

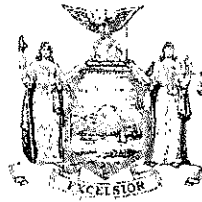
Exhibit D

From: [Melissa Fountain](#)
To: [Si Kinsella](#)
Cc: robert.freeman@dps.ny.gov; [Jane E Hall](#); jmiskiewicz@lipower.org
Subject: Appeal 199-02 (FOIL Request No. 2018-694)
Date: Tuesday, April 09, 2019 1:46:10 PM
Attachments: [19-02letter.pdf](#)
[S14C0519040808300.pdf](#)

Please see attached regarding Appeal 19-02 (FOIL Request No. 2018-694)

Melissa Fountain
NYS Office of the State Comptroller
Secretary
Division of Legal Services
(518)473-5880
mfountain@osc.ny.gov

THOMAS P. DINAPOLI
STATE COMPTROLLER



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

DIVISION OF LEGAL SERVICES
110 State Street - 14th Floor
Albany, NY 12236
Tel: (518) 474-3444
Fax: (518) 473-9104

April 9, 2019

Simon V. Kinsella
P.O. Box 792
Wainscott, NY 11975
SI@WAINSCOTT.LIFE

Re: Appeal 19-02 (FOIL Request No. 2018-694)

Dear Mr. Kinsella:

This is in response to your March 27, 2019 appeal, regarding your November 26, 2018 request for records, and our subsequent response on March 20, 2019, pursuant to the Freedom of Information Law.

In short, you appealed the denial of access to price information redacted from the record provided, namely the Power Purchase Agreement (Agreement) between Deepwater Wind South Fork, LLC and the Long Island Power Authority (LIPA) executed February 2017 (PBC01-C000883-6015200).

Public Officer Law Section 87(2)(d) authorizes an agency to withhold portions of records 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. Such Agreement was redacted in keeping with LIPA's correspondence of May 25, 2017 (attached), from Thomas Falcone, LIPA Chief Executive Officer. Further, James Miskiewicz, LIPA Deputy General Counsel, notes as follows:

"[N]ote Encore College Bookstores, Inc. v. ASI Corp., 87 N.Y.2d 410 (1995) ("Commercial information . . . 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."), citing to the federal Freedom of Information Act upon which New York's FOIL statute was modelled. From a state-wide perspective, NYSERDA is presently involved in reviewing bids it received earlier this year in response to an RFP for additional off-shore wind, and will continue to issue other RFPs in the future as it meets the goal of 9000 MW.

As Mr. Miskiewicz states, "The impairment of getting the best offer from developers as [LIPA] head[s] into a period of repeated offshore wind procurement seems to be exactly what the Court of Appeals noted above. NYSERDA has taken the same position as LIPA and has redacted those publicized portions of developer bids that would set forth pricing details. See: <https://www.nyserda.ny.gov/All-Programs/Programs/Offshore-Wind/Offshore-Wind-Solicitations/Generators-and-Developers/2018-Solicitation>."

In response to the additional contentions set forth in your appeal, please note that the price information redacted from the Agreement was not developed pursuant to an algorithm, and, there is no legal requirement that an agency honor a prospective or ongoing request for records that may be received at some point in the future.

Sincerely,



Camille S. Jobin-Davis
Special Counsel for Ethics
FOIL Appeals Officer

Attachment

cc: Robert Freeman, Committee on Open Government
James Miskiewicz, LIPA Deputy General Counsel
Jane Hall, Records Access Officer



Thomas Falcone
Chief Executive Officer
516.222.7700

May 25, 2017

Professor Jeremy Firestone
University of Delaware
College of Earth Ocean and Environment
373 ISE Lab
Newark, DE 19716

Dear Professor Firestone,

I write in response to your appeal of the denial of your Freedom of Information Law (FOIL) request by LIPA General Counsel Jon R. Mostel in which you seek un-redacted copies of the power purchase agreement (PPA) with Deepwater Wind and other documentation setting forth pricing and other commercially-sensitive information. For the reasons set forth below, I affirm the denial of your FOIL request.

Background

On January 27, 2017, shortly after the LIPA Board of Trustees approved the PPA, you sought a copy of the agreement "or other similar documents regarding the sale of power to LIPA by Deepwater Wind or its affiliates from an offshore wind power project and documents about the cost of the undersea cable to East Hampton." LIPA responded on February 3, 2017 that no records could be disclosed because the PPA remained under review by the Office of the Comptroller of the State of New York. You were nevertheless directed to LIPA's public website where public materials regarding the project had been posted.

