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# Exhibits: A Bus Tour of Chicago-Style Fraud

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**Unredacted**

## EXHIBITS

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# **EXHIBIT 1**



March 28, 2012

**SENT VIA EMAIL AND CERTIFIED MAIL**

The Honorable Tony West  
Acting Associate Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Ave. NW  
Washington, D.C. 20530-0001  
Email: [tony.west@usdoj.gov](mailto:tony.west@usdoj.gov)

**RE: Request for Investigation**

Dear Mr. West:

We write on behalf of Cause of Action, a nonprofit, nonpartisan organization that uses public advocacy and legal reform strategies to ensure greater transparency in government and protect taxpayer interests and economic freedom. We write to request an investigation into the disbursement of funds to the Chicago Transit Authority ("CTA"), which has been fraudulently reporting its "deadhead" bus vehicle miles as "revenue" bus vehicle miles for several years.

Pursuant to 49 U.S.C. § 5307 ("Section 5307"), large urbanized areas, such as the Greater Chicago area that the Chicago Transit Authority services, are eligible for allocated formula funding for transportation services based on a combination of bus revenue vehicle miles, bus passenger miles, fixed guideway revenue vehicle miles, and fixed guideway route miles as well as population and population density. Each year, in order to receive funding under Section 5307, a large transit agency such as CTA must submit through the National Transit Database ("NTD") a certification of certain data, including that year's motor bus vehicle revenue miles. The official responsible for certifying accuracy and truthfulness of this data is the Chief Executive Officer of the entity. For CTA, that person is the President of the CTA.

Between the reporting years of 1982 and 2010, the Chicago Transit Authority knowingly used definitions of bus revenue vehicle miles and deadhead miles that are different from and non-compliant with the definitions required under the NTD reporting manuals, NTD reporting glossary, and U.S. Department of Transportation, Federal Transit Administration ("FTA") circular guidance and/or regulations. As a result of the CTA's use of these definitions, greater bus vehicle revenue miles were reported each reporting year to the NTD than actually occurred. For each reporting year in which CTA inflated the number of revenue miles, the federal



The Honorable Tony West

March 28, 2012

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government authorized disbursement of funds to CTA that were in excess of that permitted by law under the Section 5307 FTA formula. As a result of CTA's inaccurate reporting, and with the knowledge of CTA, the United States Government paid to CTA through its formula grant program more money than that which CTA was entitled to receive each year. [REDACTED]

[REDACTED]

As attached Exhibits 1 and 2 demonstrate, a member of an audit team that performed an audit of the Chicago Transit Authority – a copy of which is included as Exhibit 3 – informed CTA of their misreporting, and CTA did nothing. The conclusion of the audit team that CTA has used a different definition was disclosed to the public through the Office of Auditor General, State of Illinois, but no action was pursued against CTA by state or federal officials. Moreover, the contents of the technical report, Exhibit 2, were never disclosed to the public, and the representations made by CTA to audit team members regarding their rationale for using a different definition for receiving more federal funds than entitled to were never made public. CTA has continually used a definition of bus vehicle revenue mile that is different from other, similar entities. As a result, CTA has received more federal money under the Section 5307 grants than they are entitled to.

[REDACTED]

If you do not understand this request or any portion thereof, or require any additional information in pursuing an investigation, please do not hesitate to contact me at 202-507-5800

[REDACTED] We appreciate your prompt attention to this matter and thank you for your consideration.

Sincerely,

[REDACTED]

Enclosures:

- Exhibit 1: Affidavit of [REDACTED]
- Exhibit 2: Technical Report of IL-OAG team
- Exhibit 3: Audit Report of IL-OAG

# **EXHIBIT 2**

## Karen Groen Olea

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**From:** Scovel, Calvin L. <Calvin.Scovel@oig.dot.gov>  
**Sent:** Tuesday, May 24, 2011 6:12 PM  
**To:** Rogoff, Peter;  
**Cc:** Calvaresi-Barr, Ann; Dixon, Lou E.; Barry, Timothy M; Dettelbach, Brian A.; Come, Joseph W.; Sturniolo, Maria; Biehl, Scott  
**Subject:** RE: FTA Grant Program

Thank you, Peter. I'm just back from one hearing this afternoon and resetting my sights on another tomorrow.

We have been reviewing options for our response to the matters brought to our attention by Mr. [redacted] and would like to discuss further with Scott Biehl of your office. We will contact Scott by the end of the week. And I fully concur that we must deconflict our actions going forward. Greatly appreciate your attention and cooperation in this case--

Cal

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**From:** peter.rogoff@dot.gov [mailto:peter.rogoff@dot.gov]  
**Sent:** Tuesday, May 24, 2011 1:17 PM  
**To:** Scovel, Calvin L.; [redacted]@mail.house.gov  
**Cc:** Calvaresi-Barr, Ann; Dixon, Lou E.; Barry, Timothy M; Dettelbach, Brian A.; Come, Joseph W.; Sturniolo, Maria; Biehl, Scott  
**Subject:** RE: FTA Grant Program

Cal: I asked my Deputy Chief Counsel to look into this matter further. He is still gathering information. It's noteworthy that the State Auditor chose not to follow up on this finding. At the same time, I understand that there is some data that compares CTA's deadhead hours to those of like-sized agencies...data that raises some questions about CTA's interpretation of our reporting requirements. Let me encourage your staff to be in touch with my Deputy Chief Counsel, Scott Biehl (copied) on this matter as I have other folks in the agency that will be necessarily recused. We should take care not to trip over each other if we both decide to dig further into this matter. Many thanks to you and Mr. [redacted] for calling this to our attention. -P

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**From:** Scovel, Calvin L. [mailto:Calvin.Scovel@oig.dot.gov]  
**Sent:** Wednesday, May 04, 2011 4:59 AM  
**To:** [redacted]  
**Cc:** Rogoff, Peter (FTA); Calvaresi-Barr, Ann <OIG>; Dixon, Lou E <OIG>; Barry, Timothy M <OIG>; Dettelbach, Brian A <OIG>; Come, Joseph W <OIG>; Sturniolo, Maria <OIG>  
**Subject:** RE: FTA Grant Program

Thank you, Mr. [redacted] --we will include these matters in our review and communicate further with you.

Cal Scovel  
DOT IG

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**From:** [redacted] [mailto:[redacted]@mail.house.gov]  
**Sent:** Tuesday, May 03, 2011 7:27 PM  
**To:** Scovel, Calvin L.

**Cc:** Rogoff, Peter; Calvaresi-Barr, Ann; Dixon, Lou E.; Barry, Timothy M; Dettelbach, Brian A.; Come, Joseph W.; Sturniolo, Maria

**Subject:** FW: FTA Grant Program

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**From:** [REDACTED]

**Sent:** Tuesday, May 03, 2011 6:15 PM

**To:**

**Subject:** FW: FTA Grant Program

[REDACTED]: OK, let me start over.

I am going to send you the materials broken into two parts, one for each of the two issues with the 49 USC5307 "formula" grant program.

As we have discussed, I am giving you the materials, and a methodology for presenting this to DOT OIG, with the understanding that we will make a reasonable attempt to keep my name out of this, at least formally, at this point. If there is a desire to have a hearing on this at some point, let's talk about that then.

The first attachment is a Word™ document that I prepared while part of the team doing of performance audit of the Chicago Transit Authority for the State of Illinois Office of the Auditor General. This 25-page document, written the style of the School of Physically Painful Prose, was intended to be a technical document discussing the matters that derived from our finding that the Chicago Transit Authority was significantly overstating its reported bus vehicle revenue hours, which had two implications for our work at the time:

1. We were doing a performance audit, which included a lot of performance metrics and, if you are doing that, you have to make sure that the data you are using has a reasonable degree of assurance – and this didn't. therefore, we had to use other performance indicators.
2. While the above meant that we had to change our contractual work, the bigger deal was, by overstating bus vehicle revenue miles by improperly classifying deadhead miles as revenue miles, CTA was, in essence, submitting a false claim to the Federal government in the amount of over a million dollars a year, likely several million, and that this had evidently been going on for more than two decades.

The attached document reads like a Ph.D. desertion from a candidate who has just learned that the attractive older woman he has been seeing for the past several month is the wife of his thesis advisor. CTA refused to concede anything, they raised every point to "prove" they were right that anyone could conceive of, and just took a "that's-our-story-and-we're-sticking-to-it" attitude. This left me no options other than do a very detailed case paper, including laying down the "law," what they did, showing how they violated the law, and then rebutting everyone of their arguments.

This is, unfortunately, the type of situation which shows why District Attorneys hate to bring white collar crimes – everything is technical, the defense explains to the jury how difficult it was to even know all these requirements existed, no one ever told them they were doing anything wrong – and we do not concede that we actually did anything wrong. Well, they did – and the fact that FTA never called them on this just demonstrates that two parties are at fault here.

So, we're clear, the Federal government didn't lose any money over this; what CTA did was to claim a higher share of the "pot" of money than they were entitled to, the people who were harmed were the transit riders from the other large transit agencies in the nation who didn't get to take bus trips, or had to pay a higher fare, or were otherwise disadvantaged because CTA got money that should have gone to other transit agencies.

The attached was my last attempt to make something more of this than a reference in an audit report. We were subcontractors to the Illinois AG, the report went out over his name, not ours, so he got to make the decision – and he decided to not do what I believe was required, to forward this to the proper authorities, namely FTA and DOT OIG.

[ . . . ]

<http://www.auditor.illinois.gov/Audit-Reports/Performance-Special-Multi/Performance-Audits/07-Mass-Transit-NE-IL-Perf-Main-Report.pdf>

(This is the audit report that generated this issue.)

Go to page 72, which is “pdf” page 126, first paragraph:

“Our review raised questions about the accuracy of CTA’s reporting of revenue vehicle hours and miles. CTA may be incorrectly reporting some deadhead hours/miles as revenue hours/miles (i.e., miles and hours a vehicle travels when out of revenue service). This clearly is suggested by differences in reported hourly values for CTA and the peer group (Exhibit 3-19). The average vehicle revenue hours as a percent of vehicle hours is 87 percent for the peer group and 99 percent for CTA.”

This audit report did get spread around fairly well for this type of thing; in fact, it won the award from the National Association of State Auditors for the best large performance audit (large) of the year for 2008.


[ . . . ]

# **EXHIBIT 3**



**AFFIDAVIT OF THOMAS A. RUBIN**

I, Thomas A. Rubin, a resident of Oakland, California, hereby declare under oath as follows:

1. I am 64 years of age, and I am competent to make this declaration. I have  personal knowledge of the matters set forth in this affidavit and could and would testify to the contents of this affidavit if I was called as a witness.
2. I am a Certified Public Accountant licensed in the State of California and hold several professional certifications in accounting, auditing, consulting, and governmental finance. I have over thirty-five (35) years of experience with governmental surface-transportation issues. I founded and directed the North American transit industry practice of what was then Deloitte Haskins & Sells (DH&S) a company that is now incorporated in Deloitte & Touche, LLP, an international audit, financial advisory, tax, and consulting firm. In this position, I prepared the audit work program for audits of transit agencies, directed training for transit agency auditors on a national basis, and I was the primary or reviewing partner for the audits of dozens of D&T transit operators' clients, including their reports to the U.S. Department of Transportation (DOT). I served as the Chair of the American Institute of Certified Public Accountants task force that worked with the U.S. DOT to establish audit procedures, specifically including audit procedures for those data reported by transit operators to U.S. DOT that was used to calculate Federal grants to transit agencies, and served as a technical resource for other CPA firms that had questions regarding such audits. I served as Auditor-Controller (chief financial officer) of the Southern California Rapid

## AFFIDAVIT OF THOMAS A. RUBIN

Transit District in Los Angeles, then the third largest transit operator in the United States, which is now incorporated into the Los Angeles County Metropolitan Transportation Authority.

3. In 2006 and 2007, I was a subcontractor who was part of a team that conducted a performance audit of the Chicago Transit Authority (CTA) for the State of Illinois Office of the Auditor General (IL-OAG). The final Performance Audit of Mass Transit Agencies of Northeastern Illinois: RTA, CTA, METRA, and PACE (2007 Performance Audit) was released in March 2007 by Illinois Auditor General William G. Holland.
4. During the course of the audit, our team uncovered that the CTA was falsely overstating its reported bus vehicle revenue miles in its annual applications for grant funding under the formula grant program administered by the Federal Transit Administration (FTA) pursuant to 49 U.S.C. § 5307.
5. I personally prepared a twenty-five (25) page document regarding CTA's reporting of its bus vehicle revenue miles ("technical report") and presented it to the Auditor General's staff during the conduct of the performance audit.
6. Attached hereto is a true and correct copy of the technical report I prepared, with additional refinements added subsequent to the audit.
7. To the best of my knowledge, all of the data in my technical report is accurate and my conclusions are correct.
8. I reported the information from my report to the Department of Transportation Office of Inspector General, and presented DOT-OIG with a copy of the report, in 2009.



# AFFIDAVIT OF THOMAS A. RUBIN

I do hereby declare under penalty of perjury that the foregoing Affidavit is true and correct and I have not embellished any of the foregoing statements.

3/22/12

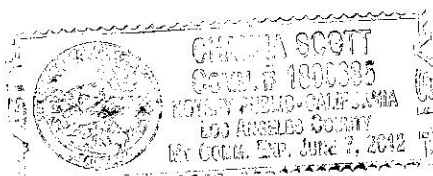
Date

Thomas A. Rubin

Thomas A. Rubin, Affiant

**Los Angeles, California**

BEFORE ME, the undersigned notary, CHANNA SCOTT on this 22 day of MARCH 2012, personally appeared Thomas A. Rubin, known to me to be a credible person of lawful age who was duly sworn by me, and on his oath declared to be true, the above matters set forth in this Affidavit. My commission expires on 06/07/12.



# **EXHIBIT 4**

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## **CHICAGO TRANSIT AUTHORITY OVERREPORTING OF MOTOR BUS VEHICLE REVENUE MILES**

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### **SUMMARY**

The Chicago Transit Authority (CTA) appears to have been improperly classifying as Vehicle Revenue Miles (VRM) and Vehicle Revenue Hours (VRH) motor bus miles and hours that, under the Federal Transit Administration's (FTA) National Transit Database (NTDB) regulations, are not properly so classed.

CTA officials have stated that it includes as VRM and VRH travel between operating garages and the beginning and ends of scheduled service on fixed route bus lines, and between routes for buses servicing more than bus line, service not classified as VRM and VRH by NTDB regulations. These non-revenue service hours and miles to, from, and between revenue service assignments are commonly called "deadhead" in the transportation industry. For the sake of simplicity, we will utilize this term to refer to the miles and hours that are in question, even though, as will be discussed below, there is a technical issue regarding the inclusion of such miles and hours as deadhead in CTA's reports to the FTA.

