcuski* is a medical malpractice case and the Court estopped the statute of limitation based on the fact that the defendant surgeon had been aware that he had negligently performed a procedure, but afterwards made intentional, fraudulent misrepresentations to her that her pains would disappear with therapy. JMA has not proffered a single intentional misleading statement Respondents have ever stated in all the FOIL responses. The case is inapposite, and there should not be any estoppel for the four-month statute of limitation of judicial challenge on the 2018 and 2019 FOIL requests.

⁸ JMA cites *Hadden v. Consolidated Edison Co.*, 410 N.Y.S. 2d 274 (1978) and *Alsens American Portland Cement Works v. Degnon Contracting Co.*, 222 N.Y. 34 (1917) for support, but neither case even mentions a statute of limitations – one concerns waiver of a time limit agreed to in a private contract and the other does not concern time limits at all – nor is either related to FOIL.

requests a day), and many of these requests (just like the three requests JMA made in 2018, 2019 and 2023), call for multiple categories of records. Bowden Affirm. ¶ 3. MTA FOIL Team must deal with the gargantuan task of responding to these requests efficiently, and cannot search requests from years prior for duplicates when compiling its responses to any given request. And the 2023 FOIL Request made no reference to JMA's 2018 and 2019 FOIL requests. Waiver of substantive defense requires intentionality, and it would be unreasonable to imply such intentionality from Respondents' having merely produced records in response to JMA's duplicate FOIL requests. *Gooden v. New York City Police Dept – Foil Unit*, 2016 N.Y. Misc. LEXIS 2544, *2-3 (Sup. Ct. N.Y. Cty. May 16, 2016) (“Even if petitioner’s second FOIL request is more detailed than his first request, belated judicial review of that denial cannot be based on petitioner’s second request for the same information.”) (internal citation omitted).

II. INFORMATION CONTAINS IN THE USEP REPORTS AND THEIR INTERNAL AUDITS ARE TRADE SECRET AND DISCLOSURE WOULD CAUSE SUBSTANTIAL INJURY TO KRC'S COMPETITIVE POSITION⁹

⁹ JMA has requested alternatively that the Court should review the records *in camera*, but that is unnecessary here. Only “when an agency claims a FOIL exemption that cannot be evaluated on the basis of the documentation submitted on the motion, [is] an *in camera* inspection appropriate.” *DJL Restaurant Corp. v. Dep’t of Bldgs.*, 273 A.D.2d 167, 169 (1st Dept. 2000) (citing *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)). Here, the accompanying Takeda Affid. and Maemura Affid. fully describe the kinds of confidential and commercial sensitive information present in the USEP reports and their internal audits. As such, an *in camera* inspection is unnecessary. *Hutchinson v. Annucci*, 189 A.D.3d 1850, 1855 (3d Dept. 2020) (finding in case concerning endangerment exemption that affidavit providing detailed explanation of the nature of the content of the records rendered *in camera* review unnecessary); *Davidson v. Police Dep’t*, 197 A.D.2d 466, 467 (1st Dept. 1993) (finding *in camera* inspection unnecessary where nature of redacted information had been described).

Alternatively, even if the Court were to hold that Respondents have not demonstrated, as a matter of law, that the materials are within a FOIL exemption, then the proper procedure is an “*in camera* inspection ordered by Special Term.” *Matter of M. Farbman & Sons v. N.Y.C. Heath & Hosps. Corp.*, 62 N.Y.2d 75, 83 (1984). Thus, although we do not believe disclosure is warranted at all, if the Court is inclined to disagree, it should not order disclosure without first reviewing the documents *in camera*.

Public Officers Law § 87(2)(d) authorizes the withholding of two distinct types of confidential commercial information that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” First, agency records are exempt from disclosure if they “contain bona fide trade secrets.” *Matter of Verizon N.Y., Inc. v. New York State Pub. Serv. Commn.*, 137 A.D.3d 66, 74 (3d Dept 2016). Although the term “trade secret” is not defined in FOIL (or elsewhere in New York’s statutory law), courts generally follow section 757 of the Restatement of Torts in determining whether information is entitled to protection. *Ashland Mgt. v. Janien*, 82 N.Y.2d 395, 407 (1993); *Verizon*, 137 A.D.3d at 72-73.

