SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NEW FLYER OF AMERICA, INC.

Plaintiff

vs

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, ET AL

Defendant

Case No.: **BC621090**

FINAL RULING ON PETITION FOR WRIT OF MANDATE

Plaintiff New Flyer of America, Inc. ("Plaintiff") seeks a writ of mandate prohibiting Defendant Los Angeles County Metropolitan Transportation Authority ("Metro") from releasing alleged confidential, proprietary and/or trade secret information related to a contract between Plaintiff and Metro for the sale of transit buses pursuant to a California Public Records Act ("CPRA") request made by intervenor Jobs to Move America Coalition ("JMA").

Plaintiff's Evidentiary Objections

Declaration of Madeline Janis in Response to Plaintiff's Reply Evidence

(1) Entire Declaration – Overruled.
(2) Sustained.
(3) Sustained.
(4) Overruled as to authentication of Exhibit A; sustained as to remainder starting with "in which ...."
(5) Sustained.
(6) Overruled as to authentication of Exhibit B; sustained as to remainder starting with "in which ...."
(7) Sustained.
(8) Sustained.

(9) Sustained.
(10) Sustained.
(11) Sustained.
(12) Sustained as to first sentence. Overruled as to remainder.
(13) Overruled.

Declaration of Madeline Janis in Support of JMA's Trial Brief

(14) Entire Declaration – Overruled.
(15) Overruled.
(16) Overruled.
(17) Overruled.
(18) Sustained.
(19) Overruled as to authentication of Exhibit 3; sustained as to remainder.
(20) Sustained.
(21) Overruled as to authentication of Exhibit 4; sustained as to remainder.
(22) Overruled.
(23) Overruled.
(24) Sustained
(25) Sustained.
(26) Overruled.
(27) Sustained.
(28) Overruled as to authentication of Exhibit 14; sustained as to remainder.
(29) Sustained.
(30) Sustained.
(31) Sustained.
(32) Sustained.
(33) Overruled as to Exhibit 15; sustained as to remainder.
(34) Sustained.
(35) Sustained.
(36) Sustained.
(37) Sustained.

Declaration of Abhilasha Bhola in Response to Plaintiff's Reply Evidence

(38) Entire Declaration – Overruled.
(39) Overruled.
(40) Overruled.
(41) Overruled.
(42) Overruled.
(43) Overruled as to first and last sentences; sustained as to second sentence.
(44) Overruled.

(45) Overruled.
(46) Overruled.
(47) Overruled.

Statement of the Case

Plaintiff's Contract with Metro

On February 1, 2013, Plaintiff and Metro entered into a Firm Fixed Price Contract (Metro Contract No. OP33202869) (the "Contract") for the purchase of up to 900 compressed natural gas transit buses by Metro from Plaintiff. (Harper Decl. ¶ 7.) In connection with bidding on the Contract, Plaintiff was required to submit a U.S. Employment Plan ("USEP"). (Ibid.) The USEP was intended to provide information regarding the number of existing Plaintiff jobs in the United States and the projected additional jobs that would be created in the United States and California if Plaintiff was ultimately awarded the Contract. After the Contract was awarded to Plaintiff, Plaintiff was then required to submit quarterly reports to Metro that provided actual jobs data and information associated with work from the Contract (the "Quarterly Reports"). (Ibid.)

Pursuant to the Contract, "all records ... and other information relating to the Work and the conduct of LACMTA's business, including information submitted by the Contractor shall become the exclusive property of LACMTA and shall be deemed public records." However, Metro agreed to inform Plaintiff of any CPRA request for documents marked "Trade Secret," Confidential," or "Proprietary" or any financial records provided by Plaintiff to Metro. The Contract states that Plaintiff may seek protection for the records pursuant to the CPRA. (Janis Decl. Exh. 6 at § G-34.A.)

JMA's CPRA Requests

Metro received two requests from JMA under the CPRA covering the Contract, the USEP, and the Quarterly Reports. Plaintiff objected to Metro's disclosure of some information contained in the USEP and Quarterly Reports, while JMA objected to the redaction of any information contained in the USEP and Quarterly Reports. Plaintiff provided JMA with redacted versions of the USEP

and Quarterly Reports. Metro gave Plaintiff a deadline of May 20, 2016 to initiate legal proceedings to prevent disclosure of the unredacted documents. (Danos Decl. ¶¶ 5-14, Exh. 2-4.)

