Exhibit C

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March 27, 2019

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

Send via USPS and Fax
Fax: 1-518-473-8940

Re: FOIL Request – Appeal
(reference # 2018-694)

Dear State Comptroller DiNapoli:

Pursuant to New York State's Freedom of Information Law (FOIL), I hereby appeal the decision of the Office of the State Comptroller ("OSC") to deny me access to the records per my FOIL request (with reference: 2018-694) of November 26, 2018 (please see attached).

The aforementioned FOIL request asked the OSC to grant me access to the "Power Purchase Agreement ("PPA") between Deepwater Wind South Fork, LLC ("Deepwater Wind SF") and the Long Island Power Authority ("LIPA") executed February 2017 (OSC contract number: C000883)" and specifically "the contract price and any increase or decrease in contract price" contained therein.

The OSC provided the PPA, but the contract price was redacted, thereby denying me access to the requested records.

The OSC denied my request citing PSL Section 87(2)(d) which authorizes an agency to withhold records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

The OSC failed to address the legal issues that were raised in my FOIL request of November 26, 2018. These issues were largely drawn from the Committee on Open Government's FOIL Advisory Opinions numbers 12656 and 19286 (please see attached).

In a more recent opinion (dated March 13, 2019), the Assistant Director of the Committee on Open Government, Kristin O'Neill, said that where an algorithm is used to make "important government decisions" that "neither the vendor nor the county should be permitted to claim trade secret status." Although this opinion was in reference to an algorithm written by a vendor to calculate residential property assessments for Nassau County, the same principle is applicable here.

In this matter, the state authority is the OSC, the vendor is Deepwater Wind SF and the "important government decision" is whether or not the PPA is in the public interest. As in the Committee on Open Government's recent opinion, the "important government decision" is largely reliant upon information that has been given "trade secret status" – the contract price. It is impossible for the public to determine whether PPA is in the public interest or not without knowing the contract price which has been denied them.

The principle at issue here is whether or not the OSC should be permitted to give the contract price as expressed in the PPA "trade secret status". I do not believe it should.

In this matter, it is important to note that the subject enterprise is a corporate vehicle or shell company. Typically, corporate vehicles are used by their holding companies solely to bid on a specific contract to supply electricity from an offshore wind farm. Only if a bid is successful and the corporate vehicle is awarded with a PPA, does it then begin the process of applying for permits to start building its wind farm. It is standard practice for a separate corporate vehicle or shell company to be used to submit a bid for each contract. In this case, the holding company is Ørsted US Offshore Wind ("Ørsted") formerly Deepwater Wind, LLC and the corporate vehicle is Deepwater Wind SF.

As at the time of writing this appeal, there are only six wind-farm operators that have been awarded with a PPA to supply electricity within the US and Ørsted has a controlling interest in five.

Of the five wind farms where Ørsted holds a controlling interest, three have disclosed their respective contract prices and one contract is still under negotiation (the contract price is due to be disclosed upon signing). The sole exception is the subject enterprise (please see Table 1 below) that has refused to publicly disclose the executed contract price per its PPA claiming trade secret status.

Table 1

Corporation / Name of Offshore Wind Farm	Offshore Wind Developer(s)	Electricity Market	Date Contract Price Released	Levelized Contract Price
Avangrid Inc. & Copenhagen Infrastructure Partners	Vineyard Wind LLC / Vineyard Wind	State of Massachusetts	July, 2018	6.5 c/kWh
Ørsted US Offshore Wind [2]	Revolution Wind CT	State of Connecticut	*Contract price under negotiation*	
Ørsted US Offshore Wind [2]	Revolution Wind RI	State of Rhode Island	February, 2019	7.4 c/kWh
Ørsted US Offshore Wind [2]	Skipjack Offshore Energy, LLC / Skipjack Wind Farm [4]	State of Maryland	May, 2017	13.2 c/kWh [4]
Ørsted US Offshore Wind [2]	Deepwater Wind Rhode Island, LLC / Block Island Wind Farm	Block Island, Rhode Island	Aug, 2010	24.4 c/kWh [1]
Ørsted US Offshore Wind [2]	Deepwater Wind South Fork, LLC / South Fork Wind Farm	Long Island, New York	Trade Secret (22 to 25 c/kWh) [3]	

Notes: 1 Contract includes a yearly increase in price of 3.5%
2 Ørsted US Offshore Wind formerly owned by Deepwater Wind, LLC
3 Estimated contract price based on New York State Comptroller Open Book Valuations of $1.6 billion & $388 million.
4 Skipjack Offshore Energy, LLC and U.S. Wind, Inc. submitted separate bids but the levelised contract price is for both wind farm operators combined.