Under the Restatement, a trade secret is “any formula, pattern, device or compilation of information which is used in one’s business, and which gives [the business] an opportunity to obtain an advantage over competitors who do not know or use it.” *Ashland*, 82 N.Y.2d at 407, quoting Restatement of Torts § 757, Comment b). The factors to be considered in determining whether given information is one’s trade secret are:

- “(1) the extent to which the information is known outside of [the] business;
- (2) the extent to which it is known by employees and others involved in [the] business;
- (3) the extent of measures taken by [the business] to guard the secrecy of the information;
- (4) the value of the information to [the business] and [its] competitors;
- (5) the amount of effort or money expended by [the business] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” *id.*

Second, even records that do not qualify for trade secret protection are exempt if “submitted to [the] agency by a commercial enterprise,” and disclosure “would cause substantial injury to the competitive position of the subject enterprise.” Public Officers Law

§ 87(2)(d); see *Verizon*, 137 AD3d at 69. “[T]he party seeking [this] exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury.” *Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008).

a. USEP Reports and Their Internal Audits Contain Detailed Confidential Information Regarding KRC’s Staffing, Pricing, Cost Structure, Manufacturing Process, Capacity to Undertake New Projects, and Industry Relationships that Are Not Publicly Available and Took Years of Efforts to Establish and Safeguard

KRC is not a publicly traded company with mandatory financial disclosure responsibilities, and as such KRC’s manufacturing capacity or cost structure, including labor cost, are not publicly available. *Takeda* ¶ 6. The USEP information “is secret and not generally available even within KRC, much less to the public.” *Id.* ¶ 21. To maintain the confidentiality of the USEP information, KRC “compartmentalized” it and allowed only a limited number of executives to access. *Id.* ¶ 22. When submitting USEP information to Respondents, KRC includes “written warning to limit internal distribution” and demands “a non-disclosure agreement” when providing additional information for the purpose of internal audit by MTA. *Id.* ¶¶ 23-24.

Rolling stock manufacture is a complex and highly competitive market with about a dozen carbuilders globally, and the competition is particularly fierce in the US because it comprises less than 50% of the railcars in Japan and less than 20% of the railcars in Europe. *Id.* ¶¶ 7-8. As a prime contractor for the Contract R211, KRC’s supply chain is “global in scale and represents the cumulative product of decades of give-and-take and relationship building in the rolling stock industry.” *Id.* ¶ 10. “The confidentiality of the commercial information is a serious concern even as between KRC and members of its own supply chain, many of which are [its] competitors or members of a competitor’s supply chain.” *Id.* ¶ 11. Specifically, some of KRC’s suppliers have refused to share the USEP reports with KRC,

and only directly provides them to Respondents with specific confidentiality agreements. *Id.* ¶¶ 23-24.

USEP reports contains “proprietary and confidential commercial information regarding staffing, production, man-hours, payroll, overhead, benefits, insurance, taxes and other costs” at each specific stage of the design and manufacturing process. *Id.* ¶ 10. Public disclosure of such information would allow “profitability, pricing strategies, manufacturing processes, capacity to undertake new projects, industry relationships and other aspects of the inner workings” to be shared. *Id.* In addition, it would reveal the industry relationships, pricing, technology, and trade secrets (including but not limited to means and methods of design and fabrication) offered by KRC and its supply chain)” which took “over 40 years in business” for KRC to develop. *Id.* ¶¶ 26-27. Similarly, Fuji provides that USEP reports and their audits were “developed through tens of million of dollars ... and countless hours and efforts” and if disclosed “would allow competitors to know Fuji’s entire cost and overhead structure.” Maemura Affid. ¶¶ 20, 23.

In light of the fact that USEP reports and their audits contain commercially sensitive information that KRC and its subcontractors and suppliers have taken extensive efforts to develop and safeguard its confidentiality, the information should be deemed trade secret based on its obvious value to competitors. *Matter of Schenectady v. O’Keeffe*, 50 A.D.3d 1384, 1386 (3d Dept. 2008) (upholding FOIL withholding of “a detailed inventory of the age, cost, and extend of the property” for evident value to potential competitors); *Glens Falls Newspaper, Inc. v. Counties of Warren & Washington Indus. Dev. Agency*, 257 A.D.2d 948, 950 (3d Dept. 1999) (withhold settlement agreement for “obvious advantage to ... competitors.”).