On May 20, 2016, Plaintiff filed a complaint for declaratory and injunctive relief to prevent release of the unredacted USEP and Quarterly Reports. On July 15, 2016, counsel for Metro informed Plaintiff and JMA that Metro intended to produce the unredacted versions of the documents on July 25, 2016, unless Plaintiff obtained a court order enjoining such disclosure. On September 15, 2016, the court (Judge Mary Strobel) granted Plaintiff's motion for a preliminary injunction prohibiting release of the unredacted documents during the pendency of this litigation.[1] (Harper Decl. ¶¶ 8-9, Exh. 4-5; Danos Decl. ¶¶ 5-14, Exh. 2-4.)

Redacted Information at Issue

In Plaintiff's opening brief, Plaintiff states that it "seeks to protect its nonpublic, detailed cost and pricing information, supplier information, and individual employee information." (Opening Brief (OB) 1.) JMA does not object to the redaction of the names of Plaintiff's employees from the records. (See Compl. in Intervention ¶ 25.) In reply, Plaintiff states it has now agreed to the release of the two supplier names at issue.[2] (Reply 14.) Therefore, the only redactions at issue relate to Plaintiff's cost and pricing information.

Specifically, Plaintiff seeks to redact wage, cost, and benefit information for specific, line item jobs (e.g. "electrical technician," "manufacturing engineer," quality assurance inspector.") (See OB 5.)

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[1] An order granting or denying a preliminary injunction "is not an adjudication of the ultimate merits of the dispute." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.)

[2] Plaintiff explains that JMA produced evidence that the two supplier names were already made public in a Metro staff report. (Reply 14; see also Oppo. 18-19.)

Procedural History

On May 20, 2016, Plaintiff filed a complaint for declaratory and injunctive relief. On June 28, 2016, Metro filed an answer. On September 13, 2016, the court (Judge Rita Miller) granted JMA's motion to intervene. JMA filed its complaint in intervention on September 14, 2016.

On September 15, 2016, the court (Judge Mary Strobel) granted the preliminary injunction and ordered Plaintiff to post a $40,000 undertaking. Plaintiff posted the undertaking.

On September 22, 2016, the parties agreed that the matter would be decided by Judge Mary Strobel (Department 82), a writs and receivers department. Although the parties and the court have treated the complaint for declaratory and injunctive relief as a petition for writ of mandate, Plaintiff has not sought leave to file an amended pleading that expressly seeks relief under CCP section 1085. JMA has not challenged this aspect of Plaintiff's pleading by demurrer or similar procedure.

The court has received Plaintiff's opening trial brief, JMA's opposition, Metro's response, Plaintiff's reply, and JMA's submission of declarations in response to Plaintiff's reply evidence.[3]

Standard of Review

CPRA

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[3] On September 8, 2017, the court (Judge Amy Hogue) granted JMA leave to file these sur-reply declarations.

Pursuant to the CPRA (Gov. Code § 6250, et seq.), individual citizens have a right to access government records. In enacting the CPRA, the California Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250; see also *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63.) To facilitate the public's access to this information, the CPRA mandates, in part, that:

> [E]ach state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available . . ." (Gov. Code § 6253(b).)

The CPRA defines "public records" subject to its provisions as follows:

> (e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975. (Gov. Code § 6252(e).)

While the CPRA provides exemptions to its disclosure requirements, these exemptions must be narrowly construed and the agency bears the burden of showing that a specific exemption applies. (*Sacramento County Employees' Retirement System v. Superior Court* (2013) 195 Cal.App.4th 440, 453.) Moreover, the exemptions in section 6254 "[do] not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law." (§ 6254.) Thus, the exemptions in section 6254 "allow nondisclosure but do not prohibit disclosure." (*Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1262.)

An interested third party may bring a "reverse-CPRA lawsuit" to review an agency's decision to release confidential documents exempt from disclosure under the CPRA. (See *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1266-1271.) "Mandamus should be available to prevent a public agency from acting in an unlawful manner by releasing information the disclosure of which is prohibited by law." (Id. at 1266.)

There are two essential requirements to the issuance of an ordinary writ of mandate: (1) a clear, present and ministerial duty on the part of the respondent, and (2) a clear, present, and beneficial right on the part of the petitioner to the performance of that duty. (*California Ass'n for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704.) "An action in ordinary mandamus is proper where ... the claim is that an agency has failed to act as required by law." (Id. at 705.) "[T]he inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support." (*Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 849.)