Neither the OSC, the subject enterprise nor its holding company, Ørsted, has explained the inconsistent application of trade secret status regarding an executed contract price. Why is the subject enterprise in this case permitted to conceal its contract price under the cloak of trade secret status, but not done the same for its other four wind farms?

Regarding the claim that subject enterprise would suffer "substantial injury" to its "competitive position" if its contract price were to be disclosed, this claim is not supported by the evidence. In fact, the evidence supports the opposite.

In 2010, Deepwater Wind Rhode Island, LLC (the Block Island Wind Farm) publicly disclosed its contract price which was followed by Skipjack Offshore Energy, LLC (Deepwater Wind's Maryland wind farm) in 2017. At the time, both these corporations were owned by Deepwater Wind, LLC (now Ørsted). Yet, despite these two wholly owned subsidiaries of Deepwater Wind, LLC disclosing their respective contract prices, the competitive position of Deepwater Wind, LLC did not suffer. On the contrary, Deepwater Wind, LLC, went on to successfully compete against other wind-farm developers by winning the next two contracts – a 400-megawatt wind farm for Rhode Island and a 300-megawatt wind farm for Connecticut – and, under the new ownership of Ørsted, is now the most successful wind-farm operator in the US market today.

It is difficult to argue that an executed contract price is a "trade secret … which if disclosed would cause substantial injury to the competitive position of the subject enterprise", therefore, where having disclosed the contract price for all but one of its wind farms, that same company is the most competitive and the most successful wind-farm operator in the United States.

Finally, by permitting the price as expressed in an executed public contract to be hidden from public scrutiny under the cloak of trade secrets, the OSC is leaving the door wide open for any public authority to conceal the price contained in any public contract. Such a sea-change in public policy would undermine the purpose of the Freedom of Information Law, which is "to shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse" (Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)).

Pursuant to Freedom of Information Law, I look forward to hearing from you (or whomever is 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.

For avoidance of doubt, I expressly reserve my right to keep the time period covered by this FOIL request open through to the date of the response to this request by the OSC as expressed in my FOIL request of November 26, 2018, including my request for –

> *The PPA between Deepwater and LIPA executed November 2018 together with all appendices and/or attachments referred to in the PPA including but not limited to the contract price and any increase or decrease in contract price over the term of the PPA.*

In addition, please be advised that the 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.

Thank you for your assistance.

Sincerely yours,

Si Kinsella

Si Kinsella

C/c: Ms. Camille Jobin-Davis
Records Appeals Officer
Office of the State Comptroller
110 State Street, 14th Floor
Albany, New York 12236

Ms. Jane Hall
Records Access Officer
Office of the State Comptroller
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November 26, 2018

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
Deepwater Wind South Fork, 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. The Power Purchase Agreement ("PPA") between Deepwater Wind South Fork, LLC ("Deepwater") and the Long Island Power Authority ("LIPA") executed February 2017 (OSC contract number: C000883) together with all appendices and/or attachments referred to in the PPA including but not limited to the contract price and any increase or decrease in contract price over the term of the PPA; and

2. The PPA between Deepwater and LIPA executed November 2018 together with all appendices and/or attachments referred to in the PPA including but not limited to the contract price and any increase or decrease in contract price over the term of the PPA.

In the event that either Deepwater and/or LIPA claims that contract price(s) are "trade secrets … submitted . . . by a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise" (Public Officers Law § 87(2)(d)), the OSC must provide "persuasive evidence" that disclosure would cause the harm envisioned by an exception to rights of access and that a "speculative conclusion that disclosure might potentially cause harm" or similar blanket denial is insufficient to meet the burden of proof (Markowitz v. Serio, 11 NY3d 43, 51, 862 NYS2d 833 [2008]).

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

I am requesting the negotiated contract price and terms as expressed in the PPA. The subject of the PPA, the South Fork Wind Farm, is "unique" (Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 [1980]) insofar as its location, capacity, technology, distance of delivery, infrastructure needs, geology, regulatory environment, etc., and the PPA, as stated in Contracting Plumbers, *supra*, has been "negotiated independently with certain benefits and concessions … depending upon circumstances particular to" the South Fork Wind Farm. Disclosure of the contract price, therefore, would neither adversely impact negotiating positions nor substantially injure the competitive position of future projects.

This FOIL request is in the public interest and the specific interest of Long Island ratepayers who ultimately will have to pay the contract price. Revealing the terms of public contracts fosters the purpose of the Freedom of Information Law "to shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse" (Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)).