This over-reporting of VRM and VRH has two significant impacts:

1. Under 49 USC 5307 and 5336 and their implementing regulations, VRM is utilized to allocate "formula" funding to urbanized areas, such as the Greater Chicago area, which then flows to individual transit agency grantees, such as CTA. Each VRM reported through the NTDB system in the 2004 reporting year and accepted by FTA generated approximately 38¢ in grant funding in Federal fiscal year 2006 (FY06). It is not possible to determine the precise fiscal impact of this overstatement of VRM without substantial detail analysis which is not within our scope of work, but it is likely that impact is between well over one million to more than five million dollars in excess grant funding allocation to this region in FY06, with generally similar or slightly smaller amounts each preceding year since the introduction of VRM as a formula grant "driver" following the passage of the Federal Surface Transportation Assistance Act of 1982.
2. Because CTA reports very different VRM and VRM as a percentage of Vehicle Total Miles (VTM) and Hours (VTH) than its peers, many of the most common and useful performance indicators cannot be properly utilized to evaluate CTA service.

As a result of these findings:

1. We recommend that CTA notify FTA of this condition, including rendering this report to FTA. CTA should revise its methodologies for reporting VRM and VRH to become compliant with the applicable statute and implementing regulations. It should, in future NTDB reports to FTA, report VRM and VRH in a compliant manner and, for past years, recalculate VRM as may be directed by FTA and have the required opinions rendered by independent public accountants.

2. Because CTA’s VRM- and VRH-based performance metrics are not comparable to those of its peer agencies, we have substituted performance measures utilizing VTM and VTH for purposes of this performance audit. We find the vehicle total mile/hour metrics to be based on comparable, and usable, data for CTA and its peers.

## CRITERIA

### Audit Standards

The applicable Audit Standards for this performance audit engagement are:

1. *Government Auditing Standards – 2003 Revision* (aka “Yellow Book”) (GAO-03-673G), June 2003, Comptroller General of the United States, United States General Accountability Office, June 2003<sup>1</sup>, particularly Chapters 3, “General Standards, 7, “Field Work Standards for Performance Audits,” and 8, “Reporting Standards for Performance Audits.”
2. *Performance Audit Manual*, March 2004, Office of the Auditor General, State of Illinois promulgated by the Office of the Auditor General at 74 Ill. Adm. Code 420.310.

These publications are virtually identical in regard to the particular issue at question and, because the results impact Federal grant funding, we will cite to the GAO standard.

The principle standards that apply to this particular include:

Yellow Book §7.28, “Identifying Audit Criteria,” states:

“Criteria are the standards, measures, expectations of what should exist, best practices, and benchmarks against which performance is compared or evaluated. Criteria, one of the elements of a finding, provide a context for understanding the results of the audit. ... The following are some examples of possible criteria:

- a. purpose or goals prescribed by law or regulation or set by officials of the audited entity, ...
- c. technically developed standards or norms,
- d. expert opinions, ...
- f. performance of similar entities,”

In compliance with this standard, the expert members of performance audit team, who have well over 100 years of directly applicable transit agency operating, consulting, and auditing experience between them, have developed a set of performance metrics, described below.

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<sup>1</sup> On February 1, 2007, the Comptroller-General issued the 2007 Revision to the “Yellow Book” (GAO-07-162G); the field work related to this study was completed prior to its publication under the standards promulgated in the 2003 Revision.



Yellow Book §7.31, “Identifying Sources of Audit Evidence,” states:

“In identifying potential sources of data that could be used as audit evidence, auditors should consider the validity and reliability of the data, including data collected by the audited entity, data generated by the auditors, or data provided by third parties, as well as the sufficiency and relevance of the evidence.”

Yellow Book §7.52, “Tests of Evidence,” states:

“Evidence should be sufficient, competent, and relevant to support a sound basis for audit findings, conclusions, and recommendations. ...

b. Evidence is competent if it is valid, reliable, and consistent with fact. In assessing the competence of evidence, auditors should consider such factors as whether the evidence is accurate, authoritative, timely, and authentic. When appropriate, auditors may use statistical methods to derive competent evidence.”

§§7.31 and 7.52 require us to test the competence, specifically including the accuracy, of the CTA data we utilized to calculate the performance metrics discussed below.

Yellow Book §8.24, “Direct Reporting of Fraud, Illegal Acts, Violations of Provisions of Contracts or Grant Agreements, and Abuse,” states:

“Officials of the audited entity are responsible for taking timely and appropriate steps to remedy fraud, illegal acts, violations of provisions of contracts or grant agreements, or abuse that auditors report to them. When fraud, illegal acts, violations of provisions of contracts or grant agreements, or abuse involves assistance received directly or indirectly from a government agency, auditors may have a duty to report such fraud, illegal acts, violations of provisions of contracts or grant agreements, or abuse directly to that governmental agency if officials of the audited entity fail to take remedial steps. If auditors conclude that such failure is likely to cause them to report such findings or resign from the audit, they should communicate that conclusion to the governing body of the audited entity. Then, if the audited entity does not report the fraud, illegal act, violation of provisions of contracts or grant agreements, or abuse as soon as possible to the entity that provided the governmental assistance, the auditors should report the fraud, illegal act, violation of provisions of contracts or grant agreements, or abuse directly to that entity.”

As will be discussed below, we have concluded that the overstatement of VRM may be a “violation of provisions of contracts or grant agreements” and we have concluded that this is a reportable finding. We make no representation that it is, or is not, any of the other conditions listed in the above; for our purposes, this is not a matter of concern, as the reporting requirements are identical no matter which of the others conditions may, or may not, not be involved.

We are reporting this finding to CTA management, which has a duty to report it directly to its governing body, the CTA Board of Directors, and we are also reporting it directly to the CTA Board of Directors<sup>2</sup>. If this finding is not reported to the entity that provided the governmental assistance, the FTA, then the performance auditor (the Auditor-General) has a responsibility to do so.

### Performance Metrics

The transit expert performance audit team members made a determination to first identify well over 100 potential transit operations and other applicable performance metrics for use as candidate criteria in the conduct of this performance audit. We then calculated the values for CTA (and the other transit operators) and the members of the selected transit mode (motor bus, heavy rail, demand-responsive for CTA) peer groups. Based on our evaluation of results and other work, we selected certain of these candidates for inclusion in this report. Several of these motor bus mode candidate measures, including some of the most widely utilized in transit industry, utilize VRM and/or VRH as components, including:

1. Cost per Vehicle Revenue Hour – A measure of cost-efficiency of transit service provided
2. Boardings per Vehicle Revenue Hour – A measure of productivity of transit service provided
3. Boardings per Vehicle Revenue Mile – A measure of productivity of transit service provided
4. Operating Speed (Vehicle Revenue Miles/Vehicle Revenue Hours) – A classification metric, utilized to assist in differentiation of types of bus service and establishment of peer groups and in interpreting the information produced by other metrics (Technically, Vehicle Revenue Miles/Vehicle Revenue Hours produces a value that is slightly lower than the actual vehicle operating speed. In NTDB reporting, Vehicle Revenue Hours includes “Layover/Recovery Time” between the end of service on a vehicle/train one-way trip in scheduled service and the beginning of the return trip.<sup>3</sup> As a result, the actual vehicle operating speed is generally a few percent points higher than the value obtained by the VRM/VRH calculation. The variation between different members of a peer group due to this factor is usually minor.)
5. Average Passenger Load (Passenger Miles/Vehicle Revenue Miles) – A measure of productivity of transit service provided
6. Deadhead Ratio – Miles ([Vehicle Total Miles – Vehicle Revenue Miles]/Vehicle Total Miles) – A productivity metric, used, among other things, to help assess efficiency of location of operating facilities and assignment of bus lines to specific operating garages and to assist in identifying reasons for cost differences between members of peer groups.

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<sup>2</sup> This matter was discussed, in detail, with CTA financial, operational, and legal management; however, this report was not rendered.

<sup>3</sup> FTA, *National Transit Database 2004 Reporting Manual*, page 354

All of the above metrics have long histories in transit performance auditing. For example, two of the five statutory transit performance audit metrics for triennial performance audits of California transit operators are “operating cost per vehicle service hour” (which is identical to metric 1. above) and “passengers per vehicle service mile” (which is identical to metric 3. above)<sup>4</sup>. Professor Gordon J. Fielding, in his seminal *Managing Public Transit Strategically – A Comprehensive Approach to Strengthening Service and Monitoring Performance*<sup>5</sup>, uses speed (metric 4. above) as one of three metrics that classify motor bus transit operators into peer groups and then identifies revenue vehicle hours/operating expense (the inverse of metric 1.) and boardings per revenue vehicle hour (metric 2. above) as two of his seven “marker” variables that he identified, out of a total of 48 variables that he screened for utility in performance analysis, as the most useful.

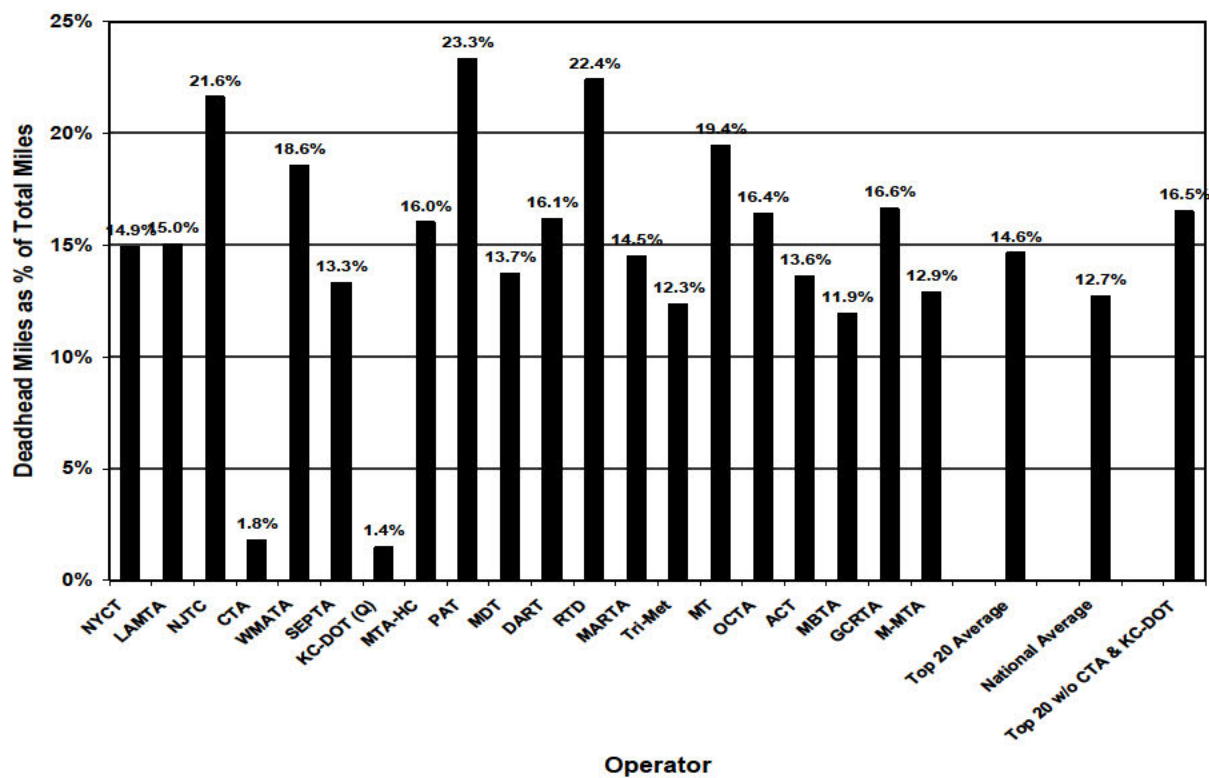
From prior peer group performance analysis of larger motor bus transit operators, the performance audit team had previous knowledge of CTA’s very high ratio of VRM to VTM and VRH to VTH. An analysis of the 2004 data reported for the 20 largest motor bus directly operated service transit operators (measured by VTM) showed that CTA had a “miles” deadhead ratio of 1.8%.

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<sup>4</sup> California Public Utilities Code §99246(d).

<sup>5</sup> Jossey-Bass Inc., 1987. See also Gordon J. Fielding, Timilynn L. Babitsky, and Mary E. Brenner, *Performance Evaluation for Fixed Route Transit: The Key to Quick, Efficient and Inexpensive Analysis*, Institute of Transportation Studies and School of Social Sciences, University of California, Irvine, December 1983, which is the basis for much of Professor Fielding’s later book.

**Exhibit 1<sup>6</sup> -- National Transit Database 2004  
“Top 20” Bus Operators – Deadhead Percentages**



With the exception of an agency that reported data questioned by FTA (King County Department of Transportation, which serves the county where Seattle is located, reported 1.4% “miles” deadhead for 2004. KC-DOT had previously reported miles deadhead of 18.3%, 18.2%,

<sup>6</sup> The agencies are, arranged from largest to smallest by vehicle total miles, from left to right on the graph:

NYCT	MTA-New York City Transit	New York, NY
LAMTA	Los Angeles County Metropolitan Transportation Authority	Los Angeles, CA
NJTC	New Jersey Transit Corporation	Newark, NJ
CTA	Chicago Transit Authority	Chicago, IL
WMATA	Washington Metropolitan Area Transportation Authority	Washington, DC
SEPTA	Southeastern Pennsylvania Transportation Authority	Philadelphia, PA
KC-DOT	King County Department of Transportation	Seattle, WA
MTA-HC	Metropolitan Transit Authority of Harris County	Houston, TX
PAT	Port Authority of Allegheny County/Port Authority Transit	Pittsburgh, PA
MDT	Miami-Dade Transit	Miami, FL
DART	Dallas Area Rapid Transit	Dallas, TX
RTD	Regional Transit District	Denver, CO
MARTA	Metropolitan Atlanta Rapid Transit District	Atlanta, GA
Tri-Met	Tri-County Metropolitan Transportation District of Oregon	Portland, OR
MT	Metro Transit	Minneapolis/Saint Paul, MN
OCTA	Orange County Transportation Authority	Orange, CA
ACT	Alameda-Contra Costa Transit District	Oakland, CA
MBTA	Massachusetts Bay Transportation Authority	Boston, MA
GCRTA	Greater Cleveland Regional Transit Authority	Cleveland, OH
M-MTA	Maryland Transit Administration	Baltimore, MD

and 17.8% for the 2001, 2002, and 2003 NTDB reporting years, respectively, and had reported an “hours” deadhead of 20.5% for 2004. The KC-DOT 2004 RVM and other data are marked with a “Q” in the NTDB reports, indicating that they were “questioned” by FTA staff and contractors, for reasons that are obvious. For these reasons, we regard this KC-DOT data as unreliable and unusable for our current purposes.), the range reported by the other operators was from a low of 11.9% (Massachusetts Bay Transportation Authority [MBTA], which serves the greater Boston area) to a high of 23.3% (Port Authority of Allegany County/Port Authority Transit [PAT], which serves the greater Pittsburgh area), with a weighted average of 14.6%. If the data for CTA and the “top 20” reporter that we took exception to are excluded, the weighted average of the other 18 peers is 16.5% – over nine times the 1.8% reported by CTA. The simple average of the values reported by the other 18 peers is 16.3%. CTA’s value of 1.8% was under one-sixth the 11.9% lowest value reported by the other 18 peers.

This wide variance from the norm established by the peers caused the performance audit team to perform additional field work to determine the reason(s) for the variance.

In addition, an analysis of CTA’s values on other metrics produced rankings that were questioned by the expert members of the performance audit team. CTA’s Cost per Vehicle Revenue Hour was \$98.74, eighth lowest within the peer group and well under the peer group (all 20 members) weighted average of \$109.54, and just over the national average for all motor bus directly operated service agencies of \$96.66. Based on the team’s prior knowledge of CTA’s operating characteristics and those of the rest of the transit industry, a higher value was expected.