ANALYSIS

Plaintiff contends that the redacted cost and pricing information is exempt from disclosure under the CPRA as protectable trade secrets. (OB 7-12.) Plaintiff also contends that the redacted cost and pricing information is exempt from disclosure pursuant to the catch-all exemption in Government Code section 6255. (OB 14-15.) JMA challenges these arguments on the merits. JMA also contends that the interested party in a reverse-CPRA action must show that the disclosure is "prohibited by law," and that Plaintiff cannot meet that burden because it relies solely on "permissive" CPRA exemptions.[4] The court addresses this argument first.

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[4] JMA did not make this argument about the standard of review in its opposition, filed September 2, 2016, to Plaintiff's motion for preliminary injunction.

Scope of Review in Reverse-CPRA Action

In the opening brief, Plaintiff incorrectly suggests that under Government Code section 6258 "any person may institute proceedings for injunctive relief or a writ of mandate to enforce his or her rights under the CPRA." (OB 2, citing Gov. Code § 6258.) As explained in *Marken*, section 6258 "expressly provides only for a cause of action to compel disclosure, not an action to prohibit disclosure."[5] (*Marken, supra* at 1265; see also *Filarsky v. Sup. Ct.* (2002) 28 Cal.4th 419, 431.) Plaintiff's request for declaratory relief and a permanent injunction are not supported by the CPRA or relevant case law.

However, the parties and the court have construed Plaintiff's complaint as a reverse-CPRA action under CCP section 1085. *Marken* endorsed judicial review of an agency decision under the CPRA in a traditional mandamus proceeding. The Court of Appeal stated that such mandamus review is only "available to prevent a public agency from acting in an unlawful manner by releasing information the disclosure of which is *prohibited by law*." (*Marken, supra* at 1266 [emphasis added].) In its discussion of CPRA exemptions, the Court of Appeal noted that "the exemptions from disclosure provided by section 6254 are permissive, not mandatory: They allow nondisclosure but do not prohibit disclosure." (Id. at 1262.) In a footnote, the Court of Appeal also stated: "As discussed, the exemptions from disclosure provided by section 6254 are permissive, not mandatory. However, public agencies have no discretion to disclose certain categories of documents, for example, ... under Education Code section 49076 a school district may not grant any person access to 'pupil records' without written parental consent or judicial order except under certain express, limited circumstances..... Whether an anticipated agency disclosure

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[5] Section 6258 provides in pertinent part: "Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right *to inspect or to receive a copy of any public record or class of public records under this chapter*." (emphasis added.)

of confidential information is 'otherwise prohibited by law' relates to the merits of the mandamus proceeding, not the petitioner's right to bring it." (Id. at 1266, fn. 12.)

This language from *Marken* strongly suggests that an interested party in a reverse-CPRA action cannot rely solely on permissive CPRA exemptions, such as those in section 6254. Rather, the interested party must show that the disclosure is prohibited by law, and that the agency has a clear, present, and ministerial duty to refrain from disclosure. This interpretation of the scope of review in a reverse-CPRA proceeding is consistent with the standard in reverse-FOIA actions under the federal Administrative Procedure Act. (See e.g. *Chrysler Corp. v. Brown* (1979) 441 U.S. 281, 318.)

In reply, Plaintiff argues that the *Marken* court specifically analyzed whether the information at issue was exempt from disclosure under the CPRA. (Reply 3-4.) In *Marken*, a high school teacher sought to enjoin the school district's planned disclosure of records concerning the district's investigation and finding that the teacher violated the district's sexual harassment policy. The Court of Appeal analyzed at length whether the documents were exempt from mandatory disclosure under section 6254(c), which allows an agency to withhold personnel files "disclosure of which would constitute an unwarranted invasion of privacy." (*Marken, supra* at 1271-1276.) However, the Court of Appeal also noted that the petitioner argued that the disclosure was not only exempt under section 6254(c), but also violated his state constitutional right to privacy. (Id. at 1271.) In a footnote, the Court of Appeal further noted: "[I]f the proposed disclosure of the investigation report and the letter of reprimand does not fall within the subdivision (c) exemption, it necessarily does not violate Marken's constitutional right to privacy; and its disclosure is not prohibited." (Id. at 1271, fn. 18.) In light of this discussion, Plaintiff's argument that *Marken* did not consider whether the disclosure was "otherwise prohibited by law" is unpersuasive.

Plaintiff argues that JMA waived any objection to the reverse-CPRA procedure because it filed a complaint in intervention. (Reply 4-5.) Plaintiff's argument is misplaced. JMA does not object to the reverse-CPRA procedure, but only argues that under *Marken* Plaintiff must show that the disclosure is prohibited by law. JMA did not waive the appropriate standard of review.