In early 2017, the deadline for submission of bids had been reached and the PPA was awarded to Deepwater. Deepwater, therefore, as the "successful bidder [has] no reasonable expectation of not having its bid open to the public" (Contracting Plumbers, *supra*). As stated in Contracting Plumbers, *supra*, and confirmed in a case involving a request for a copy of a successful proposal following an award, "Once the contract was awarded ... the terms of [the] RFP response could no longer be competitively sensitive" (Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346, 634 NYS2d 575, 577 [1995]).

Furthermore, the holding company of Deepwater disclosed the contract price to the ratepayers of Rhode Island and Maryland for two of its subsidiaries, namely Deepwater Wind Rhode Island, LLC of Rhode Island (24.4 ¢/kWh with a 3.5% yearly increase) and Skipjack Offshore Energy, LLC of Maryland (13.2 ¢/kWh with a 1% yearly increase). The ratepayers of Long Island should be treated in the same way and the contract price should be disclosed as it was to the ratepayers of Rhode Island and Maryland.

The time period covered by this FOIL request is from January 1, 2017 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 vie email (Si@Wainscott.Life) or via United States Postal Service (addressed to: PO Box 792, Wainscott, NY 11975).

Thank you very much for your cooperation.

Sincerely yours,

Si Kinsella

Si Kinsella

State of New York
Department of State
Committee on Open Government

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July 28, 2015
FOIL-AO-19286
E-Mail

TO:
FROM: Robert J. Freeman, Executive Director
CC:

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear :

As you are aware, I have received your letter, and I hope that you will accept my apologies for the delay in response.

The issue involves a request made pursuant to the Freedom of Information Law (FOIL) by your client for certain records of the Office for People with Developmental Disabilities (hereafter "the Office"). The records sought relate to a situation in which your client engaged in a procurement process that resulted in a "tentative award" in March. Nevertheless, the records sought were withheld on the basis of §87(2)(c) of FOIL, which states that an agency may withhold records or portions of records when disclosure "would impair present or imminent contract awards…" It was contended that even though a tentative award was announced, "the Office's deliberative process continues and the procurement is not yet the subject of a final agency determination." It was also stated that disclosure "would impair the Office's competitive position in negotiating a successful final procurement award and contract", and that "the request includes materials for which the submitting parties have requested protection from FOIL due to the materials' proprietary or trade secret nature."

In this regard, as a general matter, FOIL is based on a presumption of access. Stated differently, all agency records are available, except those records or portions of records that fall within one or more of the exceptions to rights of access appearing in §87(2) of FOIL. Reference was made by the Office to two of the exceptions.

In the exception referenced above, §87(2)(c), the key word is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

As we understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure of those bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor a bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied.

In a decision rendered nearly thirty-five years ago, however, it was held that after the deadline for submission of bids or proposals has been reached and a contract has been awarded, "the successful bidder had no reasonable expectation of not having its bid open to the public" (Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 [1980]). Conversely, the Court of Appeals sustained the assertion of §87(2)(c) in Murray v. Troy Urban Renewal Agency, (453 NYS2d 400, 56 NY2d 888 [1982]), in which the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld.

As stated in Contracting Plumbers, *supra*, and confirmed in a case involving a request for a copy of a successful proposal following an award, "Once the contract was awarded...the terms of [the] RFP response could no longer be competitively sensitive" (Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346, 634 NYS2d 575, 577 [1995]). When a tentative award was announced, the records that you requested would be required to be made available to the public at least in part; in our opinions, no longer would disclosure "impair" the ability of the Office to reach a fair and optimal agreement on behalf of the public.

Some have suggested that disclosure is beneficial. If, for example, the award is later rejected, disclosure might enable other entities interested in contracting with an agency to offer a lower price or, in the case of an RFP, to better meet the needs of an agency and offer a better value. In that event, disclosure would not impair, but rather would enhance the government's ability to reach a positive or optimal agreement.

The reference in the response to §89(5) of FOIL relates to §87(2)(d), which permits an agency to deny access to records insofar as disclosure "would cause substantial injury to the competitive position" of a commercial entity. Therefore, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

"[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475)."

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

"...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore,

the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, (639 NYS2d 990, 87 NY2d 410 [1995]). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

"FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained..."

As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise..." (Id., 419-420).

Whether or the extent to which the Office could meet the burden of demonstrating that disclosure would cause actual harm to the competitive position of a commercial entity is unknown. Nevertheless, it is clear that the burden of justifying secrecy is hardly automatic; on the contrary, the courts have been demanding in determinations involving the assertion of §87(2)(d).

