

Appendix B

From: James Miskiewicz
To: [Si Kinsella](mailto:Si.Kinsella)
Cc: robert.freeman@dps.ny.gov
Subject: RE: FOIL Request - Deepwater Wind
Date: August 31 2017 17:30:57
Attachments: [DR-0014 Attachment Consideration of Approval of Power Purchase Agreement for Offshore Wind.pdf](#)
[DeepWater-PPA OSC approved_Redacted.pdf](#)

Dear Ms. Kinsella,

On behalf of Jon R. Mostel, LIPA's Records Access Officer, I write in response to your Freedom of Information Law (FOIL) request seeking:

- 1) All records of communications about the proposed off-shore wind farm being developed to deliver electricity to eastern Long Island between or among any of the Entities and LIPA and any other agency of the LIPA;
- 2) Any confidentiality agreement and/or any non-disclosure agreement between or among any of the Entities and LIPA and/or any agency of LIPA; and,
- 3) All records pertaining to any confidentiality agreement and/or any non-disclosure agreement between or among any of the Entities and LIPA and/or any agency of LIPA.

With regard to your request for all communications about the Deepwater Wind project, copies of LIPA's request for proposals to develop electric generation for the South Fork is publicly available at <https://www.psegliny.com/page.cfm/AboutUs/Proposals/SouthFork> and <https://www.psegliny.com/files.cfm/SFRFP1.pdf>. See also the publicly-available 2016 presentation to the LIPA REV Committee of the Board of Trustees.

<http://www.lipower.org/pdfs/company/papers/board/committees/REV/09212016/Discussion%20of%20the%20South%20Fork%20RFP.pdf>.

Other media coverage is also available via the Internet. LIPA does not maintain such articles as a record under the definition of FOIL. Also attached is a memorandum to the full Board by LIPA CEO Thomas Falcone seeking approval of the Power Purchase Agreement (PPA) in January 2017. As you know, the PPA was approved by the Board in January and subsequently by the New York State Attorney General and Comptroller's Offices as required by state procurement law.

Regarding your request for confidentiality agreements, Public Officers Law § 87(2)(d) permits LIPA to "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 a secret, and must not be of public knowledge or of a general knowledge in the trade or business." *Id.* 475.



Attached is a redacted version of the Purchase Power Agreement (PPA) between LIPA and Deepwater. The information redacted pertains to certain pricing and cost formulas that are regarded as trade secrets. Pursuant to provisions within the attached PPA, Deepwater Wind explicitly asked that the redacted information be treated as confidential, as defined by New York's FOIL law.

Pursuant to Section 89(4) of FOIL, if you believe any portion of your request has been improperly denied, any appeal on this decision may be made in writing within 30 business days to Thomas Falcone, Chief Executive Officer, Long Island Power Authority, 333 Earle Ovington Blvd, Suite 403, Uniondale, New York 11553.

Please feel free to contact me with any questions.

Sincerely,
James Miskiewicz
Special Counsel

From: Si Kinsella [<mailto:Si@FinkKinsella.com>]
Sent: Friday, August 11, 2017 3:16 PM
To: FOIL <foil@lipower.org>
Subject: FOIL Request - Deepwater Wind

Records Access Officer, Jon R. Mostel:

Please see Freedom of Information Law (FOIL) request (attached).

Sincerely yours,
Si Kinsella

Si Kinsella
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