CTA’s Boardings per Vehicle Revenue Hour were 43.3, below the peer group (all 20 members) average of 45.2; a value higher than the average was expected. Average Passenger Load was 11.8, below the peer group average of 12.4; again, a value higher than the average was expected.

These results, taken in total, tended to confirm the questions on comparability of data raised by CTA’s low deadhead ratio. They also served to indicate to the experts that it was not advisable to utilize performance metrics based on VRM and VRH in the evaluation of CTA’s motor bus service because the resulting comparisons appeared to produce not entirely logical results.

The team then tested several substitute metrics that utilized TVM and TVH rather than RVM and RVH. CTA’s peer group rankings on these metrics appeared to be far more consistent with other factors known to the performance audit team and we decided to use total, rather than revenue, miles and hours statistics for most CTA motor bus service peer group analysis purposes. (In order to be consistent, total, vice revenue, miles and hours were used for the performance metrics for the CTA’s and the other operators’ fixed route service as well.)

### **Statutory/Regulatory/Contractual Provisions**

Section 15 of what was formerly known as the Urban Mass Transportation Act of 1964, As Amended [since recodified as 49 USC 5301 *et seq.*; “Section 15” is now found at 49 USC 5335(a)], established the statutory underpinning for what was originally the Urban Mass

Transportation Administration's (UMTA, now FTA) Financial Accounting and Reporting Elements (FARE) project, which became the national standard for annual reporting of financial and operating data to the U.S. Department of Transportation in a consistent manner. (49 USC 5335(a)(2) states, "The Secretary (of Transportation) may make a grant under section 5307 of this title only if the applicant, and any person that will receive benefits directly from the grant, are subject to the reporting and uniform systems," which has served as a most significant incentive to transit operators to submit NTDB reports.) There has been a long series of evolutionary changes to what is now known as the National Transit Database since the first reports were rendered for the 1979 reporting year, but many of the most significant concepts and requirements – including VRM, VRH, TVM, and TVH – can be traced back to the original implementing regulations from the 1970's with little change in detail and virtually none in concept.

In the Surface Transportation Assistance Act of 1982 (STAA) (P.L. 97-424), Congress made major changes to the transit "formula" funding program. The formula grant program, originally known as "Section 5," later "Section 9," and now as 49 USC 5307 grants, are allocated to urbanized areas (UZA) under a complex methodology with several elements (49 USC 5336 – this section uses the term, "Revenue Vehicle-Miles," which is utilized and understood to be identical to "Vehicle Revenue Miles" in NTDB), including several that are reported to FTA through the NTDB, including RVM. Because the concepts of RVM and TVM were already well established in the then-UMTA regulations, it must be accepted that Congress, in specifying RVM as the formula funding "driver," understood the difference between RVM and TVM and enacted into law exactly what it intended, and that there is an important distinction between RVM and TVM in terms of how Congress intended that formula funds are to be allocated.

(There is an additional Federal transit grant program that is formula-driven by VRM, the 49 USC 5309 Fixed Guideway Modernization program. CTA did report bus-on-fixed guideway VRM to NTDB in 1984-93 and 1995-2000. No analysis was performed of the potential impact on §5309 formula allocations through overstatement of VRM because: (1) CTA has not reported motor bus fixed guideway VRM since 2000, (2) the number of total motor bus fixed guideway VRM was relatively low compared to the CTA totals, approximately 1.45 million per year for the years between 1984 and 1996 and approximately .6 million per year for 1997-2000, or approximately 1-2% of CTA total VRM, (3) the potential for over-reported motor bus fixed guideway VRM would likely be small because most, if not all, deadhead involving motor bus fixed guideway service would be to and from the guideway, not on it.)

As the responsible Federal agency for NTDB and for the allocation of 49 USC 5307 formula funds, FTA has promulgated its regulations. These regulations are found in two locations, the first being 49 CFR 630, with the more detailed regulations being promulgated annually in the form of the *National Transit Database Reporting Manual* (Reporting Manual). This latter document has been reissued for each year's reporting cycle for the past several years, with generally fairly minor changes and updates from year to year. We will utilize the 2004



version<sup>7</sup>, as 2004 was the year with the most recent available NTDB data available from FTA. There have been no major changes in the regulations pertaining to definitions of VRM, VRH, TVM, and TVH since the beginning of the program.

The specific Reporting Manual elements that are important to this issue include:

1. Definition of “Bus” transit (formerly known as “Motor Bus,” mode code “MB;” FTA still utilizes the MB mode code for NTDB purposes) (page 81): “A transit mode comprised of rubber-tired passenger vehicles operating on fixed routes and schedules over roadways. Vehicles are powered by:
  - Diesel
  - Gasoline
  - Battery, or
  - Alternative fuel engines contained within the vehicle.”

In the above, for our purposes, the key phrase is, “operating on *fixed routes and schedules* (emphasis added). With two minor exceptions that do not apply to the CTA situation, bus miles and hours not on fixed routes *and* operated in accordance with a published schedule is *not* Bus service under the NTDB definition. Besides Bus, FTA recognizes fifteen other modes of transit service: Aerial Tramway, Automated Guideway, Cable Car, Commuter Rail, Demand Responsive, Ferryboat, Heavy Rail, Inclined Plane, Jitney, Light Rail, Monorail, Publico, Trolleybus, Vanpool, and, for certain purposes, Alaska Railroad<sup>8</sup> – the miles at issue that CTA is classifying as Bus VRM service does not meet the characteristics of any of the above non-Bus modes.

(The two exceptions that do not apply are “Point Deviation” and “Route Deviation.” “Point Deviation” service is, “A method of providing transit service to all origins and destinations within a corridor, defined by a prescribed distance from a street (e.g.,  $\frac{3}{4}$  mile), making scheduled stops at mandatory time points along the corridor on a predetermined schedule. This type of service does not follow a fixed route because the path is determined based on the origins and destinations of the passengers. Passengers can use the service in three ways:

1. By traveling between mandatory time points on the schedule
2. By advising the bus operator if they want to be taken to a destination this is not a schedule time point when boarding, or
3. If they want to be picked up at a location that is not a scheduled time point, by calling the transit system and requesting a pickup.<sup>9</sup>”

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<sup>7</sup> Available on the NTDB web site at:

<http://www.ntdprogram.com/NTD/ReprtMan.nsf/Web/ReportingManual2004?OpenDocument>, specifically the “Transit Agency Service Module” for most of our current purposes.

<sup>8</sup> (*Reporting Manual*, pages 55-57, with detailed definitions in the glossary at pages 81-89)

<sup>9</sup> *Reporting Manual*, page 86; see also page 57 for an illustration and diagram.

“Route Deviation” service is, “A type of transit service that operates as conventional fixed route bus service along a fixed alignment or path with scheduled time points at each terminal point and key intermediate locations. Route deviation service is different from conventional fixed route bus service in that the bus may deviate from the route alignment to serve destinations within a prescribed distance (e.g.,  $\frac{3}{4}$  mile) of the route. Following an off route deviations, the bus must return to the point on the route it left. Passengers may use the service in two ways:

1. If they want to be taken off route as part of service deviation, they must tell the bus operator when boarding, or
2. If they want to be picked up an off route location, they must call the transit system and request a pickup, and the dispatcher notifies the bus operator.<sup>10</sup>

The service involved with the miles at issue that CTA is classifying as VRM does not satisfy the qualification characteristics of either of the above.)

2. Definition of “Revenue Service (Miles, Hours, and Trips)” (page 350): “The time when a vehicle is available to the general public and there is an expectation of carrying passengers. These passengers either:
  - Directly pay fares
  - Are subsidized by public policy, or
  - Provide payment through some contractual arrangement.
 Vehicles operated in fare free service are considered in revenue service. Revenue service includes:
  - Layover/recovery time
 Revenue service excludes:
  - Deadhead
  - Vehicle maintenance testing
  - School bus service, and
  - Charter service.”
3. Definition of “Total Service” (page 352): “The time from when a transit vehicle starts (pull-out time) from a garage to go into revenue service to the time when it returns to the garage (pull-in time) after completing its revenue service. Since total service covers the time between:
  - Pull-Out, and
  - Pull-in
 It therefore includes both:
  - Deadhead, and
  - Revenue Service.”
4. Definition of “Deadhead (Miles and Hours)” (page 346): “The miles and hours that a vehicle travels when out of revenue service. Deadhead includes:

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<sup>10</sup> *Reporting Manual*, page 87; see also page 57.

- Leaving or return to the garage or yard facility
- Changing routes
- When there is no expectation of carrying revenue passengers

However, deadhead does not include:

- Charter service
- School bus service
- Operator training
- Maintenance training<sup>11</sup>.

FTA Circular C 9030.1 C, October 1, 1998, “Urbanized Area Formula Program: Grant Application Instructions, Chapter V: Requirements Associated with Urbanized Area Formula Grants, point 2., states:

“NATIONAL TRANSIT DATABASE REPORTING SYSTEM. Section 5335(a) of Title 49, U.S.C. prohibits the Secretary of Transportation from making any grants under the Urbanized Area Formula Program unless the grant applicant and any person (entity, organization) to receive benefits directly from that grant are each subject to the National Transit Database Reporting System and Uniform System of Accounts. All recipients and direct beneficiaries under the Urbanized Area Formula Program must maintain and report financial and operating information on an annual basis, as prescribed in FTA regulations (49 C.F.R. Part 630) and the current National Transit Database Reporting Manual. Failure to do so will result in loss of eligibility for assistance under the Urbanized Area Formula Program. Annual workshops on reporting requirements are offered by FTA.”

The above is the regulatory provision that requires transit operators to render NTDB reports in compliance with the applicable FTA’s regulations.

The “original” version of this Circular, Urban Mass Transit Administration – the “old” name for FTA prior to the statutory name change (UMTA) C 9030.1, June 27, 1983, has relevance to this finding, even though it is been superseded, as discussed below.

## **CTA’S METHODOLOGY AND PERFORMANCE AUDITOR RESPONSE**

In interviews with CTA management personnel, primarily Lynn Sapyta, Vice President/ Comptroller, we were informed that CTA does not report miles and hours “leaving or return to the garage or yard facility” as deadhead because, by CTA Board policy, CTA buses are in transit service and bus operators are instructed to pull over and pick up any potential rider that flags them down.

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<sup>11</sup> *Reporting Manual* discusses Revenue Service and Deadhead miles and hours, including illustrations of proper classification, at pp. 285-286.

Following our interviews, we were provided with the following e-mail, from Gary DeLorme, NTD Manager, FTA to Ms. Sapyta on this subject. Because the contents of this communications parallel what we have been informed by CTA management and the arguments presented by it, and because the FTA is the responsible Federal agency for such matters, we have elected to include this e-mail and respond to the points made therein. Our response follows the text of the e-mail.

For the same of ease of identification of whose words are being presented, *Mr. DoLorme's e-mail will be presented in Arial italic font*, while the words of the performance audit team will be presented in Times New Roman “normal.”

**From:** Gary.Delorme@dot.gov

**To:** lsapyta@transitchicago.com

**Cc:** sweiler@transitchicago.com ; Gary.Delorme@dot.gov ; Bernie.Pitchke@ntdprogram.com

**Sent:** Wednesday, May 31, 2006 9:17 AM

**Subject:** RE: NTD Revenue miles issue cited by State auditor General

Lynn, Sharon,

Just a quick note.

As we have discussed, it is true that for motor bus, CTA has the around the lowest percent of deadhead miles per total miles of the large urban transit systems. Most transit agencies have at least 5% deadhead to total miles. Usually, deadhead lower than 5% triggers an NTD error check. It is my understanding that since the 1970s, CTA has been consistently around 2%. See the attached CTA NTD MB historical file. (Not included. The schedule showed a deadhead range between 1.4% and 2.0% between 1984 and 2004.)

As you know the NTD tries to question and validate data, but we are not on-site auditors. The NTD relies on the transit agency's auditors and Triennial reviews to find areas of noncompliance. Not all systems are alike. One size does not fit all. So we ask the agencies to explain why their data is outside certain thresholds values. While we have questioned CTA's deadhead over the years, we do not do a route by route analysis of transit authority practices.

In reviewing the NTD submissions for CTA, with Emmet and others in the 1980s, the 2% deadhead figure was always explained as a unique characteristic of CTA's service. CTA's explanation to FTA was based on the following

After questioning CTA's deadhead in the 1980s, the 2% figure has been accepted each year, first, because it was audited an independent auditing firm and certified by the CEO.

Secondly, NTD staff know that CTA MB service, unlike most transit authorities, has around 8 bus garages spread evenly around the city, so deadhead is naturally low. The city requires bus stops every 1/8<sup>th</sup> of mile.

Third, PACE, not CTA, provides most of the long trips in the Chicago UZA. In other cities, transit agencies usually provide both long express and city trips. Long trip usually have longer deadhead miles.

And finally, and most important, CTA has a unique pull out policy, where buses are in service on their way to their normal routes right after leaving the bus garage. I was told the signs on the buses say In Service and they pick up passengers while deadheading. Per the NTD manual, if the bus or van is in service on the way to their normal service routes, they do not accrue deadhead hours.

This is the explanation we have always been given. If this is not correct, please let me know. This explanation has always appeared reasonable to my predecessors and other NTD analysts over a couple of decades, and CTA's NTD submissions have been accepted.

I hope this helps.

If the auditors find some irregularities in any of the data submitted to the NTD over the years, please keep me informed.

Thanks,

Gary DeLorme, NTD Manager, FTA (phone number omitted)

First, note that this response shows that FTA has not performed a detailed analysis of this issue, but has been and is relying on the work of others, and is asking for any findings of irregularities to be reported to it.

Second, we are not aware of exactly what question was posed to Mr. DeLorme or what information was provided to him, but it could not have included any of the narrative materials in this section, as they had not been provided to CTA at that time.

Mr. DeLorme states that “CTA has the around (sic) the lowest percent of deadhead miles per total miles of the large urban transit systems.” From our analysis of 2003 NTDB data, CTA has by far the lowest deadhead of the 26 Bus transit operators that reported more than 20,000,000 Total Vehicle Miles. CTA’s deadhead was 1.6%; the second lowest was VIA Metropolitan Transit (San Antonio), at 7.2%, four-and-one-half times CTA’s ratio. Third lowest was the Massachusetts Bay Transportation Authority (Boston), at 11.8%, over seven times CTA’s ratio. This is not a difference of degree; it is literally a difference of order of magnitude. (We are excluding the 1.4% deadhead reported for the most recent year by King County DOT, as it was questioned by FTA for reasons discussed above.)

He also notes that CTA “has around 8 bus garages spread evenly around the city, so deadhead is naturally low.” While it is not illogical to expect that, all else equal, operators with more garages per mile of service area are likely to have lower deadhead, there are a very large number of other factors that can impact deadhead. To cite just one, the statement above, that there are “around 8 bus garages spread evenly around the city,” is a bit of an overstatement *vis-à-vis* the “evenly,” and all eight are in the City of Chicago proper, which has an area of 228.5 square miles<sup>12</sup>, which is approximately 64% of the 356 square miles of service area that CTA reported to NTDB. To service routes that begin and end outside of the City of Chicago, CTA buses have to travel from their garages in the City to the route ends in suburban Cook County.