Plaintiff argues that while Metro has determined that the records are public records "generally subject to release under the CPRA, it has not taken a position (or exercised 'discretion') as to whether the

specific redacted information in those records is exempt from disclosure under the CPRA, leaving that determination to this Court." (Reply 3.) This argument is at odds with Plaintiff's request for writ relief under section 1085. "Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner." (*Marken, supra* at 1265.) Moreover, "a public agency may not initiate an action for declaratory relief to determine its own obligation to disclose documents to a member of the public." (Id. at 1263-1264.) Under the CPRA, Metro cannot "leave to the court" a determination of whether the CPRA exemptions apply. If Metro has not exercised its discretion, the court cannot issue a writ directing Metro to exercise its discretion in a specific manner.

Despite Plaintiff's argument, the record reflects that Metro determined that the records at issue were subject to disclosure. (See Metro Response at 1-2.) Metro gave Plaintiff a deadline of May 20, 2016 to initiate legal proceedings to prevent disclosure of the unredacted documents. After the action was filed, Metro indicated that it intended to produce the unredacted versions of the documents on July 25, 2016, unless Plaintiff obtained a court order enjoining such disclosure. (Harper Decl. ¶¶ 8-9, Exh. 4-5; Danos Decl. ¶¶ 5-14, Exh. 2-3.) It may be fairly inferred that Metro determined the information was disclosable.

Metro did argue in its September 2, 2016 opposition to Plaintiff's OSC re: preliminary injunction that it was "unable *to definitively* determine whether New Flyer's USEP data, in fact, constitutes confidential proprietary and trade secret information." (Metro Response Exh. A at 4 [emphasis added].) This statement could be construed as evidence that Metro abdicated its responsibility under the CPRA. On the other hand, the court has no evidence Metro acted in bad faith when it indicated to Plaintiff in July 2016 it would disclose the unredacted records unless enjoined by court order. Metro's statement that it could not "definitively" determine if a trade secret privilege applies does not necessarily show that it did not exercise its discretion. The court concludes that Metro did exercise its discretion by deciding to disclose the unredacted records.

Based on the foregoing, to be entitled to an ordinary writ of mandate, Plaintiff must show that the intended disclosure of the redacted information at issue is prohibited by law. As appropriate under CCP section 1085, Plaintiff also could challenge the intended disclosure as "arbitrary, capricious, or entirely lacking in evidentiary support." (*Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 849; see also Oppo. 11, citing *Marken, supra at* 1265-66 and *Chrysler Corp. v. Brown* (1979) 441 U.S. 281, 318.)

CPRA Exemptions for Trade Secret Information

Is Disclosure of Plaintiff's Alleged Trade Secrets Prohibited by Law?

It is not clear from Plaintiff's papers whether Plaintiff contends that any law *prohibits* disclosure of its alleged trade secrets in the USEP and Quarterly Reports. In the opening brief, Plaintiff states that the CPRA "does not require" disclosure of trade secret information, which is different than an affirmative prohibition. (OB 7.) Assuming Plaintiff contends that disclosure is prohibited by law, Plaintiff relies on Government Code sections 6254(k), 6276, 6276.44 and 6254.15 and Evidence Code section 1060.[6] (Ibid.)

Section 6254 states that the CPRA does nct "require" disclosure of certain categories of documents. Relevant here, "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law..." are exempt from disclosure. (Gov. Code § 6254(k).)

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[6] Plaintiff does not rely on any specific prohibition from disclosure in the Uniform Trade Secrets Act, or on section 6254.7 of the CPRA. Civil Code section 3426.7(c) states: "This title does not affect the disclosure of a record by a state or local agency under the California Public Records Act." Section 6254.7 states that, with exceptions, "trade secrets are not public records under this section." That section only applies to certain air pollution data.

Section 6276, of Article 2 "Other Exemptions from Disclosure," states that "Records or information *not required* to be disclosed pursuant to subdivision (k) of Section 6254 may include, but shall not be limited to, records or information identified in statutes listed in this article." (emphasis added.) Section 6276.44 of the CPRA provides that documents which constitute trade secrets pursuant to Evidence Code section 1060 are exempted from disclosure.

Section 6254.15 of the CPRA also states: "Nothing in this chapter shall be construed *to require* the disclosure of records that are any of the following: corporate financial records, corporate proprietary information including trade secrets...." (emphasis added.)

