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SIMON V. KINSELLA
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February 5, 2021

State Comptroller Thomas P. DiNapoli
New York Office of the State Comptroller
110 State Street
Albany, NY 12236

C/o: Privacy Appeals Officer
PrivacyAppealsOfficer@osc.ny.gov

Re: FOIL Request – Appeal
(reference #2020-0628)

Dear Mr. DiNapoli,

Pursuant to New York State’s Freedom of Information Law (“FOIL”), I now appeal the constructive denial by the Office of the State Comptroller (the “OSC”) of access to records sought in FOIL request #2020-0628 filed December 26, 2020.¹

On January 5, 2021, OSC Records Access Officer Jane Hall acknowledged receipt of said FOIL request stating that “I will contact you within twenty business days to advise you regarding our determination or, if additional time is needed [emphasis added].”

On February 4, 2021, I received a follow-up letter from Ms. Hall advising me that OSC is “continuing to gather the records for your request. Due to the type of records involved and the nature of the review process, it may take up to 90 business days before we make a determination and provide those records that may be available ... no later than 06/14/2021 [emphasis added.]” Still, it has been over forty days and FOIL compels the OSC to either advised me of its determination in whole or in part (and request time if needed) or granted me access to the requested records.² The OSC has done neither. Accordingly, the OSC has “denied [me] access to a record ... within thirty days”³ and its failure “to conform to the provisions of subdivision three of this section shall constitute a denial.”⁴

¹ Exhibit 1 – FOIL Request for Information by Simon V. Kinsella of December 26, 2020

² NY Public Officers Law § 89 (3) (a)

³ *Ibid*

⁴ *Id.* § 89 (4) (a)

Even if the OSC had satisfied its obligations pursuant to FOIL (which it has *not*) and had determined to grant my request “in whole or in part ... within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part [emphasis added;]”⁵ but the OSC’s response merely cites the “type” of records and the “nature” of review, but provides neither a reason why an amendment to a contract is of such “type” nor why the “nature” of review is so exceptional that it requires a total of four month to “make a determination and provide those records that may be available.” If this scenario were applicable (it is *not*), a “reasonable time [would depend] ... on attendant circumstances such as volume of request, possibility that other requests have been made, necessity to conduct legal research, search and retrieval techniques used to locate records[,]”⁶ but the OSC has failed to cited any such reasons or any reason.

Furthermore, it is difficult to imagine why it would conceivably take the OSC four months to provide a copy of an amendment to a contract where the contract (of one hundred and thirty-eight pages and explanatory memorandum of thirty-four pages, twenty-six attachments) was approved within only two months. The underlying contract had been fully executed by February 6, 2017, and approved by the OSC on March 29, 2017.⁷ The OSC would have received the amendment (executed in September 2020⁸) in October 2020 (if not sooner). Allowing for the same length of time it took the OSC to approve the power purchase agreement (i.e., two months), it would reasonably follow that the amendment would have been approved by December 2020. Therefore, there is no plausible reason why the OSC requires six months (until June 14, 2021) to provide a copy of what it received in October 2020 and should have approved by December 2020.

⁵ NY Public Officers Law § 89 (3) (a)

⁶ New York State Department of State, Committee on Open Government, Advisory Opinion 12219

⁷ Exhibit 2 – South Fork Power Purchase Agreement (“PPA”) between then Deepwater Wind South Fork LLC and LIPA executed February 6, 2020 (signatory & cover pages only)

⁸ Exhibit 3 – South Fork RFP “Last Updated: September 30th, 2020” that reads (footnote): “An amendment to the existing power purchase agreement between LIPA and Deepwater Wind was executed by LIPA and is being reviewed by the NYS Comptroller’s Office [emphasis added].”

February 5, 2021

According to Freedom of Information Law, I look forward to hearing from you (or whoever you designated to determine appeals) within ten business days after receiving this appeal. Should the requested records be denied on appeal, please explain the reasons for the denial fully in writing as required by law.

I expressly reserve my right to keep this FOIL request open through to the date of the OSC's substantive response as expressed in my FOIL request of December 26, 2020.

Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

This matter is currently before the New York State Public Service Commission under Article VII (case 18-T-0604). Therefore, I request that the OSC provide the requested records on an expedited basis please.

Should the OSC fail to meet its statutory obligations under FOIL, I will not delay seeking judgment pursuant to Article 78 of the Civil Practice Law and Rules and enjoin New York State Department of Public Service.