We performed a statistical analysis to test the effects of the number of garages per service area coverage on deadhead. We constructed a spreadsheet for all Bus directly operated service agencies for the 2003 NTDB reporting year. This schedule included the number of bus operating facilities, transit operator service area, Vehicle Revenue Miles, and Vehicle Revenue Miles. After eliminating records with missing data, there were 307 operators. (It must be noted that there are obvious indications that some of the data is of low quality for certain operators in the 307 population, most particularly for transit operator service area. Service area is not one of the NTDB data elements that are subjected to detailed review and the service areas reported for some operators appear very large for the type of service operated. Also, service area is reported for all services provided by an operator and there are situations where the operator provides service in non-core urban areas through non-bus modes, which would tend to overstate service area for our instant purpose. However, the number of highly questionable data points is

<sup>12</sup> City of Chicago web site, “City Layout,”

[http://www.ci.chi.il.us/city/webportal/portalContentItemAction.do?BV\\_SessionID=@@@1389257496.1151606910@@@&BV\\_EngineID=cccfaiddiedmemlfcefecelldfhdfgm.0&contentOID=536907746&contentType=CO C\\_EDITORIAL&topChannelName=HomePage](http://www.ci.chi.il.us/city/webportal/portalContentItemAction.do?BV_SessionID=@@@1389257496.1151606910@@@&BV_EngineID=cccfaiddiedmemlfcefecelldfhdfgm.0&contentOID=536907746&contentType=CO C_EDITORIAL&topChannelName=HomePage)



relatively small compared to the total size of the population and are focused far more on the smaller operators. We determined that accepting the population with a degree of possibly compromised data was preferable to our arbitrarily determining which data to accept and reject and that the data for the population was usable for our purposes.) We then calculated square miles per operating facility and deadhead percentage for these operators and did a number of simple regressions, with square miles per operating facility as the independent variable and deadhead percentage as the dependent variable. The results are summarized in the following schedule:

**Exhibit 2**  
**Square Miles per Operating Facility vs. Deadhead Percentage**  
**Results of Regression Analyses**

Independent Variable: Square Miles per Operating Facility

Dependent Variable: Deadhead Percentage

Selection Criterion	Number of Observations	r-squared (Correlation Coefficient)	Predictor Values (as Percentages)	
			Constant	X Coefficient
All	307	0.0850471	6.95%	0.0032281%
>1 Operating Facility	64	0.0333468	12.87%	-0.0018058%
>2 Operating Facilities	33	0.0374126	14.94%	-0.0050557%
>3 Operating Facilities	21	0.0307416	15.51%	-0.0052778%
>4 Operating Facilities	14	0.0248975	15.84%	-0.0060456%
>10,000,000 Actual Vehicle Miles	40	0.0037838	15.04%	-0.0009424%
>20,000,000 Actual Vehicle Miles	24	0.0295290	16.00%	-0.0031528%

In summary, none of these trials produced anything remotely close to a statistically significant relationship.

The correlation coefficient ( $r^2$ ) measures the degree to which the independent and dependent variables are related; a value of “1” means that the independent and dependent move in total concert with each other and that variations in the independent variable (square miles per

operating facility in this case) explain 100% of the variations in the dependent variable (deadhead percentage) and a value of zero means that there is no relationship what-so-ever. Generally speaking,  $r^2$  values between zero and .3 – which would mean that variations in the independent variable explain 30% of the variations in the dependent variable – are considered too low to indicate statistically significant relationships.

The highest  $r^2$  value obtained, .085 (which would indicate that variations in service area square miles per operating facility explained 8.5% of the variation in deadhead percentage), was for the all-inclusive, 307 operator case. This  $r^2$  value far too low to be regarded as indicating any statistical significance.

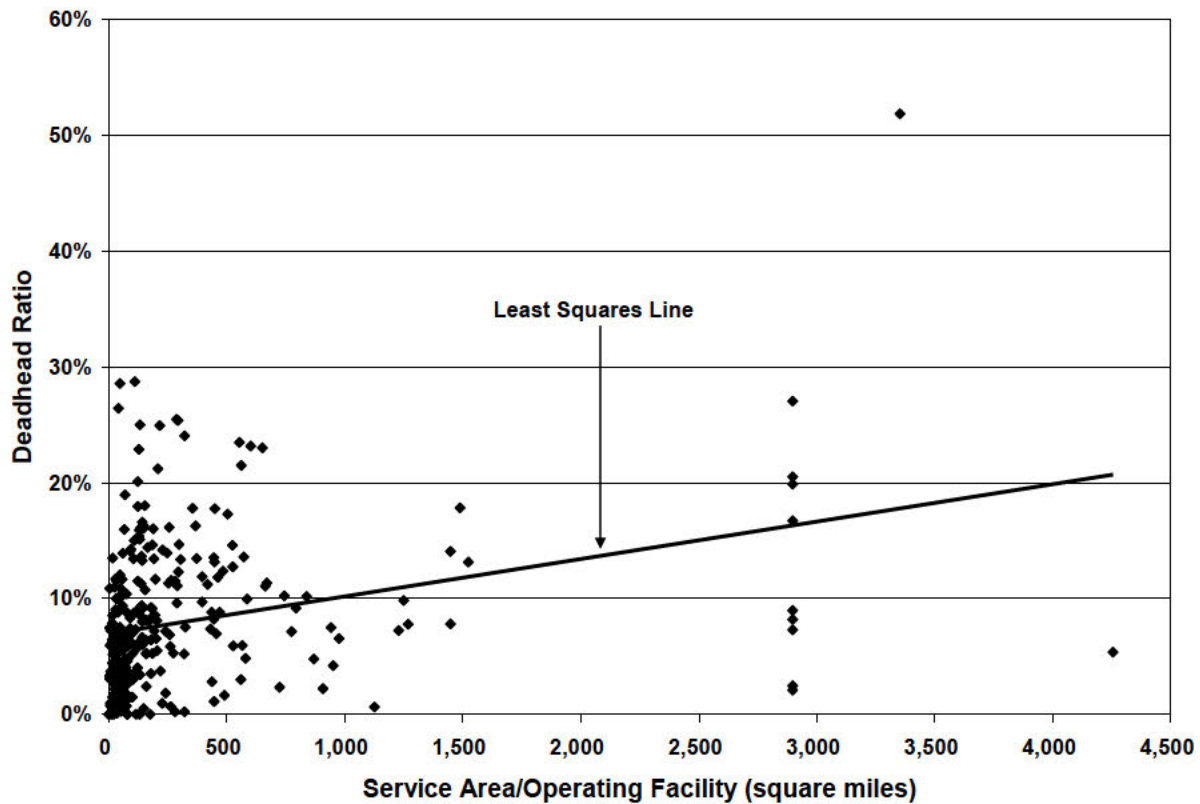
Interestingly, for every other regression, the X-coefficient had a negative value. The latter means that, as the square miles per operating facility increases, the deadhead percentage decreases – which is the reverse of the hypothesis being tested and simply not logical. The scatter graph of the data points and the relationship predicted by the first,  $n = 307$  regression, are shown below<sup>13</sup> and the following graph shows the results for the larger motor bus operators only:

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<sup>13</sup> In this graph, note the significant number of entities with “deadhead ratios” lower than those that we are questioning for CTA, including some with 0.0% deadhead. We do not accept an argument that the existence of other transit agencies reporting deadhead ratios this low, which were accepted by FTA, makes what CTA reported “reasonable;” rather, we believe that an alternative hypothesis, that there are significant numbers of other transit agencies that are underreporting deadhead and that they reports are accepted by FTA, should be considered.

In the 49 USC 5307 formula allocation process, only those transit operators in UZA’s with populations of 200,000 or greater receive formula funding based on vehicle revenue miles; therefore, this data has no Federal funding import. Most of the agencies reporting extremely low “deadhead ratios,” including the eight that reported zero deadhead miles, were from UZA’s with populations under 200,000.

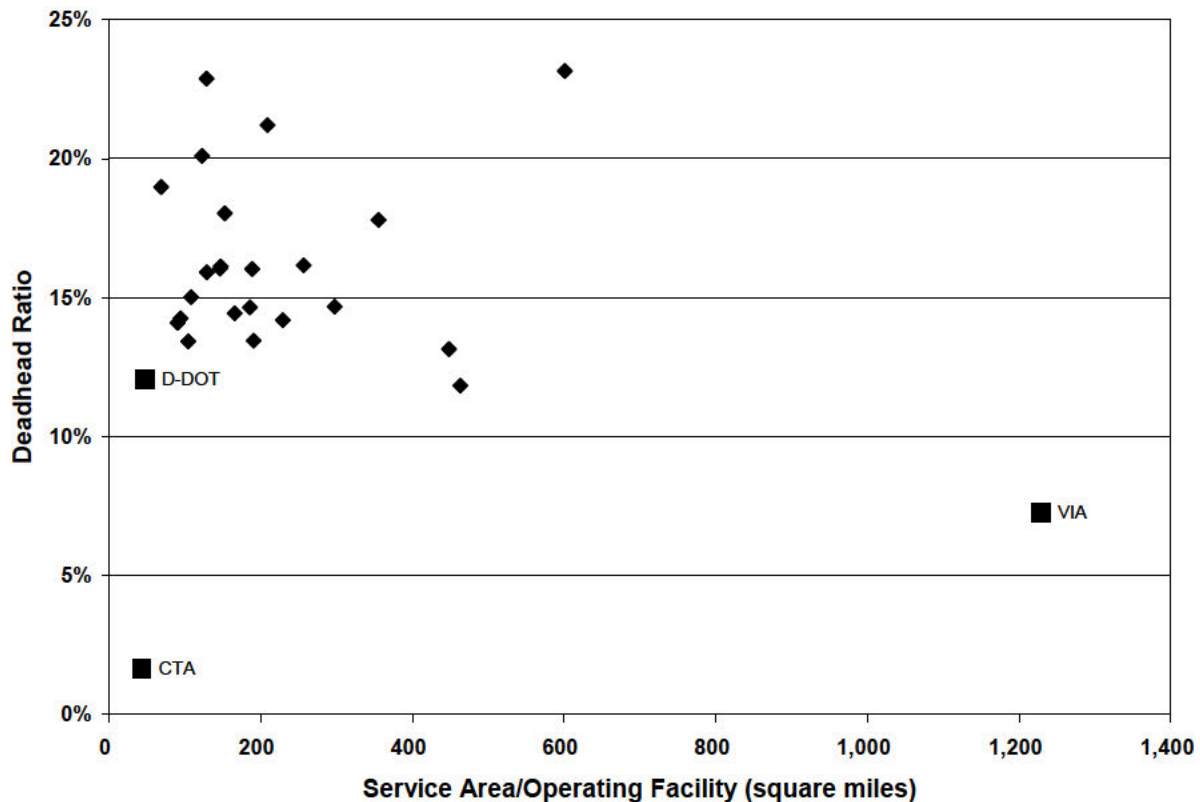
**Exhibit 3**  
**Deadhead Ratio vs. Service Area per Operating Facility**  
**All Bus Operators with NTDB Data 2003 (population = 307)**



Both the quantitative results of this regression and an “eyeball” analysis of the scatter graph show that there is no strong relationship between square miles per operating facility and deadhead; the variation in deadhead appears to be due to another factor, or more likely, several other factors.

We attempted several other regressions with subsets of the 307 data points to see if a significant relationship could be found; none produced workable relationships, with none of them explaining even 4% of the variation in deadhead percentage. There is simply nothing here of value to work with.

**Exhibit 4**  
**Deadhead Ratio vs. Service Area per Operating Facility**  
**Bus Operators > 20,000,000 Vehicle Revenue Miles 2003 (population = 26)**



Mr. DeLorme also comments, “*The city requires bus stops every 1/8<sup>th</sup> of mile.*” The distance between stops on a bus route has no bearing on deadhead.

He also states, “*Third, PACE, not CTA, provides most of the long trips in the Chicago UZA. In other cities, transit agencies usually provide both long express and city trips. Long trip usually have longer deadhead miles.*”

It is certainly true that the dual bus operator arrangement in the Greater Chicago area has resulted in Pace having the greater portion of the long express trips, a different characteristic from many areas where a single dominant bus operator provides the vast majority of the services. Unfortunately, without huge detail research, it is not possible to quantitatively test the accuracy of the hypothesis that “long trips usually have longer deadhead miles.”

It is, however, possible to produce and consider antidotal evidence. Under our logic rules (We produced our number of operating facilities by subtracting the number of “heavy maintenance facilities” from “total maintenance facilities” in the NTDB data. Heavy maintenance facilities are not generally utilized as bus operating facilities. Under the NTDB instructions, maintenance facilities that provide both heavy maintenance and other services are

not reported as heavy maintenance facilities.<sup>14</sup>), in the 2003 reporting year, CTA has eight operating facilities, so with 356 square miles in its service area, it has 45 square miles per operating facility. Its average bus trip length was 2.58 miles for 2003<sup>15</sup>. CTA reported a 1.6% deadhead for 2003.

Now let us consider the San Francisco Municipal Railway (MUNI), which provides all but a tiny portion of its service in the 49 square miles of the City and County of San Francisco, with other bus, and other mode, transit operators providing service into the City from the North, East, and South (with the Pacific Ocean to the West). With three Bus operating facilities, MUNI has 16 square miles per operating facility. MUNI's Bus average trip length was 2.15 miles for 2003. However, despite a square miles per operating facility that was approximately a third of CTA's, and an average bus trip length 17% shorter than CTA's, Muni reported a 13.5% deadhead ratio – over eight times what CTA reported.

MTA-New York City Transit has a very short Bus average trip length, 1.78 miles. Its service area square miles per operating facility is 186, and its deadhead percentage is 14.6%.

The Detroit Department of Transportation, with 48 square miles per operating facility and a separate bus operator that services the Detroit suburbs, and an average trip length of 4.92, reported a 12.0% deadhead ratio.

These specific examples, in combination with the statistical analysis, show a rather tenuous relationship between average trip length and deadhead ratio – there is a logical link between these factors, but all the factors discussed so far appear to account for only a small segment of the observed variation in deadhead percentage.

While there are many aspects of CTA's operations that tend to logically support a hypothesis that its deadhead ratio is likely to be at the lower end of the range of its peers, CTA's reported results appear to be far beyond the reasonable range that can be explained by such factors. As was discussed previously, for the 2004 reporting year, CTA's deadhead ratio was 1.8%, while its peers among the 20 largest bus operators (exempting KC-DOT, which reported values questioned by FTA) were in a range from 11.9% to 23.3%.

Obviously, there is something else of major import that is going on to account for CTA's extremely low deadhead ratio – which brings us to the following from Mr. DeLorme's e-mail:

*“And finally, and most important, CTA has a unique pull out policy, where buses are in service on their way to their normal routes right after leaving the bus garage. I was told the signs on the buses say In Service and they pick up passengers while deadheading. Per the NTD manual, if the bus or van is in service on the way to their normal service routes, they do not accrue deadhead hours.”*

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<sup>14</sup> Reporting Manual, page 229.