As discussed in *Marken*, the exemptions in section 6254 are permissive, not mandatory. Moreover, the exemption in 6254(k) is expressly based on privileges in other federal or state law. Thus, section 6254(k) itself does not prohibit disclosure. Sections 6276, 6276.44, and 6254.15 also do not include language of prohibition. Rather, these sections only state that the CPRA does not "require" disclosure of certain records.

Evidence Code section 1060 provides that: "If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice." Section 1060 creates a conditional privilege against disclosure, not an absolute prohibition. Plaintiff cites no authority, and provides no cogent argument, that section 1060 as incorporated in section 6254(k) is a mandatory prohibition on disclosure of trade secrets in public records.

Based on the foregoing, Plaintiff arguably has failed to show that in the CPRA context, disclosure of the redacted information, even if shown to be trade secrets, is prohibited by law. The writ could be denied on that basis. However, the court proceeds to analyze whether the redacted information is a trade secret, the disclosure of which would be prohibited under Section 1060.

Was Metro's Decision to Disclose the Redacted Cost and Pricing Information Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support?

Although not fully briefed by either party, CCP section 1085 would seem to allow Plaintiff to challenge the intended disclosure as "arbitrary, capricious, or entirely lacking in evidentiary support." (*Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 849; see also Oppo. 11, citing *Marken, supra at* 1265-66 and *Chrysler Corp. v. Brown* (1979) 441 U.S. 281, 318.) Since the CPRA exemptions Plaintiff relies on are permissive and not mandatory, it would seem facially that Metro had discretion to disclose the unredacted records. However, Metro apparently did not decide to disclose the unredacted records despite trade secret protection. Rather, Metro concluded that the redacted information was *not* protected by a trade secret privilege, and that disclosure was therefore required. (Response 2.) In this context, it seems appropriate to consider whether Metro's decision was arbitrary, capricious, or lacking in evidentiary support.

Under the Uniform Trade Secrets Act, "Trade secret" is "information... that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code § 3426.1(d).)

"An exact definition of a trade secret is not possible. Some 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 his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." (*Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal.App.2d 279, 289.)

"[R]easonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis,' and controlling plant access." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1454.) "Requiring employees to sign confidentiality agreements is a reasonable step to ensure secrecy." (Ibid.)

Evidence Code section 1060 does not allow the owner of a trade secret to claim the trade secret privilege if it would "work injustice." The Court of Appeal has interpreted this language to require an analysis of whether the interests of justice are served by nondisclosure. (See *Uribe v. Howie* (1971) 19 Cal.App.3d 194, 207, 210-211.)

Economic Value from not being Generally Known to the Public

Plaintiff contends that it derives economic value from maintaining the confidentiality of its labor cost information because competitors could use such information to (1) undercut Plaintiff on future bids, and (2) to compete for skilled labor. (OB 11-12; Reply 11-13.)

In a declaration, Plaintiff's Vice President for Human Resources, Janice Harper, states: "[The] USEP ... provides specific pricing and cost breakdowns and strategies in the form of line item wage and cost information by specific job type. This information reveals New Flyer's pricing and cost strategy with respect to the Contract. In particular, it reveals wage and benefit cost information for skilled labor, including in California. Such information is not publicly available and may not be derived from public sources.... Making public New Flyer's detailed wage, benefit, and cost information with respect to skilled labor would not only allow such competitors to undercut New Flyer on future bids, but it would also provide them with nonpublic information to compete for skilled labor or even poach New Flyer's current employees." (Harper Decl. ¶ 16; Id. at ¶ 18.)

Plaintiff also submits evidence, through the declaration of its Executive Vice President for Sales and Marketing, Paul Smith, and the deposition transcripts of Harper and Smith, that the transit bus

industry is highly competitive and labor costs are an important factor in winning a bid. Generally, the transit bus industry is a replacement business. That is, the prospects for new business tend to be to replace existing bus supply with new buses. As a result, business growth tends to come from increased market share compared to competitors. The price of a bus in a bid for a transit contract is often one of the most important factors in winning the bid. (See Smith Decl. ¶¶ 2-5; see Exh. 9, Smith Depo. at 16, 19, 52-54, 134-135.) Plaintiff has lost bids over a couple of hundred dollars in the price of a bus. (Smith Depo. at 52-54.)