On February 3, 2017, you responded that "irrespective of whether a more detailed contract is subject to further review and amendment *** I want the documents that support the LIPA decision as to cost and price of the project." You further indicated that you wished to have your FOIL treated as a continuing request.

On April 10, 2017, following the Comptroller's approval of the PPA, Mr. Mostel denied your FOIL request because the information you sought fell within FOIL's exception to disclosure, as provided in Public Officers Law §87(2)(d), in that the information constituted "trade secrets" which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

On May 8, 2017, you filed the instant appeal arguing that similar contracts in Europe and elsewhere in the United States had been made publicly available and that such "uniformity of practice" negated LIPA's ability to assert a claim of privilege.



Discussion

Pursuant to Public Officers Law § 87(2)(d), LIPA may "deny access to records or portions thereof that . . . are trade secrets or are submitted . . . by a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." The "trade secret" principle under the federal Freedom of Information Act (the template for New York's FOIL statute) was discussed in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). There the Supreme Court noted 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 (citations omitted). The New York State Public Service Commission has adopted a virtually identical definition and rules governing the submission of such material to that agency and protection of the privilege. *See* 16 NYCRR 6-1.3 *et seq.* In *Kewanee*, the Court added that "the 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.* 475.

That a private entity such as Deepwater Wind over the course of its dealings with a state authority may provide records to an authority, or in this case reach a negotiated price for services, does not negate the availability of exceptions to disclosure provided under FOIL. *Markowitz v. Serio*, 11 N.Y.3d 43, 49 (2008). Records submitted by a private entity at the behest of a state authority are subject to public disclosure unless the private entity asserts that a FOIL exemption applies and meets its burden of establishing the basis for nondisclosure. *Id.* *See also, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132, 490 N.Y.S.2d 488, 480 N.E.2d 74 [1985]; *Matter of New York Tel. Co. v. Public Serv. Commn.*, 56 N.Y.2d 213, 219-220, 451 N.Y.S.2d 679, 436 N.E.2d 1281 [1982]). Accordingly, the New York State Court of Appeals has held that FOIL exemptions are regarded as having been grafted onto "certain limitations on the disclosure of otherwise accessible records." *Id.* at 50 (citing *Matter of Xerox Corp.*, 65 N.Y.2d at 132).

Here, the information you seek is set forth in provisions of the PPA which Deepwater Wind explicitly asked be treated and marked as confidential, as defined by New York's FOIL law. Regarding your separate request for cost breakdowns for the undersea and underground cable connecting the project to the LIPA system, no such records exist as such price and the cost elements are subsumed within the PPA itself. Notwithstanding your assertion that confidentiality claims lack "credulity," Deepwater Wind's requests for confidential treatment of this information meets the necessary burden for establishing a basis for nondisclosure. As a private entity operating in a growing and competitive market to generate renewable energy, disclosure of the information in your FOIL would work a competitive disadvantage to Deepwater Wind in any future contracts it may pursue to provide renewable energy with utilities in the region. For that reason, Deepwater has a reasonable interest in maintaining



the subject of your request "a trade secret" that is not a matter "of public knowledge or of a general knowledge in the trade or business." *Kewanee, supra*.

Your reliance on public disclosure of similar information in Europe or in other states raises no basis for reversing the denial of your FOIL request. The agreements that you cite as having been publicly disclosed were disclosed precisely because state laws mandated public agency review and approval of agreements reached between private entities. See e.g., *In re Proposed Town of New Shoreham Project*, 25 A.3d 482 (2011) (Reviewing Rhode Island's "Renewable Energy Standard" and the adequacy of the State's Public Utilities Commission's public review of the "terms and pricing" of a PPA struck by Deepwater Wind pursuant to requirements of Rhode Island law). No similar mandate for public review of pricing information applies here. The PPA was approved in accordance with LIPA's enabling statute, requiring approval by LIPA's Board, and review and approval by the New York State Attorney General and Comptroller.

Accordingly, for the reasons discussed, I affirm denial of the FOIL.

Sincerely,

/s/ Thomas Falcone

Thomas Falcone

cc: Robert Freeman, Committee on Open Government