<sup>15</sup> Calculations of average trip lengths by operator in this section from NTBD 2003 “Profile” data.

There are two separate issues there, the first in regard to the definition of revenue service, the second in regard to the definition of deadhead. (We also note that Mr. DeLorme's statement above actually states, "... (buses) pick up passengers **while deadheading**" [emphasis added].)

The applicable standard for revenue service is the NTDB definition of Bus: "A transit mode comprised of rubber-tired passenger vehicles operating on fixed routes and schedules over roadways." If the bus is not operating on fixed routes under an established schedule, it is *not* in Bus service and the applicable miles are *not* reportable as Vehicle Revenue Miles.

To test CTA's compliance with the "fixed route" and "schedules" tests, we obtained from the CTA web site a selection of route schedules with maps for CTA service on Michigan Avenue, one of the most heavily utilized bus transit streets in the U.S., specifically CTA bus routes 2, 3, X3, X4, 6, 7, 14, 26, X28, 126, 127, 143, 144, 145, 146, 147, 148, 151, and 157. We examined the published schedules for each of these bus lines for scheduled service between the beginnings and ends of the routes and the operating facilities and found none. We searched CTA's web site "schedule" page for other routes with service between the eight CTA operating facilities and the beginnings and ends of the Michigan Avenue routes and found nothing. We examined each of the route maps printed in the schedules to determine if the travel to and from operating facilities were shown and found nothing. We examined the CTA January 2006 "Bus and Rail Map" for indications of routes going from the ends of these lines to and from operating facilities and found none.

We have found no indication what-so-ever that leads us to believe that CTA establishes schedules for the travel of buses between operating facilities and the beginnings and ends of bus lines, nor between bus lines where the same buses are used to provided services on multiple lines, nor that CTA has established fixed bus routes on the streets utilized for travel between operating facilities and the beginning and ends of bus routes.

Because there are neither fixed routes nor schedules for bus travel between operating facilities and the beginnings and ends of bus routes, such bus travel is *not* reportable as Revenue Vehicle Miles or Hours.

Turning now to the "deadhead" issue, CTA's argument appears to be based on its reading of the NTDB definition of deadhead:

"The miles and hours that a vehicle travels when out of revenue service.

Deadhead includes:

- Leaving or return to the garage or yard facility
- Changing routes
- When there is no expectation of carrying revenue passengers"

CTA argues that, because it has established a policy of picking up passengers when buses are traveling between operating facilities and the beginnings and ends of bus routes, there *is* "an expectation of carrying revenue passengers," and, because this factor in the definition of deadhead is not satisfied, the bus travel in question is, therefore, *not* properly classified as deadhead and, therefore, such bus travel must be counted as vehicle revenue miles.

It can be argued that, while there may be some expectation of carrying revenue passengers in bus travel of this type, when we consider that such travel will often be during hours, such as prior to the beginning of the morning rush hour, when transit travel is minimal; that, to a very large degree, such bus travel will not be on published bus routes; that much of such travel will be on streets without bus stops where potential riders could not reasonably have expectations of buses arriving; that it would be difficult for such potential bus riders to determine where the bus that they are thinking of flagging down is going with a header sign stating only, “In Service;” and that the bus operators will likely not be expecting to stop to pick up passengers, particularly where there are no bus stops; than that these expectations of carrying revenue passengers must be rather low. In considering all of these, it is also valid to ponder if treating this type of bus vehicle travel as Vehicle Revenue Miles is consistent with what Congress intended when it determined that future transit formula grant funds were to be allocated on the basis of Vehicle Revenue Miles and not Vehicle Total Miles or any other vehicle mile statistic.

However, for our current purpose, let us assume *any* expectation of carrying revenue passengers that is above absolute zero, no matter little above absolute zero, does mean that this attribute of the deadhead definition is *not* met. Even if this is valid, and even if we go further and, for purposes of argument, grant that such bus travel is not properly classified as deadhead, this is *not* relevant to the point at issue. The key question is *not*, “is such bus travel deadhead?;” it is, “is such bus travel revenue service properly classified as Vehicle Revenue Miles?” Even if such bus travel does not meet the requirements to be classified as deadhead as promulgated above, that does *not* mean that it is properly classified as Vehicle Revenue Miles. Failure to meet the requirement to be classified as deadhead miles *does not* mean that such service is automatically classified as VRM.

Therefore, even if we grant that CTA’s argument that such bus travel is not deadhead is correct, its argument that such service is, therefore, VRM does *not* prevail.

However, we do not grant CTA’s argument that such bus travel is not deadhead. Returning to the NTDB definition of deadhead, we still have the primary imperative in the definition to consider, that deadhead is “The miles and hours that a vehicle travels when out of revenue service.” Since this component of the NTDB deadhead definition is primary, and the “when there is no expectation of carrying passengers” is detail, we find that the “out of revenue service” condition prevails and that such bus travel is properly classified as deadhead.

It is certainly correct that CTA has structured a particular combination of conditions that challenges the NTDB definition *of deadhead*; however, both the spirit and its letter of this definition prevail to determine that CTA’s argument that such bus travel is VRM fails<sup>16</sup>.

While CTA’s Board of Directors has the power to order that its buses operating other than on fixed routes and in scheduled service will carry passengers, under our Federal system of governance, even if the CTA Board were to take action to formally classify such bus travel as

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<sup>16</sup> FTA may wish to consider if the published definitions *et al* in the NTD regulations should be revised to address this issue.

“revenue service,” no local legislative body can override the laws enacted by the U.S. Congress and the regulations implementing such laws.

Mr. DeLorme also states, *“After questioning CTA’s deadhead in the 1980s, the 2% figure has been accepted each year, first, because it was audited an independent auditing firm and certified by the CEO.”*

This gets to the heart of the problem, because, in essence, it implies that, once the CTA 2% deadhead was accepted as being in compliance with the regulations as they existed at the time, it was, to a large degree, accepted, as long as the two certifications were provided. However, this position is based on the assumption that the 2% deadhead was properly accepted when it was first reported.

The applicable FTA regulations have changed over the years. The original FTA (then UMTA) regulation on revenue vehicle miles was UMTA Circular C 9030.1, June 27, 1983, which has the following on page 13 of Appendix C:

“... to categorize transit vehicle travel as revenue service, a viable market for this travel must be demonstrated. For example, vehicle travel between a bus garage and what previously was the beginning of a route should not be reported as vehicle revenue miles simply because the route was redefined as beginning at the garage. Other necessary criteria are: this increased route mileage, with added stops, must be incorporated formally into published schedules; and there must be more than incidental use of this additional service by revenue passengers.”

As discussed in detail above, at the present time, CTA does *not* include the distance between bus garages and the beginning of bus routes in its route maps and schedules, nor did we find any other evidence that bus travel on such streets were included in descriptions of bus routes. We did not research if it had in the past, but we have no reason to believe that it did. If the distance from bus garage to route beginning was not formally included in the route descriptions, then this factor alone would have disqualified this bus travel from being included as vehicle revenue miles and hours. Even if it had, the absence of inclusion on route maps and schedules and of any indication that there was anything more than incidental travel on buses transiting from bus garages to route commencement (and back) would have disqualified this bus travel from classification as vehicle revenue mile and revenue hour service.

C 9030.1 is no longer in force, having been superseded three times, with the current version, C 9030.1 C, adopted October 1, 1998.<sup>17</sup> However, the key point is *not* that this is the current requirement – it clearly isn’t – but that it *was* the then-current standard when this process began, it should have been applied at the time – but evidently wasn’t – and that the argument that the current 2% deadhead should be accepted because it was accepted in the past was based on failure to apply the proper standards at that time.

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<sup>17</sup> FTA, “Circulars/Guidance,” available at:  
[http://www.fta.dot.gov/publications/publications\\_circulars\\_guidance.html](http://www.fta.dot.gov/publications/publications_circulars_guidance.html).



There is a final interesting aspect to CTA's process of treating Bus deadhead miles and hour as Revenue Vehicle Miles and Hours – since the only components of TVM and TVH are Revenue Service and deadhead, if all CTA Bus deadhead service is classified as RVM and RVH, then what is left to be generate the 1.8% 2004 deadhead statistic, and the other very low statistics for other years?

On March 26, 2007, FTA published a proposed rule, "National Transit Database: Amendment to Reporting Requirements and Non-Substantive Technical Changes"<sup>18</sup>. The proposed rule documents the potential for a significantly stronger response to non-compliance NTDB submissions, specifically in § 630.8 (page 14064), which states:

"FTA may enter a zero or adjust any questionable data item(s) in a reporting agency's section 5335 report used in computing the section 5307 or 5311 apportionment. These adjustments may be made if any data appear inaccurate or have not been collected in accordance with FTA's definitions and/or confidence and precision levels, or if there is a lack of adequate documentation or a reliable recordkeeping system."

#### **ESTIMATED RANGE OF FINANCIAL IMPACT OF OVERSTATEMENT OF VEHICLE REVENUE MILES**

While we conclude that CTA is overstating Bus VRM by a significant amount, without far more detail work, it is not possible to precisely quantify the financial impact.

As an alternative, we have done a projection of a reasonable range of estimate of impact.

Using the "Top 20" transit operators for the 2004 NTDB reporting year, and excluding CTA and KC-DOT (which had its VRM and VTM data "questioned" by FTA), the range of deadhead ratios is 11.9% for MBTA to 23.3% for PAT, compared to CTA's 1.8%. We will calculate the financial impact on the Federal FY06 49 USC 5307 formula grants to the Greater Chicago from CTA's VRM report to NTDB by comparing what would have been the change if its deadhead ratio were the minimum and maximums of the range for the "Top 20" peers and VTM was not changed.

(The methodology for the 49 USC 5307 allocations for the VRM portion of the funds is that each area basically gets "its" percentage of the national total back. The "value" of a VRM is calculated by dividing the funding "pot" dollar amount by the total VRM's reported. Therefore, if the national total number of VRM's were to change because CTA were to reduce the number it reported, the denominator of the dollar value calculation would change and the actual value of a VRM would be different than what was utilized in the actual allocation. However, since the total number of Bus VRM for the 2004 reporting year was in excess of 1.5 billion, and it is unlikely that the over-reported CTA VRM would be 1% of that total; the change in value of a VRM would be relatively minor and will be ignored for purposes of our calculations.)

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<sup>18</sup> *Federal Register*, Volume 72, Number 57, pp. 14061-6.

**Exhibit 5**  
**Chicago Transit Authority**  
**Overstatement of Vehicle Revenue Miles**  
**Range of Financial Impact**  
**2004 Reporting/2006 Funding Years**

Total Vehicle Miles, National Transit Database, 2004	<u>67,783,000</u>
Lowest Accepted Deadhead Percentage of "Top 20" Bus Operators	11.9%
Less: CTA Deadhead Percentage	<u>-1.8%</u>
Low Range of Potential Overstatement – Percentage	<u>10.1%</u>
Low Range of Potential Overstatement -- Revenue Vehicle Miles	6,865,324
Value of a Revenue Vehicle Mile, FY06	<u>\$0.37911397</u>
Low Range of Potential Overstatement – Dollars	<u>2,602,740</u>
Highest Accepted Deadhead Percentage of "Top 20" Bus Operators	23.3%
Less: CTA Deadhead Percentage	<u>-1.8%</u>
High Range of Potential Overstatement – Percentage	<u>21.5%</u>
High Range of Potential Overstatement -- Revenue Vehicle Miles	14,581,265
Value of Revenue Vehicle Mile to FY06 49 USC 5307 Formula Grant	<u>0.37911397</u>
High Range of Potential Overstatement -- Dollars	<u><u>\$5,527,961</u></u>

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**Notes**

CTA Total Vehicle Miles and deadhead percentages from "Analysis of Feasibility of Deadhead Statistics."

The "Top 20" bus operator with the lowest deadhead percentage, after exclusion of CTA Itself and King County Department of Transportation, which had its reported mileage "questioned" by the Federal Transit Administration, was the Massachusetts Bay Transportation Authority (Boston), at 11.9%. The "Top 20" bus operator with the highest deadhead percentage was the Port Authority of Allegheny County (Pittsburgh), at 23.3%.

The data reported to the National Transit Database by the transit operators for the 2004 reporting year was utilized to make allocations of "formula" grants under 49 USC 4307 for Federal fiscal year 2006. The Value of a Revenue Vehicle Mile is the value for purposes of determining the allocation to each urbanized area, taken from "FTA Fiscal Year 2006 Appropriations and Allocations Change and Corrections; Announcement of States Selected for Participation in Section 2310 Pilot Program," 02-03-06, Number 71 FR 5909, Table 6, "Revised Fiscal Year 2006 Formula Program Apportionment Data Unit Values."

The above schedule establishes a range of estimate of the dollar value of the over reporting of CTA Bus Vehicle Miles for the 2004 NTDB reporting year of approximately \$2.6-5.5 million in 49 USC 5307 formula grant funds received for FY2006, based on the assumption that the accepted range of deadhead percentage values is established by the other members of the “Top 20” Bus operators for 2004. (Because of the time required from the end of each NTDB reporting year to collect and process data, there is a two-year time difference between when RVM is operated and the formula funding it generates is available to the operators. Therefore, data reported for the 2004 NTDB reporting year, which is reported to NTDB in 2005, generates funding that will be available to transit grantees in Federal fiscal year 2006 [FY06], generally early in FY06.) From our knowledge of CTA’s operating characteristics, we would expect that CTA’s actual deadhead percentage to be nearer to the low end of the range, and perhaps even below the 11.9% low end of the range. If the actual CTA deadhead percentage was halfway between the 11.9% and CTA’s reported 1.8%, at 6.85%, than the additional funding received through the over reporting of VRM would be approximately \$1.3 million.

Data from a spreadsheet prepared by Gary DeLorme, NTD Manager, FTA, shows that CTA has reported deadheads between 1.4% and 2.0% every year since 1984, which would tend to indicate that there are roughly comparable financial impacts every year at least back to 1986 (the year for which the 1984 reporting year data would have been used to allocate “formula” funds), which would indicate the potential for 21 years of over-reporting of VRM mile data (NTDB reporting years 1984 to 2004 inclusive) and, therefore, 21 years (Federal fiscal years 1986-2006) of higher than justified 49 USC 5307 formula funding. Data reported by CTA for the 2005 NTDB reporting year will not generate grant funding until the beginning of Federal FY07 in October 2006, at the earliest, and we have not tested CTA VRM reported for the years prior to 1984.

# **Exhibit 5**



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

September 7, 2012

**VIA E-MAIL AND CERTIFIED MAIL**

Calvin L Scovel, III  
Inspector General, U.S. Department of Transportation  
ATTN: FOIA Requester Service Center  
1200 New Jersey Avenue, S.E.  
Room W73-407  
Washington, D.C. 20590  
E-mail: hotline@oig.dot.gov

**RE: Freedom of Information Act Request**

Dear Mr. Scovel:

We write on behalf of Cause of Action, a nonprofit, nonpartisan organization that uses investigative, legal, and communications tools to educate the public on how government accountability and transparency protects taxpayer interests and economic opportunity.