Sincerely yours,



Si Kinsella

C/c: Privacy Appeals Officer
Office of the State Comptroller
110 State Street
Albany, New York 12236-0001
Email: PrivacyAppealsOfficer@osc.ny.gov

Cameron Macdonald, Esq.
Government Justice Center, Inc.
30 South Pearl Street, Suite 1210
Albany, New York 12207
Email: Cam@GovJustice.org

Records Access Officer
Office of the NYS Comptroller
110 State Street
Albany, NY 12236-0001
Fax: +1-518-473-8940
Email: FOIL@OSC.State.NY.US



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NEW YORK 12236

THOMAS P. DiNAPOLI
STATE COMPTROLLER

PRESS OFFICE
Tel: (518) 474-4015
Fax: (518) 473-8940

February 04, 2021

Mr. Simon Kinsella
PO Box 792
Wainscott, NY 11975

Re: FOIL Request #2020-0628

Dear Mr. Simon Kinsella,

This is to follow up on your request pursuant to the Freedom of Information Law (Public Officers Law, Article 6; hereinafter "FOIL") dated 12/26/2020, receipt of which has been previously acknowledged, in which you requested Any amendment(s) to the Power Purchase Agreement ("PPA") between then Deepwater Wind South Fork, LLC (now, South Fork Wind, LLC) and Long Island Power Authority ("LIPA") executed February 2017 (OSC contract number: C000883) together with all appendices and/or attachments referred to in said amendment(s) including but not limited to the contract price(s), any increase or decrease in contract price over the term of the PPA, and information necessary to determine whether or not prices other than those as expressed in the PPA apply to the pricing of energy delivered by South Fork Wind, LLC.

We are continuing to gather the records for your request. Due to the type of records involved and the nature of the review process, it may take up to 90 business days before we make a determination and provide those records that may be available.

We will write to you no later than 06/14/2021 and inform you of any cost associated with producing or photocopying the records.

I trust this information is helpful.

Sincerely,

Jane Hall
Records Access Officer



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NEW YORK 12236

THOMAS P. DiNAPOLI
STATE COMPTROLLER

PRESS OFFICE
Tel: (518) 474-4015
Fax: (518) 473-8940

January 05, 2021

Mr. Simon Kinsella
PO Box 792
Wainscott, NY 11975

Re: FOIL Request #2020-0628

Dear Mr. Simon Kinsella,

I have received your Freedom of Information Law request dated 12/26/2020 and received in this office on 12/28/2020 via email.

I have asked the appropriate personnel within this agency to gather the requested information to the extent that it is kept or held by this agency.

We will process your request as soon as possible. After the records you described are retrieved, we will be better able to determine if additional time is needed to review the records to establish whether they are available pursuant to FOIL and, if they are, to reproduce the records.

I will contact you within twenty business days to advise you regarding our determination or, if additional time is needed, to provide a date when you can expect our determination. If such records are available under FOIL, we will notify you when you may expect to receive the records.

Sincerely,

Jane Hall
Records Access Officer

E-MAIL: [SI@WAINSCOTT.LIFE](mailto:Si@WAINSCOTT.LIFE)

SIMON V. KINSELLA
P.O. BOX 792
WAINSCOTT, N. Y. 11975

MOBILE: (631) 903-9154

December 26, 2020

Records Access Officer
Office of the NYS Comptroller
110 State Street
Albany, NY 12236-0001

Sent via Fax and Email
Fax: +1-518-473-8940
Email: FOIL@OSC.State.NY.US

Re: FOIL Request - South Fork Wind, LLC

Dear Sir or Madam:

Pursuant to New York State Freedom of Information Law (FOIL), I hereby request a copy of each “record” of the Office of the NYS Comptroller (“OSC”) and each “agency” of the OSC (as the terms “record” and “agency” are defined in Public Officers Law §86), specifically:

1. Any amendment(s) to the Power Purchase Agreement (“PPA”) between then Deepwater Wind South Fork, LLC (now, South Fork Wind, LLC) and Long Island Power Authority (“LIPA”) executed February 2017 (OSC contract number: C000883) together with all appendices and/or attachments referred to in said amendment(s) including but not limited to the contract price(s), any increase or decrease in contract price over the term of the PPA, and information necessary to determine whether or not prices other than those as expressed in the PPA apply to the pricing of energy delivered by South Fork Wind, LLC.

Please note the recent ruling by Hon. Richard Rivera in Article 78 matter of *Simon V. Kinsella vs. Office of the New York State Comptroller* (index 904100-19, attached) pertaining to the subject PPA whereby the Court found that “the record requested was of significant interest to the general public as the records sought consisted of the contract prices which would affect the pricing of utilities supplied to the general public” and that Public Officers Law §87(2)(d) does *not* apply.