The cost of labor to build a bus is an important component of the overall price of a bus or bid. (Smith Decl. ¶ 4.) The transit bus industry is an "engineer-to-order" business, and every order has a unique cost structure. (Smith Depo. at 21-22.) Both Harper and Smith testified at their depositions that detailed information about Plaintiff's labor costs from the USEP could allow competitors to predict Plaintiff's price and underbid Plaintiff in the future. (Smith Depo. at 47, 55, 130-134; Exh. 10, Harper Depo. at 60, 65-66; see also Reply Harper and Smith Decls.) This cost information could also potentially be used by competitors to attract skilled labor employees that Plaintiff seeks to hire. (Harper Depo. 43, 67; Harper Reply Decl. ¶ 7.)

In opposition, JMA argues that wage information cannot be confidential in California because employers cannot prohibit employees from revealing their own wages. (Oppo. 16; citing Labor Code § 232, § 1197(k)(1).) Plaintiff responds that the USEP lists wages and benefit information by job type, and does not contain any individual, specific employee's wages. (Reply 7.) However, it seems that competitors could use individual employee's wages to estimate Plaintiff's wage costs for specific line item jobs. Harper conceded at deposition that nothing prevents individual employees from publically disclosing their wage and benefit information. (See Oppo. Exh. 17 at 40-45.) While it is not clear that employees would divulge such information publically or to competitors, this possibility weakens Plaintiff's assertion of competitive harm.

JMA argues that Plaintiff has already publicly disclosed in the USEP aggregate wage and benefit figures, and that this disclosure undermines Plaintiff's claim of competitive harm.[7] (Oppo. 18.) Plaintiff argues that individual employee wage rates are subject to variation, while benefit costs are less flexible. (Reply 12-13; Harper Reply Decl. ¶¶ 5-7.) Plaintiff contends that disclosure of the fully burdened rate does not disclose the crucial line item wage information that could be used by competitors to undercut Plaintiff's bids. A reasonable inference could be made that competitors may be able to estimate Plaintiff's wage costs from the fully burdened rates if they obtain information about Plaintiff's benefits costs, including from individual employees.

Based on Plaintiff's declarations and deposition testimony discussed above, there is evidence that the redacted wage information in the USEP and Quarterly Reports could derive economic value if it was kept confidential. That evidence is undercut somewhat by the fact that disclosure of the fully burdened rates, or an employee's disclosure of his or her own wages and benefits, may allow competitors to estimate Plaintiff's line item costs. The court analyzes below whether there is substantial evidence that Plaintiff took reasonable steps to maintain the confidentiality of this information.

Reasonable Steps to Protect Information from Disclosure

Pursuant to the Contract, "all records ... and other information relating to the Work and the conduct of LACMTA's business, including information submitted by the Contractor shall become the exclusive property of LACMTA and shall be deemed public records." Metro agreed to inform Plaintiff of

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[7] As discussed below, JMA also argues that there is a strong public interest in favor of disclosure of the specific line item costs, even though "fully-burdened" rates (i.e. aggregate wages plus benefits) have been disclosed. While there is some potential contradiction between these two arguments, the public's use of the wage information would not necessarily be the same as Plaintiff's competitors.

any CPRA request for documents marked "Trade Secret," Confidential," or "Proprietary" or any financial records provided by Plaintiff to Metro. (Janis Decl. Exh. 6 at § G-34.A.) The Contract provides that all materials "which Contractor considers to be proprietary or confidential, must be specifically identified ... as proprietary and confidential, and shall be plainly and prominently marked ... as 'PROPRIETARY' or 'CONFIDENTIAL.'" (See § GC-42 of Contract.)

The redacted USEP submitted by Plaintiff included some pages marked confidential. (Harper Decl. Exh. 2-3; Janis Decl. Exh. 14.) However, not all documents with redacted information in the USEP were marked "confidential" or "proprietary," including the Labor Value Form which includes important wage redactions. (Janis Decl. Exh. 14.) It appears that none of the documents in the Quarterly Reports were marked "confidential" or "proprietary." (See Harper Decl. Exh. 2-3; Janis Decl. Exh. 16.) Plaintiff does not cite to any evidence explaining why these portions of the USEP and Quarterly Reports were not marked confidential. (See Reply 7-8.) Producing such information to Metro, without marking the materials as confidential, was inconsistent with the requirement that Plaintiff take reasonable steps to maintain the confidentiality of the redacted information.