It has come to our attention that the Chicago Transit Authority (CTA) may have over-reported its bus-vehicle revenue miles to the Federal Transit Administration (FTA). We seek records concerning whether the Department of Transportation (DOT) Office of Inspector General (OIG) has investigated CTA's alleged receipt of excess disbursements from the FTA based on fraudulent reporting. Therefore, and pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and DOT's FOIA regulations, 49 C.F.R. § 7.31(c), Cause of Action hereby requests an expedited production of the following records from the time period of January 1, 2011, through the present:

1. All communications to or from any employee of DOT OIG and to or from any employee of any congressional oversight committee concerning any allegations regarding CTA and its reporting of bus-vehicle revenue miles, or investigation thereof.
2. Any other documents relating to any investigation by DOT's OIG concerning CTA and its reporting of bus-vehicle revenue miles.

**I. Request for Expedited Processing of FOIA Production**

We request expedited processing of this FOIA pursuant to 49 C.F.R. § 7.31(c). According to 49 C.F.R. 7.31(c)(1)(ii), expedited processing is warranted "whenever a compelling

need is demonstrated...involv[ing]...[r]equests made by a person primarily engaged in disseminating information, with an urgency to inform the public of actual or alleged Federal Government activity.” Such a requestor must establish that “he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation.”<sup>1</sup> The requestor must also establish “a particular urgency to inform the public about the government activity involved in the request, beyond the public’s right to know about government activity generally.”<sup>2</sup>

*A. Cause of Action’s Main Professional Activity is Information Dissemination*

Cause of Action is organized and operated, *inter alia*, to publish and broadcast news, *i.e.*, information that is about current events or that would be of current interest to the public. Cause of Action routinely and systematically disseminates information to the public through various media. Cause of Action maintains a frequently visited website, [www.causeofaction.org](http://www.causeofaction.org). Additionally, since September 2011, Cause of Action has published an e-mail newsletter. This newsletter provides subscribers with regular updates regarding Cause of Action’s activities and information the organization has received from various government entities. Cause of Action also disseminates information via Twitter and Facebook. Cause of Action also produces a newsletter titled “Agency Check,” which informs interested persons about actions of federal agencies, and another periodical, “Cause of Action News.”<sup>3</sup>

Cause of Action gleans the information it regularly publishes in its newsletters from a wide variety of sources, including FOIA requests, government agencies, universities, law reviews, and even other news sources. Cause of Action researches issues on government transparency and accountability, the use of taxpayer funds, and social and economic freedom; regularly reports on this information; analyzes relevant data; evaluates the newsworthiness of the material; and puts the facts and issues into context. Cause of Action uses technology, including but not limited to the Internet, Twitter, and Facebook, in order to publish and distribute news about current events and issues that are of current interest to the general public. These activities are hallmarks of publishing, news, and journalism.

Because Cause of Action’s main professional activity is the dissemination of information to the public, it fulfills the first requirement for expedited processing of this FOIA request.

*B. There is a Particular Urgency to Inform the Public about Investigations into CTA*

The CTA, charged with administering one of the most well-known public transportation systems in one of the largest metropolitan areas of the United States, receives federal funding and its receipt of taxpayer dollars must be subject to appropriate scrutiny. At a time when decisions regarding the use of federal funds is of the upmost importance to taxpayers, the public

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<sup>1</sup> 49 C.F.R. § 7.31(c)(3) (2011).

<sup>2</sup> *Id.*

<sup>3</sup> CAUSE OF ACTION WEBSITE, Newsletters, available at <http://causeofaction.org/newsletters/>.

needs to know that the investigative faculties of the federal government are being employed to ensure that federal funds given to transit agencies like the CTA are being well-spent.

Beyond the importance of CTA's receipt of federal funds, there is additional reason for concern. Forrest Claypool, current President of the CTA, was appointed by Rahm Emmanuel, former Chief of Staff to President Barack Obama.<sup>4</sup> Mr. Claypool was a member of President Obama's media team during the 2008 election. Valerie Jarrett, Senior Advisor to the President, was Chair of the Chicago Transit Board from 1995 to 2005. Robert S. Rivkin, the General Counsel of the U.S. Department of Transportation, was General Counsel of the Chicago Transit Authority from 2001 to 2004. As explained above, Cause of Action has reason to believe that DOT has known of allegations of fraud by CTA for some time. Whether DOT or its OIG has commenced any investigation of CTA is of particular importance to the public in light of the connections between the CTA and powerful current and former members of the federal government.

Because of the importance of the CTA's activities and the potential appearance of corruption, it is of the utmost urgency that DOT and DOT OIG disclose any documents pertaining to investigation of the CTA. Only through an expedited production can these concerns regarding any DOT investigation of CTA be properly addressed. Cause of Action's FOIA request is therefore entitled to expedited processing.

## **II. Cause of Action Is Entitled to a Complete Waiver of Fees (Public-Interest Purpose)**

Cause of Action requests a waiver of both search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This statute provides that the requested information and/or documents shall be furnished without or at reduced charge if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." Cause of Action, in the present matter, satisfies all of the required elements for a fee waiver.

- A. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.*

First and foremost, "obtaining information to act as a 'watchdog' of the government is a well-recognized public interest in the FOIA."<sup>5</sup> It is for this reason that Cause of Action, a nonprofit, nonpartisan organization that uses public advocacy and legal reform strategies to

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<sup>4</sup> Fran Spielman, *Rahm Emanuel picks Forrest Claypool to head CTA*, CHICAGO SUN-TIMES, Apr. 19, 2011, available at <http://www.suntimes.com/news/politics/4915438-418/rahm-emanuel-picks-forrest-claypool-to-head-cta.html>.

<sup>5</sup> *Baltimore Sun v. United States Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001); see also *Center to Prevent Handgun Violence v. United States Dep't of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) ("This self-appointed watchdog role is recognized in our system.").



ensure greater transparency in government and protect taxpayer interests and economic freedom, seeks disclosure of the requested documents. Disclosure of the information requested by Cause of Action in this instance is likely to contribute significantly to the understanding by the public at large of the operations and activities of the federal government as the documents requested concern the performance of the statutory and regulatory duties and responsibilities of the DOT and the DOT OIG, both federal government agencies. More specifically, the information Cause of Action requests concerns identifiable “operations or activities of the government” because it relates to the operations of the DOT and the DOT OIG and their ability to manage the receipt of federal funding by transit agencies in a transparent manner at a time of great national concern over government spending.

The public at large has a moral and financial interest in knowing whether the DOT is effectively and appropriately executing its duties and responsibilities. Because of this, the information requested will benefit the public as opposed to the individual understanding of the requester or a narrow segment of interested persons. Disclosure would undoubtedly be of value to members of the public. Thus, this element is met.

*B. Disclosure of the requested information is not in the commercial interest of Cause of Action.*

Cause of Action does not seek this information to benefit commercially. Cause of Action is a nonprofit organization as defined under section 501(c)(3) of the Internal Revenue Code. Our organization is committed to protecting the public’s right to be aware of the activities of government agencies and to ensuring the lawful and appropriate use of government funds by those agencies. This request covers the activities and operations of the DOT. Cause of Action will not make a profit from the disclosure of this information. This information will be used to further the knowledge and interests of the general public regarding the DOT while providing an opportunity for the public to evaluate the policies of the DOT in relation to alleged fraud by CTA. This will also allow the public to further their insight on the operations of the DOT. In the event the disclosure of this information creates a profit motive, it is not dispositive for the commercial interest test; media or scholars could have a profit motive, as long as the dissemination of the information is in their professional capacity and would further the public interest.<sup>6</sup> Therefore, Cause of Action satisfies this element.

*C. Cause of Action has an ability to disseminate the requested information to the public and specifically intends to do so.*

Cause of Action intends to make the results of this request available to the public in various medium forms. Cause of Action uses a combination of research, litigation, advocacy, and regularly disseminated publications to advance its mission. Our staff has a combined forty-five (45) years of expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request,

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<sup>6</sup> See *Campbell v. Department of Justice*, 164 F.3d 20, 38 (D.C. Cir. 1998).



use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through Cause of Action's regularly published online newsletter, memoranda, reports, or press releases. In addition, Cause of Action will disseminate any relevant information it acquires from this request to the public through its frequently visited website, [www.causeofaction.org](http://www.causeofaction.org), which also includes links to thousands of pages of documents Cause of Action acquired through its previous FOIA requests, as well as documents related to Cause of Action's litigation and agency complaints. Lastly, after the production of the requested information, Cause of Action intends to produce a report on the matter of DOT's operations. This report may be published at, distributed to the news media, and sent to interested persons through our regular periodicals, including "Agency Check" and "Cause of Action News." An ability to show the presence of a website with occasional, consistent traffic is enough to show that a requester has an ability to disseminate information.<sup>7</sup> As with the other two (2) outlined above, Cause of Action has also met this element, in effect, justifying a fee waiver.

### **III. Cause of Action Is Entitled to News Media Requester Category Status.**

Cause of Action also asks that it not be charged search or review fees for this request because it qualifies as a "representative of the news media, or news media requester," under 5 U.S.C. § 552(a)(4)(A)(ii)(II).<sup>8</sup> In *National Security Archive v. U.S. Dep't of Defense*,<sup>9</sup> the U.S. Court of Appeals for the District of Columbia Circuit noted that FOIA's legislative history demonstrates that "it is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'*"<sup>10</sup>

Cause of Action is organized and operated, *inter alia*, to publish and broadcast news, i.e., information that is about current events or that would be of current interest to the public. Cause of Action routinely and systematically disseminates information to the public through various medium forms. Cause of Action maintains a frequently visited website, [www.causeofaction.org](http://www.causeofaction.org). Additionally, since September 2011, Cause of Action has published an e-mail newsletter. This

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<sup>7</sup> See *FedCURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009).

<sup>8</sup> Other agencies of the federal government have granted Cause of Action "representative of the news media" category status. See, e.g., FOIA Request HQ-2012-00752-F (Department of Energy), news media status granted on Feb. 15, 2012; FOIA Request No. 12-00455-F (Department of Education), news media status granted on Jan. 20, 2012; FOIA Request 12-267 (Federal Emergency Management Agency), news media status granted on Feb. 9, 2012; FOIA Request 2012-RMA-02563F (Department of Agriculture), news media status granted on May 3, 2012; FOIA Request 2012-078 (Department of Homeland Security), news media status granted on Feb. 15, 2012; FOIA Request 2012-00270 (Department of Interior), news media status granted on Feb. 17, 2012; FOIA Request (Department of Labor), news media status granted on April 20, 2012; FOIA Request CRRIF 2012-00077 (Department of Commerce), interim rolling production of documents on Mar. 1, 2012 without charge. As the U.S. Court of Appeals for the District of Columbia noted in *Oglesby v. United States Dep't of Army*, agencies should grant news media requestor status when other agencies have done so because of "the need for uniformity among the agencies in their application of FOIA." 920 F.2d 57, 66 (D.C. Cir. 1990).

<sup>9</sup> 880 F.2d 1381, 1386 (D.C. Cir. 1989).

<sup>10</sup> *Id.* (citing 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original)).

newsletter provides subscribers with regular updates regarding Cause of Action's activities and information the organization has received from various government entities. Cause of Action also disseminates information via Twitter and Facebook. Cause of Action also produces a newsletter titled "Agency Check," which informs interested persons about actions of federal agencies, and another periodical, "Cause of Action News."<sup>11</sup>

Cause of Action gleans the information it regularly publishes in its newsletters from a wide variety of sources, including FOIA requests, government agencies, universities, law reviews, and even other news sources. Cause of Action researches issues on government transparency and accountability, the use of taxpayer funds, and social and economic freedom; regularly reports on this information; analyzes relevant data; evaluates the newsworthiness of the material; and puts the facts and issues into context. Cause of Action uses technology, including but not limited to the Internet, Twitter, and Facebook, in order to publish and distribute news about current events and issues that are of current interest to the general public. These activities are hallmarks of publishing, news, and journalism. Based on these extensive publication activities,<sup>12</sup> Cause of Action qualifies for a fee waiver as a "representative of the news media, or news media requester," under FOIA and agency regulations.

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<sup>11</sup> CAUSE OF ACTION WEBSITE, Newsletters, available at <http://causeofaction.org/newsletters/>.

<sup>12</sup> See, e.g., Matthew Boyle, *Report: ACORN-affiliated group gets \$300,000 more in taxpayer money*, THE DAILY CALLER, (Sept. 16, 2011), available at <http://dailycaller.com/2011/09/16/report-acorn-affiliated-group-gets-300000-more-in-taxpayer-money/>; Matthew Boyle, *Long-time ACORN affiliate secures \$350,000 in new taxpayer funding*, THE DAILY CALLER, (Sept. 19, 2011), available at <http://dailycaller.com/2011/09/19/long-time-acorn-affiliate-secures-350000-in-new-taxpayer-funding/>; Paul Streckfus, *Accountability Group Seeks IRS Investigation of ACORN Affiliates*, EO TAX JOURNAL, Ed. 2011-173, (Oct. 24, 2011); Bobby McMahon, *EPA Stalls Utility MACT Until December, Fights Industry Bid For Year Delay*, INSIDE EPA, (Oct. 24th, 2011), available at <http://insideepa.com/201110212379934/EPA-Daily-News/Daily-News/epa-stalls-utility-mact-until-december-fights-industry-bid-for-year-delay/menu-id-95.html>; Paul Streckfus, *More Commentary on NCPL's Annual Conference*, EO TAX JOURNAL, Ed. 2011-185, (Nov. 9, 2011); Patrick Reis and Darren Goode, *Senators hedge bets ahead of CSAPR vote - Second anti-reg bill to get vote - Perry's debate gaffe - Acrimony hits new heights in Solyndra spat*, POLITICO, (Nov. 10, 2011), available at <http://www.politico.com/morningenergy/1111/morningenergy374.html>; Paul Streckfus, *More Commentary on NCPL's Annual Conference*, EO TAX JOURNAL, Ed. 2011-187, (Nov. 15, 2011); Frank Maisano, *Nov 14 Energy Update: Chu'd Out in Congress*, ENERGYNOW!, (Nov. 15, 2011), available at <http://www.energynow.com/energypanel/2011/11/15/nov-14-energy-update-chud-out-congress>; Conn Carroll, *Labor board broke federal law on Boeing suit*, WASHINGTON EXAMINER, (Nov. 27, 2011), available at <http://campaign2012.washingtonexaminer.com/article/labor-board-broke-federal-law-boeing-suit>; Matthew Vadum, *Obama uses taxpayer cash to back ACORN Name changes used to dodge the law*, WASHINGTON TIMES, (Nov. 28, 2011), available at <http://www.washingtontimes.com/news/2011/nov/28/obama-uses-taxpayer-cash-to-back-acorn-name-change/>; Matthew Boyle, *Obama administration, GAO appear to have ignored group's ACORN affiliation to award \$700K*, THE DAILY CALLER, (Nov. 28, 2011), available at <http://dailycaller.com/2011/11/28/obama-administration-gao-appear-to-have-ignored-groups-acorn-affiliation-to-award-700k/>; WORLDNETDAILY, *See which radicals got more taxpayer dollars: Support maintained despite organization's accounting 'problems'*, (Nov. 29, 2011), available at <http://www.wnd.com/index.php?fa=PAGE.view&pageId=372685>; Perry Chiamonte, *ACORN Misused Federal Grant Funds, Report Says*, FOX NEWS, (Nov. 30, 2011), available at <http://www.foxnews.com/politics/2011/11/30/acorn-misused-federal-grant-funds-report-says/>; Marsha Shuler, *Group challenges La. contribution limit*, THE ADVOCATE, (Nov. 30, 2011), available at <http://theadvocate.com/news/1437637-123/group-challenges-la-contribution-limit>; Margaret Menge, *Justice Audit Alleges ACORN Spin-Off in New York Misused Money*, NEWSMAX, (Dec. 1, 2011), available at

Cause of Action's activities clearly fall within the statutory definition of this term. 5 U.S.C. § 552(a)(4)(A)(ii)(III) defines "representative[s] of the news media" broadly to include organizations that disseminate news through electronic communications, including "*publishers of periodicals . . . who make their products available for purchase by or subscription by or free distribution to the general public.*"<sup>13</sup> Moreover, the FOIA statute itself, as amended in 2007, explicitly defines "representative of the news media"—a term that had previously been undefined in the statute—to specifically include organizations, such as Cause of Action, that regularly publish and disseminate online periodicals, *e.g.*, newsletters.<sup>14</sup> The statutory definition unequivocally commands that organizations that electronically disseminate information and publications via "alternative media *shall* be considered to be news-media entities."<sup>15</sup> As the plain language of the statute makes abundantly clear, then, an organization that regularly disseminates news via an online newsletter or periodical, such as Cause of Action, is a "representative of the news media" under the FOIA.