Specifically, far from a generalized overview, USEP reports and their internal audits have demanded detailed breakdown of KRC and its subcontractors and suppliers' particularized personnel related cost at each specific stage of the contract when designing and manufacturing railcars. Such information "would be an unfair advantage to competitors" and should not be disclosed. *Belth v. Insurance Dep't of New York*, 95 Misc. 2d 18, 20 (Sup. Ct. N.Y. Cty. 1977) ("While pricing information is readily available when a product is sold, and is no secret; costs, particularly when they depend not upon the purchase of open market commodities or the use of easily obtainable labor rates, but upon statistical assumptions; upon income derived from various investment and many other factors, may well be a trade secret."); *Matter of Arrow Elecs., Inc. v. Long Is. Power Auth.*, 2002 N.Y. Misc. LEXIS 2102, *24 (Sup. Ct. Suffolk Cty. Feb. 28, 2002) ("public disclosure of cost confidential proprietary and pricing information contained ... would unfairly benefit "KEYSPAN's" competitors").

b. The Public Disclosure of USEP Reports and Their Internal Audits Would Cause Substantial Injury to KRC and its Subcontractors and Suppliers' Competitive Position

"Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA." *Encore College Bookstores, Inc., v. Auxiliary Service Corporation of the State University of New York at Farmingdale, et al.*, 87 N.Y.2d 410, 420 (1995). There are only a dozen major players globally in the rolling stock market, and each tries to undercut the other's bid in limited number of complicated, multi-year, design-and-build projects. Takeda Affid. ¶¶ 7, 8, 11. The disclosure of USEP reports and the internal audits would provide blueprint for competitors to glean market intelligence of KRC and its subcontractors and suppliers, and such information constitutes "trade secret" because

it provides “an advantage over competitors who do not know or use it.” *Laro Maintenance Corp. v. Culkin*, 267 A.D.2d 431, 432 (2d Dept. 1999); *GE v. Macejka*, 252 A.D.2d 700, 701 (3d Dept. 1998) (“in insofar as it relates to price, cost of materials or labor and profit figures, constitutes information of a proprietary nature and objects to disclosure on that basis.”).

Even if the USEP information and their internal audits are not considered bona fide trade secrets, KRC explained how many of its subcontractors and suppliers were “competitors”, “the confidentiality of commercial information is a serious concern,” and releasing the information “would cause substantial injury to KRC by diminishing its competitive advantage in the U.S. passenger rail carbuilding industry.” Takeda Affid. ¶¶ 11, 26. Specifically, “any sophisticated and experienced market participant with its own understanding of the carbuilding business could come to a better understanding of KRC’s costs and profitability, with which they could more accurately predict and undercut KRC’s project bids and potentially drive it out of the market.” *Id.* ¶ 28. KRC even candidly admitted that it has “taken advantage of similar information of competitors which was made public through FOIL requests of third parties.” *Id.* ¶ 34. In light of how competitive the rolling stock market is, the injury to KRC’s competitive position is not speculative, but real and substantial. *Bello v. State Dep’t of Law*, 208 A.D.2d 832 (2d Dept. 1994) (“showing that disclosure of this material would “cause substantial injury to [its] competitive position.”); *Upturn, Inc. v. New York City Police Dep’t*, 2021 N.Y. Misc. LEXIS 14091, *14 (Sup. Ct. N.Y. Cty. April 6, 2021) (“The court must consider whether the information sought is valuable to the competing business, as well as the resulting damage to the submitting business if information is released, and if the disclosure is the only means for the competitor to gain the requested information, the inquiry ends here.”).

c. JMA's Arguments about USEP Reports and their Internal Audits Not Being Trade Secrets Are Unavailing

JMA argued that because Labor Law § 194-b(1), effective as of September 17, 2023, mandates a range of compensation be disclosed in the advertisement of a job, the actual wages and benefits paid by KRC and its subcontractors and suppliers at each specific stage of the Contract R211 are not secret at all. JMA's Memorandum of Law in Support (NYSECF Doc. No. 4) at 10. But JMA's arguments defies logic. If such information were not secrets, JMA's three FOIL requests in five years would have been pointless. The reality is that such information is not publicly available, nor are KRC and its subcontractor and suppliers required to disclose it. JMA cites no legal support, and there is none, where courts has held that Labor Law § 194-b(1) obliterates any commercial sensitivity of the personnel cost information.¹⁰

JMA cites a number of FOIL cases, but none of them involves trade secret. *Matter of Lane v. County of Nassau*, 221 A.D.3d 1008, 1010-11 (2d Dept. 2023) (the Court upheld the withholding of "NCPD employee information, including as to salary"); *Matter of Massaro v. New York State Thruway Auth.*, 111 A.D.3d 1001, 1004 (3d Dept 2013) (upholding redacted public employees' wages); *Hopkins v. Buffalo*, 107 A.D.2d 1078 (4th Dept. 1985) (rejecting personal privacy arguments related to payroll record). JMA's reliance on *Professional Standards Review Council of Am. v. New York State Dep't of Health* for its argument on trade secret is also misplaced, because the case is about public disclosure of bidding documents, not the detailed cost structure at each specific phase of the design and