To argue that it did take reasonable steps to maintain confidentiality, Plaintiff relies in part on the June 2016 declaration of Janice Harper. (OB 9-10.) Harper provides a generalized statement that Plaintiff discloses its trade secret information to employees on a need-to-know basis, and that employees sign a confidentiality agreement. (Harper Decl. ¶¶ 11-12.) This part of Harper's declaration is conclusory and does not compel a finding that Plaintiff has made reasonable efforts to maintain the confidentiality of the redacted information.

Plaintiff also cites to deposition testimony of Harper and Smith, copies of the employee confidentiality agreement and Plaintiff's Code of Business Conduct and Ethics, and a response to a special interrogatory. (OB 10; see Exh. 7 and 8 [confidentiality agreement and Code of Ethics]; Exh. 6 [response to special interrogatories]; and Exh. 10, Harper Depo. 36-38, 50-51, 54-56; Exh. 9, Smith Depo. at 68.) While this evidence is relevant, it does not compel a finding that Plaintiff has made

reasonable efforts to maintain the confidentiality of the redacted information. Harper conceded at deposition that nothing in the confidentiality agreement prevents individual employees from disclosing their wage and benefit information. (See Oppo. Exh. 17 at 40-45; OB Exh. 10 at 45-50.) Also, as discussed, Plaintiff disclosed some of the redacted information to Metro without marking the documents as confidential.

Based on the foregoing, there is substantial evidence that Plaintiff has not taken reasonable steps to maintain the confidentiality of the redacted information at issue. Therefore, the court cannot conclude that Metro's decision to disclose the information was arbitrary, capricious, or entirely lacking in evidentiary support.

Would Applying Trade Secret Privilege "Work Injustice"?

JMA argues that non-disclosure of the redacted wage information would "work injustice" because the public cannot verify whether Plaintiff fulfilled its promises in the USEP without the redacted information. (See Oppo. 14-16; see also Oppo. 2-8.) Because of this injustice, JMA contends that the trade secret privilege in Evidence Code section 1060 does not bar disclosure.

In her June 2016 declaration, Harper explained that the USEP was intended to provide information regarding the number of existing Plaintiff jobs in the United States and the projected additional jobs that would be created in the United States and California if Plaintiff was ultimately awarded the Contract. After the Contract was awarded to Plaintiff, Plaintiff was then required to submit quarterly reports to Metro that provided actual jobs data and information associated with work from the Contract. (Harper Decl. ¶ 7.)

JMA's executive director, Madeline Janis, declares that transit agencies in the U.S. spend approximately $5.6 billion annually for new vehicles, and that there is a concern that this taxpayer money is often spent on overseas production (and employment.) (Janis Decl. ¶ 7.) The USEPs were developed

to, among other things, provide incentives for companies to create U.S.-based jobs. (Id. ¶ 10 and Exh. 2.) In this case, the RFP for the Metro project stated, in pertinent part, that a proposer "shall provide a U.S. Employment Plan setting forth its specific commitments for creating employment opportunities in the United States in connection with the production, delivery, acceptance testing, and warranty coverage requirements for the transit buses." (Id. Exh. 6 at 3-29.)

The Contract, which was awarded to Plaintiff, called for payments of nearly $500 million for 900 transit buses. (Janis Decl. ¶ 22) JMA cites to evidence that Metro took into account the job and job-quality commitments made in the USEP when selecting Plaintiff as its contractor, and that Metro specifically considered "the work hours to be performed by new Contractor employees ... times the wages and benefits paid to those employees." (Oppo. 3-4, Exh. 7 at 10.) The staff report indicates that a price trade-off analysis related to the USEP resulted in a price difference of $35 million in favor of Plaintiff compared to the only other bidder. (Ibid.)

To argue that the unredacted information is insufficient for the public to verify the job creation benefits of the Contract, JMA argues that several aggregate figures in the Labor Value Form suggest that skilled laborer positions are being paid unrealistic compensation, such as $349,300 for the "Final Assembly" job category. (Oppo. 6.) In reply, Plaintiff submits evidence that JMA misinterpreted aggregate numbers that apply to multiple job types, resulting in realistic pay figures. (Lawrence Reply Decl. ¶¶ 3-4.) While there appears to be some ambiguity, the court agrees that the bottom part of the redacted Labor Value Form is more reasonably interpreted to state aggregate numbers for multiple employees. (Oppo. Exh. 14.)