In *Electronic Privacy Information Center v. Dep't of Defense*,<sup>16</sup> the court broadly construed a Department of Defense regulation defining "representative of the news media" to include a 501(c)(3) that, like Cause of Action, maintains a frequently visited website and regularly publishes an e-mail newsletter. Under well-established precedent, then, a 501(c)(3) requester that regularly publishes online newsletters, such as Cause of Action, is entitled to a fee

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<http://www.newsmax.com/US/ACORN-justice-audit-funds/2011/12/01/id/419672>; PITTSBURGH TRIBUNE-REVIEW, *Acorn lives: Meet AHCOA*, (Dec. 5, 2011), available at [http://www.pittsburghlive.com/x/pittsburghtrib/opinion/s\\_770135.html](http://www.pittsburghlive.com/x/pittsburghtrib/opinion/s_770135.html); Tom Fitton, *Obama Administration Violating ACORN Funding Ban According to New Audit*, BIG GOVERNMENT, (Dec. 5, 2011), available at <http://biggovernment.com/tfitton/2011/12/05/obama-administration-violating-acorn-funding-ban-according-to-new-audit/>; NATIONAL RIGHT TO WORK COMMITTEE, *NLRB: Law Breakers?*, (Dec. 10, 2011), available at <http://www.nrtwc.org/NLRB-law-breakers/>.

<sup>13</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(III) (emphasis added).

<sup>14</sup> The FOIA statute, as amended in 2007, defines "representative of the news media" as follows:

[T]he term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), *such alternative media shall be considered to be news-media entities.*

5 U.S.C. § 552(a)(ii)(III) (emphasis added).

<sup>15</sup> *Id.* (emphasis added). See generally *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-662 (2007) (noting the well-established proposition that, as used in statutes, the word "shall" is generally imperative or mandatory).

<sup>16</sup> 241 F. Supp. 2d. 5, 12-15 (D.D.C. 2003). The court pointedly noted that "a 'periodical,' unlike a daily newspaper, has been defined simply as 'a publication issued at regular intervals of more than one day.'" *Id.* at 14 n.4 (quoting American Heritage Dictionary, Second College Edition, at 923 (2000)).



waiver as a “representative of the news media,” where *Electronic Privacy Information Center* provides that “publishers of periodicals” qualify as representatives of the news media.<sup>17</sup>

The information requested regarding CTA will be of current interest to a large segment of the general public. Cause of Action will ultimately disseminate this information that it is statutorily entitled to, *inter alia*, through its regularly published online newsletter. Additionally, Cause of Action will take the information that is disclosed, using its editorial skills and judgment, to publish news articles that will be published on our website, distributed to other media sources, and distributed to interested persons through our newsletters.

As outlined above, the plain language of 5 U.S.C. § 552(a)(4)(A)(ii)(III), controlling precedent, and the agency’s regulations clearly require the conclusion that Cause of Action is a representative of the news media.

#### **IV. Production of Information and Contact Information.**

We call your attention to President Obama’s January 21, 2009, Memorandum concerning the FOIA, which states in relevant part:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA . . . The presumption of disclosure should be applied to all decisions involving FOIA.<sup>18</sup>

On the same day, President Obama spoke on the FOIA to incoming members of the Cabinet and staff of the White House and stated in relevant part:

The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over. Starting today, every agency and department should know that this administration stands on the side not of those who seek to withhold information but those who seek to make it known. To be sure, issues like personal privacy and national security must be treated with the care they demand. But the mere fact that you have the legal power to keep something secret does not mean you should always use it. The Freedom of Information Act is perhaps the most powerful instrument we have for making our government honest and transparent, and of holding it accountable. And I expect members of my

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<sup>17</sup> *Supra* at note 17.

<sup>18</sup> PRESIDENT BARACK OBAMA, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act*, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

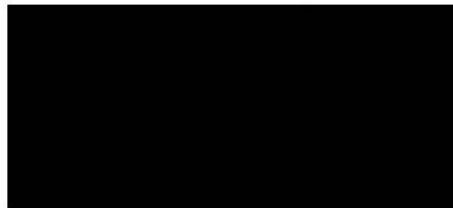
administration not simply to live up to the letter but also the spirit of this law.<sup>19</sup>

If it is your position that any portion of the requested information is exempt from disclosure, Cause of Action requests that you provide a detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.

In the event that some portions of the requested information are properly exempt from disclosure, please redact such portions and produce all remaining reasonable segregable non-exempt portions of the requested record.<sup>20</sup> If you contend that information contains non-exempt segments, but those non-exempt segments are so dispersed throughout as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. If a request is denied in full, please outline that it is not possible to segregate portions of the record for release.

In an effort to facilitate record production within the statutory limit, Cause of Action prefers to accept information and/or documents in electronic format (*e.g.*, e-mail, .pdf). When necessary, Cause of Action will accept the "rolling production" of information and/or documents, but requests that you provide prompt notification of any intent to produce information on a rolling basis.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact me (Karen.Groen.Olea@causeofaction.org) or Jack Thorlin, Legal Analyst, (Jack.Thorlin@causeofaction.org) immediately, at (202) 507-5880. Please note that, for the purposes of responding to this request, the attached Definition of Terms should be interpreted consistently. We look forward to receiving a decision regarding our request for expedited processing within ten (10) calendar days in accordance with 49 C.F.R. 7.31(c)(4). Thank you for your attention to this matter.



Encl. Responding to Document Requests, Definitions

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<sup>19</sup> PRESIDENT BARACK OBAMA, *Remarks by the President in Welcoming Senior Staff and Cabinet Secretaries to the White House*, Jan. 21, 2009, available at <http://oversight.house.gov/hearing/foia-in-the-21st-century-using-technology-to-improve-transparency-in-government/>.

<sup>20</sup> See 5 U.S.C. § 552(b).

## **Responding to Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Cause of Action.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Cause of Action's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the specific document request or portion thereof in Cause of Action's request to which the documents respond.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
6. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Cause of Action staff to determine the appropriate format in which to produce the information.
7. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

9. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
10. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
11. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
12. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

### **Definitions**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmation, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other

written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.



# **Exhibit 6**



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

September 7, 2012

**VIA E-MAIL AND CERTIFIED MAIL**

Department of Transportation FOIA Office  
Office of Inspector General  
1200 New Jersey Avenue, S.E.  
W73-407  
Washington, D.C. 20590  
E-mail: fern.kaufman@dot.gov

**RE: Freedom of Information Act Request**

Dear Ms. Kaufman:

We write on behalf of Cause of Action, a nonprofit, nonpartisan organization that uses investigative, legal, and communications tools to educate the public on how government accountability and transparency protects taxpayer interests and economic opportunity.

It has come to our attention that the Chicago Transit Authority (CTA) may have over-reported its bus-vehicle revenue miles to the Federal Transit Administration (FTA). We seek records concerning whether the Department of Transportation (DOT) and/or its Office of Inspector General (OIG) has investigated CTA's alleged receipt of excess disbursements from the FTA based on fraudulent reporting. Therefore, and pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and DOT's FOIA regulations, 49 C.F.R. § 7.31(c), Cause of Action hereby requests an expedited production of the following records from the time period of January 1, 2011, through the present:

1. All communications to or from any employee of DOT and to or from any employee of any congressional oversight committee concerning any allegations regarding CTA and its reporting of bus-vehicle revenue miles, or investigation thereof.
2. Any other documents relating to any investigation by DOT concerning CTA and its reporting of bus-vehicle revenue miles.

**I. Request for Expedited Processing of FOIA Production**

We request expedited processing of this FOIA pursuant to 49 C.F.R. § 7.31(c). According to 49 C.F.R. 7.31(c)(1)(ii), expedited processing is warranted "whenever a compelling

need is demonstrated...involv[ing]...[r]equests made by a person primarily engaged in disseminating information, with an urgency to inform the public of actual or alleged Federal Government activity.” Such a requestor must establish that “he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation.”<sup>1</sup> The requestor must also establish “a particular urgency to inform the public about the government activity involved in the request, beyond the public’s right to know about government activity generally.”<sup>2</sup>

*A. Cause of Action’s Main Professional Activity is Information Dissemination*

Cause of Action is organized and operated, *inter alia*, to publish and broadcast news, *i.e.*, information that is about current events or that would be of current interest to the public. Cause of Action routinely and systematically disseminates information to the public through various media. Cause of Action maintains a frequently visited website, [www.causeofaction.org](http://www.causeofaction.org). Additionally, since September 2011, Cause of Action has published an e-mail newsletter. This newsletter provides subscribers with regular updates regarding Cause of Action’s activities and information the organization has received from various government entities. Cause of Action also disseminates information via Twitter and Facebook. Cause of Action also produces a newsletter titled “Agency Check,” which informs interested persons about actions of federal agencies, and another periodical, “Cause of Action News.”<sup>3</sup>

Cause of Action gleans the information it regularly publishes in its newsletters from a wide variety of sources, including FOIA requests, government agencies, universities, law reviews, and even other news sources. Cause of Action researches issues on government transparency and accountability, the use of taxpayer funds, and social and economic freedom; regularly reports on this information; analyzes relevant data; evaluates the newsworthiness of the material; and puts the facts and issues into context. Cause of Action uses technology, including but not limited to the Internet, Twitter, and Facebook, in order to publish and distribute news about current events and issues that are of current interest to the general public. These activities are hallmarks of publishing, news, and journalism.

Because Cause of Action’s main professional activity is the dissemination of information to the public, it fulfills the first requirement for expedited processing of this FOIA request.

*B. There is a Particular Urgency to Inform the Public about Investigations into CTA*

The CTA, charged with administering one of the most well-known public transportation systems in one of the largest metropolitan areas of the United States, receives federal funding and its receipt of taxpayer dollars must be subject to appropriate scrutiny. At a time when decisions regarding the use of federal funds is of the utmost importance to taxpayers, the public

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<sup>1</sup> 49 C.F.R. § 7.31(c)(3) (2011).

<sup>2</sup> *Id.*

<sup>3</sup> CAUSE OF ACTION WEBSITE, Newsletters, available at <http://causeofaction.org/newsletters/>.

needs to know that the investigative faculties of the federal government are being employed to ensure that federal funds given to transit agencies like the CTA are being well-spent.

Beyond the importance of CTA's receipt of federal funds, there is additional reason for concern. Forrest Claypool, current President of the CTA, was appointed by Rahm Emmanuel, former Chief of Staff to President Barack Obama.<sup>4</sup> Mr. Claypool was a member of President Obama's media team during the 2008 election. Valerie Jarrett, Senior Advisor to the President, was Chair of the Chicago Transit Board from 1995 to 2005. Robert S. Rivkin, the General Counsel of the U.S. Department of Transportation, was General Counsel of the Chicago Transit Authority from 2001 to 2004. As explained above, Cause of Action has reason to believe that DOT has known of allegations of fraud by CTA for some time. Whether DOT or its OIG has commenced any investigation of CTA is of particular importance to the public in light of the connections between the CTA and powerful current and former members of the federal government.

Because of the importance of the CTA's activities and the potential appearance of corruption, it is of the utmost urgency that DOT disclose any documents pertaining to investigation of the CTA. Only through an expedited production can these concerns regarding any DOT investigation of CTA be properly addressed. Cause of Action's FOIA request is therefore entitled to expedited processing.

## **II. Cause of Action Is Entitled to a Complete Waiver of Fees (Public-Interest Purpose)**

Cause of Action requests a waiver of both search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This statute provides that the requested information and/or documents shall be furnished without or at reduced charge if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." Cause of Action, in the present matter, satisfies all of the required elements for a fee waiver.

*A. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.*

First and foremost, "obtaining information to act as a 'watchdog' of the government is a well-recognized public interest in the FOIA."<sup>5</sup> It is for this reason that Cause of Action, a nonprofit, nonpartisan organization that uses public advocacy and legal reform strategies to

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<sup>4</sup> Fran Spielman, *Rahm Emanuel picks Forrest Claypool to head CTA*, CHICAGO SUN-TIMES, Apr. 19, 2011, available at <http://www.suntimes.com/news/politics/4915438-418/rahm-emanuel-picks-forrest-claypool-to-head-cta.html>.

<sup>5</sup> *Baltimore Sun v. United States Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001); see also *Center to Prevent Handgun Violence v. United States Dep't of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) ("This self-appointed watchdog role is recognized in our system.").



ensure greater transparency in government and protect taxpayer interests and economic freedom, seeks disclosure of the requested documents. Disclosure of the information requested by Cause of Action in this instance is likely to contribute significantly to the understanding by the public at large of the operations and activities of the federal government as the documents requested concern the performance of the statutory and regulatory duties and responsibilities of the DOT, a federal government agency. More specifically, the information Cause of Action requests concerns identifiable "operations or activities of the government" because it relates to the operations of the DOT and its ability to manage the receipt of federal funding by transit agencies in a transparent manner at a time of great national concern over government spending.

The public at large has a moral and financial interest in knowing whether the DOT is effectively and appropriately executing its duties and responsibilities. Because of this, the information requested will benefit the public as opposed to the individual understanding of the requester or a narrow segment of interested persons. Disclosure would undoubtedly be of value to members of the public. Thus, this element is met.

*B. Disclosure of the requested information is not in the commercial interest of Cause of Action.*

Cause of Action does not seek this information to benefit commercially. Cause of Action is a nonprofit organization as defined under section 501(c)(3) of the Internal Revenue Code. Our organization is committed to protecting the public's right to be aware of the activities of government agencies and to ensuring the lawful and appropriate use of government funds by those agencies. This request covers the activities and operations of the DOT. Cause of Action will not make a profit from the disclosure of this information. This information will be used to further the knowledge and interests of the general public regarding the DOT while providing an opportunity for the public to evaluate the policies of the DOT in relation to alleged fraud by CTA. This will also allow the public to further their insight on the operations of the DOT. In the event the disclosure of this information creates a profit motive, it is not dispositive for the commercial interest test; media or scholars could have a profit motive, as long as the dissemination of the information is in their professional capacity and would further the public interest.<sup>6</sup> Therefore, Cause of Action satisfies this element.