¹⁰ JMA then cites 29 U.S.C. § 7 for the proposition that workers have a right to disclose terms of their employment. JMA's Memorandum of Law in Support (NYSECF Doc. No. 4) at 10. But Title 29 Chapter 1 was designed for the responsibilities for "Bureau of Labor Statistics" to collect annual employment data for certain industries, and 29 U.S.C. § 7 has been repealed.

manufacturing of subway cars in a competitive rolling stock market. 193 A.D.2d 937, 939 (3d Dept. 1993).¹¹

III. THE USEP AUDIT MATERIALS ARE INTER-AND-INTRA-AGENCY MATERIAL AND SHOULD BE EXEMPTED FROM FOIL UNDER PUBLIC OFFICERS LAW 87(2)(G)¹²

Although the term “inter-agency materials” is not defined under the FOIL statute, New York’s courts have construed this term to mean “deliberative material,” i.e., communications exchanged for discussion purposes not constituting final policy decisions. *Russo v. Nassau County Community Coll.*, 81 NY2d 690, 699 (1993). Pursuant to Public Officers Law § 87(2)(g), intra-agency communications are exempt from disclosure under FOIL if they are not one of the following four categories:

- (i) “statistical or factual tabulations or data,”
- (ii) “instructions to staff that affect the public,”
- (iii) “final agency policy or determinations” or
- (iv) “external audits, including but not limited to audits performed by the comptroller and the federal government”.

Internal audit reports are exempted under Public Officers Law § 87(2)(g) as “intra-agency material reflecting non-statistical, non-factual opinions and recommendations”. *Newsday, Inc. v. New York State Urban Dev. Corp.*, 181 A.D.2d 436 (1st Dept. 1992). Courts have further explained that it is not for the judiciary to “require disclosure of documents ...

¹¹ JMA “reserves its right to take discovery” concerning the trade secret position Respondents, KRC and its subcontractor and suppliers have presented. JMA’s Memorandum of Law in Support (NYSECF Doc. No. 4), n. 5. However, “discovery tends to prolong a case, and is therefore inconsistent with the summary nature of [an article 78] proceeding.” *Town of Pleasant Valley v. New York State Bd. Of Real Prop. Servs.*, 253 A.D.2d 8, 15 (2d Dept. 1999); *Shore v. Pappalardo*, 109 A.D.2d 842, 843 (2d Dept. 1985).

¹² While the 2023 FOIL Request item 1 seeks records, including bidding proposal, scoring documents, presentation and communication with the MTA board, JMA has abandoned such request in the Petition. Such request was also covered in the 2018 and 2019 FOIL requests, and JMA has failed to timely seek judicial review. Lastly, the scoring documents as well as communication within the MTA board concerning the bidding proposal are documents reflecting MTA’s opinions, evaluations, recommendation, and deliberations under inter-agency exemption. *Matter of Smith v. N.Y. State Office of the Attorney Gen.*, 116 A.D.3d 1209, 1210 (3d Dept. 2014). They are also “predecisional material” that is exempted from disclosure. *Kheel v. Ravitch*, 93 A.D.2d 422, 428 (1st Dept. 1983), *affid.*, 62 N.Y.2d 1, (1984).

of which would impinge on the [agency's] predecisional process.” *Matter of Bray v. Mar*, 106 A.D.2d 311, 313-14 (1st Dept. 1984).

- a. The Internal Audit Reports Done by the MTAAS Audit Team Are Their Recommendations to MTA Contract Administration Team to Improve Performance and Ensure Compliance¹³

MTAAS, an independent appraisal agency within MTA, provides mainly assurance services and advisory services. Lopez Affid. ¶ 2. Pursuant to Article 1026 of the Contract R211, the MTAAS conducts contract compliance audits of the USEP progress reports submitted by KRC and its subcontractors and suppliers. *Id.* ¶ 5. The USEP information concerning cost and pricing provided by KRC and its subcontractors and suppliers was considered so commercially sensitive that each of the MTAAS audit team who reviewed it entered into separate confidentiality agreements before the audit. *Id.* ¶ 11. Knowing that the MTAAS audit team would keep confidential the information received during the internal audit, KRC and its subcontractors and suppliers provided the MTAAS audit team a detailed walkthrough of their processes to observe and familiarize with the manual and computerized systems and procedures designed to capture, measure and monitor the reportable labor hours and costs, as well as the actual fulfillment data. *Id.* ¶ 9. The information held by the MTAAS audit team exists solely within internal documents and were only limitedly shared with certain MTA staff who are responsible for the administration of Contract R211, to help improve performance and efficiency. *Id.* ¶ 16.