For the avoidance of doubt, I am not requesting records pertaining to how the contract price is derived, records of formulae or costing information which may be considered to be legitimate “trade secrets”.

The time period covered by this FOIL request is from August 1, 2020 through the date of your response to this request. I am willing to pay the applicable fee for delivery of copies of the requested records. The requested records may be delivered via email (Si@Wainscott.Life) or via United States Postal Service (addressed to: PO Box 792, Waincott, NY 11975).

Thank you very much for your cooperation.

Sincerely yours,



Si Kinsella

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

SIMON V. KINSELLA,

Petitioner,

DECISION

Index No.: 904100-19

-against-

OFFICE OF THE NEW YORK STATE COMPTROLLER,

Respondent.

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

RIVERA, RICHARD J.

Petitioner filed a petition on July 9, 2019 seeking an order of this Court finding that the respondent acted unlawfully in failing to produce records in response to petitioner's FOIL request, directing the respondent to release the requested records, and awarding attorneys' fees and cost to the petitioner. The respondent filed an Answer to the petition on August 26, 2019.

The respondent submitted correspondence to the Court on November 12, 2019 indicating that the materials requested by the petitioner had been supplied to the petitioner in full. The respondent stated that they requested that petitioner's counsel discontinue the proceedings based on the release of the records sought herein. Counsel for petitioner submitted correspondence to the Court dated November 13, 2019 stating that the petitioner would not discontinue the proceeding and that the petitioner sought an award of attorneys fees.

The issues raised in the petition regarding disclosure of the requested records are now

moot based on the respondent's voluntary release of the records. *See Matter of Whitehead v. Warren County Bd. of Supervisors*, 165 AD3d 1452 (3rd Dept. 2018). Notwithstanding, the Court will address the request for attorneys fees. *Id.*

Attorneys fees may be awarded in a FOIL proceeding when 1) the petitioner substantially prevails; 2) the record requested was of clearly significant interest to the general public; and 3) the agency lacked a reasonable basis in law for withholding the record. *See Legal Aid Soc'y v. New York State Dep't. of Social Servs.*, 195 Ad2d 150, 153-154 (3rd Dept. 1993). However, even where the three prongs are established an award of counsel fees lies within the discretion of the trial court. *Id.*; *see also URAC Corp. v. PSC*, 223 AD2d 906, 907 (3rd Dept. 1996).

In the instant matter the petitioner received the requested records subsequent to the filing of the Article 78 petition and has therefore substantially prevailed. *See Whitehead* at 1453-1454 (holding that the receipt of items requested establishes that the petitioner substantially prevailed). The Court finds that the record requested was of significant interest to the general public as the records sought consisted of the contract prices which would affect the pricing of utilities supplied to the general public. However, the Court does not find that the respondent lacked a reasonable basis in law for withholding the requested records. Freedom of Information Law provides an exemption for disclosure of records which constitute trade secrets or "are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise". Pub. Officers Law §87(2)(d).

The respondent supplied the full contract to the petitioner with the pricing figures redacted. In correspondence included in the record the respondent set forth the reasons for redacting the pricing figures and set forth a reasonable argument as to why disclosure of the costs and opportunities could have a detrimental impact to the respondent and the contract provider. The respondent further expanded upon these reasons in the Memorandum of Law and Affirmations submitted in opposition. Accordingly, the Court finds that there was a reasonable

basis in law for withholding the requested records.

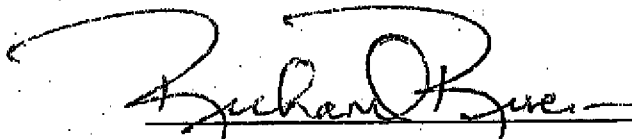
Based on the foregoing the request for counsel fees is denied. Even if there was not a reasonable basis for withholding the requested information the award of counsel fees is not required and falls within the discretion of the Court. *See URAC at 907.*

Accordingly the petition Index No. 904100-19 is dismissed.

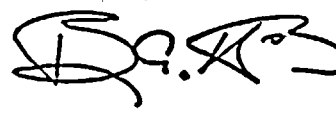
This constitutes the decision and order of the Court.

Dated:

1/14/20



HON. RICHARD RIVERA, A.S.C.J.



07/24/2020

Last Transaction

Date	Time	Type	Station ID	Duration	Pages	Result
				Digital Fax		
Dec 26	3:28PM	Fax Sent	15184738940	1:58 N/A	4	OK