*C. Cause of Action has an ability to disseminate the requested information to the public and specifically intends to do so.*

Cause of Action intends to make the results of this request available to the public in various medium forms. Cause of Action uses a combination of research, litigation, advocacy, and regularly disseminated publications to advance its mission. Our staff has a combined forty-five (45) years of expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis

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<sup>6</sup> See *Campbell v. Department of Justice*, 164 F.3d 20, 38 (D.C. Cir. 1998).

with the public, whether through Cause of Action's regularly published online newsletter, memoranda, reports, or press releases. In addition, Cause of Action will disseminate any relevant information it acquires from this request to the public through its frequently visited website, [www.causeofaction.org](http://www.causeofaction.org), which also includes links to thousands of pages of documents Cause of Action acquired through its previous FOIA requests, as well as documents related to Cause of Action's litigation and agency complaints. Lastly, after the production of the requested information, Cause of Action intends to produce a report on the matter of DOT's operations. This report may be published at, distributed to the news media, and sent to interested persons through our regular periodicals, including "Agency Check" and "Cause of Action News." An ability to show the presence of a website with occasional, consistent traffic is enough to show that a requester has an ability to disseminate information.<sup>7</sup> As with the other two (2) outlined above, Cause of Action has also met this element, in effect, justifying a fee waiver.

### **III. Cause of Action Is Entitled to News Media Requester Category Status.**

Cause of Action also asks that it not be charged search or review fees for this request because it qualifies as a "representative of the news media, or news media requester," under 5 U.S.C. § 552(a)(4)(A)(ii)(II).<sup>8</sup> In *National Security Archive v. U.S. Dep't of Defense*,<sup>9</sup> the U.S. Court of Appeals for the District of Columbia Circuit noted that FOIA's legislative history demonstrates that "it is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'*"<sup>10</sup>

Cause of Action is organized and operated, *inter alia*, to publish and broadcast news, i.e., information that is about current events or that would be of current interest to the public. Cause of Action routinely and systematically disseminates information to the public through various medium forms. Cause of Action maintains a frequently visited website, [www.causeofaction.org](http://www.causeofaction.org). Additionally, since September 2011, Cause of Action has published an e-mail newsletter. This newsletter provides subscribers with regular updates regarding Cause of Action's activities and

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<sup>7</sup> See *FedCURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009).

<sup>8</sup> Other agencies of the federal government have granted Cause of Action "representative of the news media" category status. See, e.g., FOIA Request HQ-2012-00752-F (Department of Energy), news media status granted on Feb. 15, 2012; FOIA Request No. 12-00455-F (Department of Education), news media status granted on Jan. 20, 2012; FOIA Request 12-267 (Federal Emergency Management Agency), news media status granted on Feb. 9, 2012; FOIA Request 2012-RMA-02563F (Department of Agriculture), news media status granted on May 3, 2012; FOIA Request 2012-078 (Department of Homeland Security), news media status granted on Feb. 15, 2012; FOIA Request 2012-00270 (Department of Interior), news media status granted on Feb. 17, 2012; FOIA Request (Department of Labor), news media status granted on April 20, 2012; FOIA Request CRRIF 2012-00077 (Department of Commerce), interim rolling production of documents on Mar. 1, 2012 without charge. As the U.S. Court of Appeals for the District of Columbia noted in *Oglesby v. United States Dep't of Army*, agencies should grant news media requestor status when other agencies have done so because of "the need for uniformity among the agencies in their application of FOIA." 920 F.2d 57, 66 (D.C. Cir. 1990).

<sup>9</sup> 880 F.2d 1381, 1386 (D.C. Cir. 1989).

<sup>10</sup> *Id.* (citing 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original)).

information the organization has received from various government entities. Cause of Action also disseminates information via Twitter and Facebook. Cause of Action also produces a newsletter titled "Agency Check," which informs interested persons about actions of federal agencies, and another periodical, "Cause of Action News."<sup>11</sup>

Cause of Action gleans the information it regularly publishes in its newsletters from a wide variety of sources, including FOIA requests, government agencies, universities, law reviews, and even other news sources. Cause of Action researches issues on government transparency and accountability, the use of taxpayer funds, and social and economic freedom; regularly reports on this information; analyzes relevant data; evaluates the newsworthiness of the material; and puts the facts and issues into context. Cause of Action uses technology, including but not limited to the Internet, Twitter, and Facebook, in order to publish and distribute news about current events and issues that are of current interest to the general public. These activities are hallmarks of publishing, news, and journalism. Based on these extensive publication activities,<sup>12</sup> Cause of Action qualifies for a fee waiver as a "representative of the news media, or news media requester," under FOIA and agency regulations.

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<sup>11</sup> CAUSE OF ACTION WEBSITE, Newsletters, available at <http://causeofaction.org/newsletters/>.

<sup>12</sup> See, e.g., Matthew Boyle, *Report: ACORN-affiliated group gets \$300,000 more in taxpayer money*, THE DAILY CALLER, (Sept. 16, 2011), available at <http://dailycaller.com/2011/09/16/report-acorn-affiliated-group-gets-300000-more-in-taxpayer-money/>; Matthew Boyle, *Long-time ACORN affiliate secures \$350,000 in new taxpayer funding*, THE DAILY CALLER, (Sept. 19, 2011), available at <http://dailycaller.com/2011/09/19/long-time-acorn-affiliate-secures-350000-in-new-taxpayer-funding/>; Paul Streckfus, *Accountability Group Seeks IRS Investigation of ACORN Affiliates*, EO TAX JOURNAL, Ed. 2011-173, (Oct. 24, 2011); Bobby McMahon, *EPA Stalls Utility MACT Until December, Fights Industry Bid For Year Delay*, INSIDEEPA, (Oct. 24th, 2011), available at <http://insideepa.com/201110212379934/EPA-Daily-News/Daily-News/epa-stalls-utility-mact-until-december-fights-industry-bid-for-year-delay/menu-id-95.html>; Paul Streckfus, *More Commentary on NCPL's Annual Conference*, EO TAX JOURNAL, Ed. 2011-185, (Nov. 9, 2011); Patrick Reis and Darren Goode, *Senators hedge bets ahead of CSAPR vote - Second anti-reg bill to get vote - Perry's debate gaffe - Acrimony hits new heights in Solyndra spat*, POLITICO, (Nov. 10, 2011), available at <http://www.politico.com/morningenergy/1111/morningenergy374.html>; Paul Streckfus, *More Commentary on NCPL's Annual Conference*, EO TAX JOURNAL, Ed. 2011-187, (Nov. 15, 2011); Frank Maisano, *Nov 14 Energy Update: Chu'd Out in Congress*, ENERGYNOW!, (Nov. 15, 2011), available at <http://www.energynow.com/energypanel/2011/11/15/nov-14-energy-update-chud-out-congress>; Conn Carroll, *Labor board broke federal law on Boeing suit*, WASHINGTON EXAMINER, (Nov. 27, 2011), available at <http://campaign2012.washingtonexaminer.com/article/labor-board-broke-federal-law-boeing-suit>; Matthew Vadum, *Obama uses taxpayer cash to back ACORN Name changes used to dodge the law*, WASHINGTON TIMES, (Nov. 28, 2011), available at <http://www.washingtontimes.com/news/2011/nov/28/obama-uses-taxpayer-cash-to-back-acorn-name-change/>; Matthew Boyle, *Obama administration, GAO appear to have ignored group's ACORN affiliation to award \$700K*, THE DAILY CALLER, (Nov. 28, 2011), available at <http://dailycaller.com/2011/11/28/obama-administration-gao-appear-to-have-ignored-groups-acorn-affiliation-to-award-700k/>; WORLDNETDAILY, *See which radicals got more taxpayer dollars: Support maintained despite organization's accounting 'problems'*, (Nov. 29, 2011), available at <http://www.wnd.com/index.php?fa=PAGE.view&pageId=372685>; Perry Chiamonte, *ACORN Misused Federal Grant Funds, Report Says*, FOX NEWS, (Nov. 30, 2011), available at <http://www.foxnews.com/politics/2011/11/30/acorn-misused-federal-grant-funds-report-says/>; Marsha Shuler, *Group challenges La. contribution limit*, THE ADVOCATE, (Nov. 30, 2011), available at <http://theadvocate.com/news/1437637-123/group-challenges-la.-contribution-limit>; Margaret Menge, *Justice Audit Alleges ACORN Spin-Off in New York Misused Money*, NEWSMAX, (Dec. 1, 2011), available at <http://www.newsmax.com/US/ACORN-justice-audit-funds/2011/12/01/id/419672>; PITTSBURGH TRIBUNE-REVIEW,

Cause of Action's activities clearly fall within the statutory definition of this term. 5 U.S.C. § 552(a)(4)(A)(ii)(III) defines "representative[s] of the news media" broadly to include organizations that disseminate news through electronic communications, including "*publishers of periodicals . . . who make their products available for purchase by or subscription by or free distribution to the general public.*"<sup>13</sup> Moreover, the FOIA statute itself, as amended in 2007, explicitly defines "representative of the news media"—a term that had previously been undefined in the statute—to specifically include organizations, such as Cause of Action, that regularly publish and disseminate online periodicals, *e.g.*, newsletters.<sup>14</sup> The statutory definition unequivocally commands that organizations that electronically disseminate information and publications via "alternative media *shall* be considered to be news-media entities."<sup>15</sup> As the plain language of the statute makes abundantly clear, then, an organization that regularly disseminates news via an online newsletter or periodical, such as Cause of Action, is a "representative of the news media" under the FOIA.

In *Electronic Privacy Information Center v. Dep't of Defense*,<sup>16</sup> the court broadly construed a Department of Defense regulation defining "representative of the news media" to include a 501(c)(3) that, like Cause of Action, maintains a frequently visited website and regularly publishes an e-mail newsletter. Under well-established precedent, then, a 501(c)(3) requester that regularly publishes online newsletters, such as Cause of Action, is entitled to a fee

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*Acorn lives: Meet AHCOA*, (Dec. 5, 2011), available at [http://www.pittsburghlive.com/x/pittsburghtrib/opinion/s\\_770135.html](http://www.pittsburghlive.com/x/pittsburghtrib/opinion/s_770135.html); Tom Fitton, *Obama Administration Violating ACORN Funding Ban According to New Audit*, BIG GOVERNMENT, (Dec. 5, 2011), available at <http://biggovernment.com/tfitton/2011/12/05/obama-administration-violating-acorn-funding-ban-according-to-new-audit/>; NATIONAL RIGHT TO WORK COMMITTEE, *NLRB: Law Breakers?*, (Dec. 10, 2011), available at <http://www.nrtwc.org/NLRB-law-breakers/>.

<sup>13</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(III) (emphasis added).

<sup>14</sup> The FOIA statute, as amended in 2007, defines "representative of the news media" as follows:

[T]he term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), *such alternative media shall be considered to be news-media entities.*

5 U.S.C. § 552(a)(ii)(III) (emphasis added).

<sup>15</sup> *Id.* (emphasis added). See generally *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-662 (2007) (noting the well-established proposition that, as used in statutes, the word "shall" is generally imperative or mandatory).

<sup>16</sup> 241 F. Supp. 2d. 5, 12-15 (D.D.C. 2003). The court pointedly noted that "a 'periodical,' unlike a daily newspaper, has been defined simply as 'a publication issued at regular intervals of more than one day.'" *Id.* at 14 n.4 (quoting American Heritage Dictionary, Second College Edition, at 923 (2000)).



waiver as a “representative of the news media,” where *Electronic Privacy Information Center* provides that “publishers of periodicals” qualify as representatives of the news media.<sup>17</sup>

The information requested regarding CTA will be of current interest to a large segment of the general public. Cause of Action will ultimately disseminate this information that it is statutorily entitled to, *inter alia*, through its regularly published online newsletter. Additionally, Cause of Action will take the information that is disclosed, using its editorial skills and judgment, to publish news articles that will be published on our website, distributed to other media sources, and distributed to interested persons through our newsletters.

As outlined above, the plain language of 5 U.S.C. § 552(a)(4)(A)(ii)(III), controlling precedent, and the agency’s regulations clearly require the conclusion that Cause of Action is a representative of the news media.

#### **IV. Production of Information and Contact Information.**

We call your attention to President Obama’s January 21, 2009, Memorandum concerning the FOIA, which states in relevant part:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA . . . The presumption of disclosure should be applied to all decisions involving FOIA.<sup>18</sup>

On the same day, President Obama spoke on the FOIA to incoming members of the Cabinet and staff of the White House and stated in relevant part:

The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over. Starting today, every agency and department should know that this administration stands on the side not of those who seek to withhold information but those who seek to make it known. To be sure, issues like personal privacy and national security must be treated with the care they demand. But the mere fact that you have the legal power to keep something secret does not mean you should always use it. The Freedom of Information Act is perhaps the most powerful instrument we have for making our government honest and transparent, and of holding it accountable. And I expect members of my

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<sup>17</sup> *Supra* at note 17.

<sup>18</sup> PRESIDENT BARACK OBAMA, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act*, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

administration not simply to live up to the letter but also the spirit of this law.<sup>19</sup>

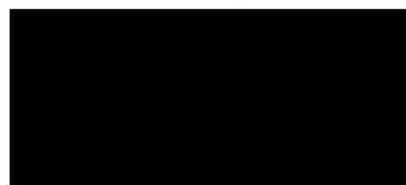
If it is your position that any portion of the requested information is exempt from disclosure, Cause of Action requests that you provide a detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.

In the event that some portions of the requested information are properly exempt from disclosure, please redact such portions and produce all remaining reasonable segregable non-exempt portions of the requested record.<sup>20</sup> If you contend that information contains non-exempt segments, but those non-exempt segments are so dispersed throughout as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. If a request is denied in full, please outline that it is not possible to segregate portions of the record for release.

In an effort to facilitate record production within the statutory limit, Cause of Action prefers to accept information and/or documents in electronic format (e.g., e-mail, .pdf). When necessary, Cause of Action will accept the "rolling production" of information and/or documents, but requests that you provide prompt notification of any intent to produce information on a rolling basis.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact me

[REDACTED]  
[REDACTED] immediately, at [REDACTED]. Please note that, for the purposes of responding to this request, the attached Definition of Terms should be interpreted consistently. We look forward to receiving a decision regarding our request for expedited processing within ten (10) calendar days in accordance with 49 C.F.R. 7.31(c)(4). Thank you for your attention to this matter.



Encl. Responding to Document Requests, Definitions

<sup>19</sup> PRESIDENT BARACK OBAMA, *Remarks by the President in Welcoming Senior Staff and Cabinet Secretaries to the White House*, Jan. 21, 2009, available at <http://oversight.house.gov/hearing/foia-in-the-21st-century-using-technology-to-improve-transparency-in-government/>.

<sup>20</sup> See 5 U.S.C. § 552(b).

## **Responding to Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Cause of Action.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Cause of Action's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the specific document request or portion thereof in Cause of Action's request to which the documents respond.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
6. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Cause of Action staff to determine the appropriate format in which to produce the information.
7. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

9. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
10. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
11. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
12. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

### **Definitions**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmation, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other

written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.