¹³ *In Camera* review is similarly unwarranted for the internal audits. *Robbins v. New York City Landmarks Preserva. Commn.*, 2021 N.Y. Misc. LEXIS 2374, *13 (Sup. Ct. N.Y. Cty. May 4, 2021) (“*in-camera* review of the material that the DOB redacted [for inter-agency exemption] ... would be unnecessary.”); *Sanctuary for Families v. New York Courts Office Admin.*, 2022 N.Y. Misc. LEXIS 5725 *6-7 (“This specific explanation satisfies respondent’s burden [for establishing intra-agency exemption] and the Court finds no basis to conduct an *in-camera* inspection of these documents.”) (citation omitted).

The Court of Appeals has explained that “[t]he point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.” *New York Times Co. v. City of New York Fire Dep’t*, 4 N.Y.3d 477, 488 (2005). The internal audits of USEP by the MTAAS audit team are first secured with Confidentiality Agreements and then limitedly shared with MTA contract administration team to improve its performance and efficiency. As such, the audit records are inter-and-intra-agency material exempted from FOIL. *Matter of Stengel v. New York City School Constr. Autho.*, 2009 Misc. LEXIS 5351 (Sup. Ct. N.Y. Cty. Jul. 29, 2009).

b. Materials Supplied by KRC to the Auditors Are Also Subject to the Inter-/Intra-Agency Exemption

JMA claims that because the audits conducted by the MTAAS audit team are of KRC and its subcontractors and suppliers, they are “external audits” and therefore not inter-or-intra-agency documents. But this is not supported by the facts or the law. *Roman v. Davis*, 2023 NYLJ LEXIS 1515, *8 (Sup. Ct. N.Y. Cty. June 16, 2023) (withholding deliberative material with “external review committee” who are not strictly public officers). The MTAAS audit team conducts the USEP audit is serving “in advisory roles” to the MTA contract administration team and should “be able to express their opinions freely” in the internal audit reports. This is the very essence of inter-agency and intra-agency FOIL exemption. *Grigger v. N.Y. State Div. of Parole*, 11 A.D.3d 850, 852 (3d Dept. 2004); *Matter of Xerox Corp. v. Town of Webster*, 65 NY2d 131, 132 (1985) (opinions and recommendations prepared by agency personnel may therefore be exempt from disclosure as predecisional material).

JMA also claims that because the internal audit reports may contain data, they are not subject to Public Officers Law § 87(2)(g). This is not true. *General Motors Corp., GM*

Powertrain Div. v. Town of Massena, 180 Misc.2d 682, 684 (Sup. Ct. St. Lawrence Cty. 1999) (holding that consultant’s real estate appraisal report was exempt from disclosure as intra-agency material as it was required that professional appraiser “cull through ... records ... to find properties which he or she, subjectively, deems similar enough to the subject property to warrant further analysis.”). As such, the MTAAS’s internal audit reports would reveal what the audit team’s assessments and opinions, and what they subjectively deem to warrant further analysis.

IV. ITEMS A AND C OF THE NOTICE OF PETITION’S REQUESTS FOR RELIEF ARE MOOT, BECAUSE CONTRACT R211 HAS BEEN PRODUCED AND THERE IS NO RECORD OF NON-COMPLIANCE CONCERNING USEP

As previously stated, Contract R211 has been produced first on May 21, 2018 and again on June 27, 2023. Bowden Affirm. ¶ 6, 24, 31. In his August 10, 2023 letter, MTA FOIL Appeal Officer provided that the records requested in Item 8 of the 2023 FOIL Request concerning “non-compliance” with the USEP “do not exist, rendering this portion of your appeal moot.” JMA has not alleged any non-speculative facts that contradict this.