The Court of Appeals, has clearly confirmed that in order to meet the burden of proof in denying access to records, agencies must provide "persuasive evidence" that disclosure would cause the harm envisioned by an exception to rights of access. In a decision dealing specifically with §87(2)(d), it was determined that a "speculative conclusion that disclosure might potentially cause harm" is insufficient to meet the burden of proof .(Markowitz v. Serio, 11 NY3d 43, 51, 862 NYS2d 833 [2008]).

Lastly, it is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY2d 267 (1996)], stating that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception

separate from that referenced in response to your client's request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (Matter of Fink v. Lefkowitz, supra, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.)."

In the context of your client's request, the Office appears to have engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access.

In an effort to encourage reconsideration of the determination to deny access, a copy of this opinion will be forwarded to Anne J. Binseel, the Appeals Officer at the Office.

I hope that I have been of assistance.

FOIL-AO-f19286
19286

State of New York
Department of State
Committee on Open Government

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May 7, 2001

FOIL-AO-12656

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear

I have received your letter of January 8, 2001 and related materials. According to your letter and the correspondence between you and the State University at Albany Records Access Officer, Stephen Beditz, and the Records Appeal Officer, L. Jeffrey Perez, Ph.D., you requested from the University at Albany certain contracts between the University Auxiliary Services, Inc. (UAS) and campus vendors, and the UAS operating budget. You have received portions of contracts between UAS and some campus vendors, i.e., Barnes & Noble, Chartwells, and Coca-Cola. However, you have questioned the propriety of deletions made prior to their disclosure.

The November 27, 2000 letter to you regarding the Barnes & Noble contract from the Appeals Officer states in pertinent part that:

"Your appeal challenges the University's redaction of certain portions of the contract between UAS and B&N and its failure to provide you copies of the current UAS operating budget, the food services contracts between UAS and Chartwells and copies of contract for other providers of student services at the University (e.g., Pizza Hut, Coca-Cola and the hair salon). I am affirming Mr. Beditz' response to your request for the following reasons:

"It is my understanding from consultation with University representatives that certain financial information in the contract between UAS and B&N had been redacted, as Mr. Beditz stated, based upon B&N's claim that disclosure of such information would cause substantial injury to its competitive position. The redaction of such information was undertaken in accordance with the provisions of section 87(2)(d) of the Public Officers Law which allows denials of access to records or parts thereof which, if disclosed, would cause substantial injury to the competitive position of the person or entity from whom the information was obtained.

"B&N has claimed that release of certain information contained in its contract with UAS would have a substantial impact upon its competitive position because each contract is unique and contains certain proprietary information. B&N has further indicated that each contract is negotiated independently with certain benefits and concessions afforded to the host campus, such as mark-ups, guarantees and expenditures, depending upon circumstances particular to that campus. Release of the information redacted from the copy provided to you, B&N contended, would adversely impact its negotiating position with other campuses as well as place it at a competitive disadvantage with respect to competing local and national bookstores. Since competition in business turns on the relative costs and opportunities faced by each competitor, the provisions of section 87(2)(d) advance the public policy of the State to further its economic development efforts and attract business by protecting businesses from the deleterious consequences of the disclosure of confidential commercial information."

The November 30, 2000 letter to you from Mr. Beditz regarding the Chartwells contract also indicated that "certain financial information in that document has been redacted based on Chartwells' claim that disclosure of such information would cause substantial injury to its

competitive position." Similarly, his letter of January 25, 2001 stated that the Coca-Cola contract was provided "with trade secret information redacted."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As suggested in the materials, the only ground of denial of significance is §87(2)(d), which permits an agency to withhold records or portions thereof that:

"are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Further, when a commercial entity is required to submit records to a state agency, pursuant to §89(5), it may request, at the time of submission, that the records or portions thereof be kept confidential in accordance with §87(2)(d). The University, through its responses to you, has indicated that portions of the records have been withheld on that basis.

I question whether either §87(2)(d) or, therefore, §89(5) would be applicable at all. The redactions involve the terms of negotiated agreements developed by the parties to those agreements; they are not records that were submitted to SUNY by a commercial enterprise. If that is so, I do not believe that §87(2)(d) would be applicable or that it would serve as a basis for a denial of access.

Even if those provisions are applicable, I do not believe that a denial of access is justifiable. In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

"[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

"...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the

matter are a subject of general knowledge in the trade, then any property right has evaporated."

From my perspective, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

"FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...

"As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.

"Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:

Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

In my view, the redacted portions of the contracts (i.e., numeric figures) are not trade secrets and likely would not cause substantial injury to the competitive position of the subject enterprises. They are not analogous to a process, formula, or financial information which shows the strengths or weaknesses of an entity. Rather, they indicate the amounts to be paid and received as the result of negotiation between two parties, and I believe that that kind of information must be disclosed.

It has been held that vendors who choose to bid on contracts to provide service to public agencies have no reasonable expectation of privacy, and that a successful bidder on a public contract "had no reasonable expectation of not having its bid open to the public" (see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS2d 196 (1980)].

The Appeals Officer wrote that each contract is "unique" and "is negotiated independently with certain benefits and concessions afforded to the host campus, such as mark-ups, guarantees and expenditures, depending upon circumstances particular to that campus." If indeed the contracts are unique, the deleted portions would have limited commercial value, if any, and their disclosure could not adversely impact negotiating positions on other campuses. Consequently, providing the redacted portions would not substantially injure the competitive position of the subject enterprises. Moreover, the contracts are not related to the enhancement of economic development or attracting business. Rather, they fulfill an aspect of SUNY's mission.

Revealing the terms of public contracts fosters the purpose of the Freedom of Information Law "to shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse" (see Encore, supra).

As I view §89(5) of the Freedom of Information Law, when a commercial enterprise seeks a guarantee that the agency to which its records are submitted will not disclose the records, and the agency confers confidentiality and upholds the guarantee of confidentiality following an appeal by a person whose request for the record has been denied, the agency has the burden of proof in its defense of the denial in any ensuing proceeding commenced for review of the denial. Stated differently, to continue the protection accorded by §89(5), an agency must believe that it can prove to a court that disclosure would, in fact, cause substantial injury to the competitive position of the commercial enterprise that submitted the record. If the agency does not believe that it can meet that burden of proof or does not have sufficient knowledge or information to ascertain the merits of the commercial entity's contentions, it must indicate that the request to the person seeking the record will be granted, in which case, following the exhaustion of administrative remedies, the commercial entity that submitted the record has fifteen days to commence a proceeding for the purpose of demonstrating to a court that disclosure would cause substantial injury to its competitive position.

As indicated earlier, agency records are presumptively available under the Freedom of Information Law, including those submitted to an agency by a commercial enterprise. In my opinion, while §89(5) provides procedural protection to commercial enterprises that are required to submit records to state agencies, its terms preserve the presumption of access and place the burden of defending secrecy either on a state agency based on its conclusion that disclosure would cause substantial injury to the competitive possession of a commercial enterprise, or on the commercial enterprise. It appears that the position taken by SUNY essentially forces the applicant for the record to expend time, effort and money to seek judicial review of the agency's denial of access to the information redacted from the contracts. As an alternative, the agency, under §89(5), in recognition of the presumption of access, could grant the applicant's request, and thereby shift the burden of proof to the vendors. Thereafter, the commercial entity claiming that disclosure would cause substantial injury to its competitive position may choose to initiate a proceeding to defend against disclosure, in which case it would have the burden of proof. In that event, the commercial enterprise, rather than the person seeking the records, would bear the expense and burden of attempting to block disclosure and litigating the matter.

It is also your view that SUNY should provide you with additional documents pertaining to the UAS operating budget. The December 29, 2000 letter from Mr. Beditz states in relevant part that:

"On November 30, 2000 I wrote in response to your earlier request for information under the New York State Public Officers Law, Freedom of Information. In that correspondence, I transmitted the University Auxiliary Services Corporation's current budget in summary form, and indicated that detailed information was available should you desire. You subsequently telephoned my office, seeking that additional information.

"In conducting additional research to identify the specific records you seek, I have determined that those additional documents are not records as defined in the Law. The NYS Public Officers Law, Article 6, Section 86.4 defines a record as '...an information kept, held, filed, produced or reproduced by, with or for an agency...' Indeed, the summary budget I transmitted is kept on file in the University's Controller's Office and therefore meets the definition of a public record, and is accessible. However, the detailed records that are used to compile that document are not held by

or for the Controller or any other University office. Accordingly, access to such documents is not reached under the provisions of Section 87 and its exceptions."

It is emphasized that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

For instance, it has been found that records maintained by an attorney retained by a industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Most importantly, in Encore (supra, 417) it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Based on the foregoing, insofar as the records sought are maintained by or for UAS, I believe that they are, in essence, SUNY's records, and that SUNY would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: L. Jeffrey Perez, Ph.D.
Stephen J. Beditz

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