However, the court agrees that there is substantial evidence of a public interest in disclosure of the specific line item wage information in the USEPs and Quarterly Reports. This information appears to have been important to Metro's decision to award the Contract to Plaintiff, and it could better allow the public to understand whether Plaintiff has fulfilled job creation promises made to win the Contract. As discussed above, there is substantial evidence Plaintiff did not take reasonable steps to maintain the

confidentiality of this information. While Plaintiff has made some showing of potential competitive harm from disclosure, that showing was not particularly strong. In balance, there is substantial evidence that applying the trade secret privilege in this case would "work injustice".

Based on the foregoing, Plaintiff fails to show that Metro's decision to disclose the redacted information was arbitrary, capricious, or entirely lacking in evidentiary support.

Catch-all Exemption under Section 6255

Section 6255 "allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure." (*City of San Jose v. Sup. Ct.* (1999) 74 Cal.App.4th 1008, 1017.) "The burden of proof is on the proponent of nondisclosure, who must demonstrate a 'clear overbalance' on the side of confidentiality." (Id. at 1018.)

This balancing is similar to that discussed above under Evidence Code section 1060, and arguably imposes an even higher burden (i.e. "clear overbalance") to justify non-disclosure. For the reasons stated above, Plaintiff fails to show that Metro was prohibited by law from disclosing the redacted information based on the catch-all exemption in section 6255, or that its decision to do so was arbitrary, capricious, or entirely lacking in evidentiary support.

JMA's Contention that Metro and Plaintiff Abused Reverse-CPRA Process

JMA requests a declaration that Metro is required to disclose the unredacted USEP and Quarterly Reports. Metro has already indicated that it would disclose the unredacted records unless enjoined by the court. In this context, the court is not persuaded JMA is entitled to a judicial declaration regarding disclosure.

JMA also contends that Metro abdicated its responsibility to enforce the CPRA when it refused to defend in this action its decision to disclose the redacted information. (Oppo. 19-20.) JMA requests that

the court declare Metro's approach as unlawful. In its complaint in intervention, JMA seeks in part a declaration that "Metro may not maintain any policy regarding the CPRA ... that provides for slower, less efficient, or lesser access to disclosable records than that prescribed by the minimum standards set forth in the CPRA." (Prayer ¶ 1.)

JMA points out that under the California Supreme Court's decision in *Filarsky v. Sup. Ct.* (2002) 28 Cal.4th 419, "a public agency may not initiate an action for declaratory relief to determine its own obligation to disclose documents to a member of the public." (See *Marken, supra* at 1263-1264.) Also, in *Marken*, the Court of Appeal reasoned in part that a reverse-CPRA action would not frustrate the CPRA's purposes, including by imposing litigation costs on the requester, because "the requesting party may elect to allow the agency itself to defend its decision." (Id. at 1268.)

Although Metro did not initiate this action, it has not defended its decision to disclose the redacted information and has maintained a position as a "neutral stakeholder." (See Metro's Response 1-2.) This "stakeholder" position is specifically required by the Contract. (Oppo. Exh. 9 at 57.) However, the result is that JMA has been required to defend against Plaintiff's reverse-CPRA action, and its request for records under the CPRA has been substantially delayed.

While the *Marken* court perhaps did not fully consider these potential consequences of reverse-CPRA actions, JMA has not shown by citation to authority that it is entitled to the requested judicial declaration. As discussed above, the court concludes that Metro did exercise its discretion to release the unredacted records, and that it informed Plaintiff in good faith that it was going to release the records unless enjoined by court order. *Marken* did not hold that a reverse-CPRA action can only be maintained if the agency elects to defend its CPRA decision.

In any event, JMA has not established it is entitled to a broad declaration that "Metro may not maintain any policy regarding the CPRA ... that provides for slower, less efficient, or lesser access to disclosable records than that prescribed by the minimum standards set forth in the

CPRA." JMA discusses its declaratory relief claim briefly, in two pages at the end of its "trial brief." JMA did not ask for a separate briefing schedule on its request for declaratory relief, so that Metro could appropriately oppose the request. Nor did JMA file a separate CCP section 1085 action challenging Metro's policy of responding to CPRA requests. Given the overbreadth of the requested relief, and the procedural posture in which it was raised, the court declines to issue the requested declaration.

Conclusion

Plaintiff's complaint for declaratory and injunctive relief, and request for writ of mandate, are DENIED. JMA's request for a judicial declaration that "Metro may not maintain any policy regarding the CPRA ... that provides for slower, less efficient, or lesser access to disclosable records than that prescribed by the minimum standards set forth in the CPRA" is DENIED.

Dated this 12 of October 2017.

MARY H. STROBEL,
JUDGE OF THE SUPERIOR COURT