“It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal.” *Matter of Hearst Corp. v. Clyne*, 50 NY2d 707, 713 (1980). Where “petitioners cannot receive the relief requested in the petition, . . . the matter [is] moot.” *Matter of Police Benevolent Assn. of NY, Inc. v State of New York*, 161 AD3d 1430, 1431 (3d Dept. 2018). “Where a petitioner receives an adequate response to a FOIL request during the pendency of [its] CPLR article 78 proceeding, the proceeding should be dismissed as moot because a determination will not

affect the rights of the parties.” *Matter of DeFreitas v New York State Police Crime Lab*, 141 AD3d 1043, 1044 (3d Dept. 2016).

Based on the aforesaid, items a (Contract R211) and c (records of USEP non-compliance) in JMA’s petition should be dismissed as they are moot. *Newton v. Police Dept. of NY*, 183 A.D.2d 621, 623 (1st Dept. 1992).

V. JMA IS NOT ENTITLED TO ANY ATTORNEYS’ FEES OR COSTS

Attorneys’ fees and costs are only available to a petitioner who “substantially prevails” on its petition, and even then, only where the agency either “had no reasonable basis for denying access” or “failed to respond to a request or appeal within the statutory time.” Public Officers Law § 89(4)(c). The award of attorneys’ fees and costs is discretionary for a failure to respond. *Matter of Yang-Hao Lu v. Kings County Dist. Attorney’s Off.*, 118 A.D.3d 815, 816 (2d Dept. 2014). And, it depends on whether the Court finds that Respondents had *no reasonable basis* for denying access.

As stated above, items a (Contract R211) and c (records of USEP non-compliance) of JMA’s requests for relief are moot – which encompass 50% of the petition – leaving only items b (USEP reports) and d (audit of USEP reports) in dispute.¹⁴ Even if the Court were to ask production for one or both of the items requested, JMA should not be deemed to have substantially prevailed. *Competitive Enter. Inst. v. Att’y Gen. of N.Y.*, 161 A.D.3d 1283 (3d Dept. 2018) (“A petitioner ‘substantially prevails’ ... when it ‘received all the information that it requested and to which it was entitled in response to the underlying FOIL litigation.’”) (internal citation omitted).

¹⁴ JMA’s unfounded assertion of “blanket denial” by Respondents in this case is belied by the fact that JMA has received significant number of records over the years and has voluntarily elected not to challenge the majority of the 2023 FOIL Request in this Article 78 proceeding.

Also, a fee award would be improper because, even if the Court were to determine that Respondents' determination that the USEP reports and their internal audits should not be exempted under Public Officers Law § 87(2)(d) and (g), Respondents at least had a reasonable basis for those determinations, as provided above. *N.Y. Times Co. v. N.Y.C. Fire Dept.*, 195 Misc. 2d 119, 127-28 (Sup. Ct. N.Y. Cty. 2003), *affid. in part* 3 A.D.3d 340 (1st Dept. 2004) (denying fee where agency had at least a reasonable legal basis for withholding parts of the material); *N.Y. Times Co. v. N.Y. State Dept. of Health*, 173 Misc. 2d 310, 320 (Sup. Ct. Albany Cty. 1997) *affid.* 243 A.D.2d 157 (3d Dept. 1998) (denying fees where agency's exemption claim, although overbroad, was not "wholly lacking in merit").

Public Officers Law § 89(3) imposes no absolute deadline on agencies when responding to FOIL record requests. *Matter of Legal Aid Socy., New York City Police Dept.*, 274 A.D.2d 207, 215 (1st Dept. 2000) *lv. Dismissed in part, denied in part*, 95 N.Y.2d 956 (2000) ("Public Officers Law §89(3) mandates no time period for disclosing records under FOIL ..."). While JMA accuses Respondents of "dragged its feet" in the FOIL process, this Article 78 does not challenge a constructive denial for an untimely response. Instead, it challenges Respondents' affirmative determinations to withhold records, and any complaints JMA has about the time the FOIL response took are without legal import and do not factor into the attorney's fee award decision. *Matter of Kalish v. City of New York*, 2009 N.Y. Misc. LEXIS 4274, *6-7 (Sup. Ct. Queens Cty. Jun. 30, 2009) (denying fees even though the agency took 11 months to respond to FOIL).

CONCLUSION

For the reasons set forth above, the Petition should be denied and dismissed.

Dated: New York, New York
February 8, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 202.8-b that the foregoing Memorandum of Law was prepared on a computer using Microsoft Word.

Word Count. The total number of words exclusive of the caption, table of contents, table of authorities, and signature blocks is 6,981.

Dated: New York, New York
February 8, 2024



Hsiao-Hsiang (Catherine) Wan

General Information

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