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CLIENT'S COPY  
COPY

**MARK LAGERKVIST,**

Plaintiff,

v.

**NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,** and  
**MATTHEW J. COEFER,** in his official  
capacity as the Custodian of Government  
Records,

Defendants.

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MERCER COUNTY**

**DOCKET NO.:**

Civil Action

**VERIFIED COMPLAINT**

Plaintiff MARK LAGERKVIST, by way of Verified Complaint against the  
Defendants, alleges as follows:

**THE PARTIES**

1. Plaintiff Mark Lagerkvist (hereinafter, "Plaintiff") is a natural person who manages and operates a news-gathering enterprise called "New Jersey Watchdog", with offices at 331 Newman Springs Road, #143, Red Bank, New Jersey 07701. Plaintiff files this action pursuant to the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq. and the common-law right of access to public records (hereinafter "common law right to know").

2. Defendant, the New Jersey Department of Environmental Protection (hereinafter “Defendant NJDEP”), is a public agency of the State of New Jersey and is a principal department of the Executive Branch of the State Government as defined by N.J.S.A. 47:1A-1.1, and is charged with the duty to provide public access to documents and government records consistent with the requirements of the OPRA and the common law right to know.

3. Defendant, Matthew J. Coefer (hereinafter “Defendant Coefer”), is an employee of the New Jersey Department of Environmental Protection and serves as the Custodian of Government Records (hereinafter “Custodian”) as defined by N.J.S.A. 47:1A-1.1, and is charged with the duty to provide public access to documents and government records consistent with the requirements of the OPRA and the common law right to know.

#### **JURISDICTION AND VENUE**

4. This court has jurisdiction over this action pursuant to N.J.S.A. 47:1A-6 because it is an action to challenge a decision or decisions made by the Custodian for Defendant NJDEP.

5. Venue is proper pursuant to R. 4:3-2(a)(2) because the causes of action asserted herein arose in Mercer County, New Jersey, and because the Defendant NJDEP is located in Mercer County, New Jersey.

#### **FACTUAL ALLEGATIONS**

6. On June 28, 2010, Plaintiff filed an OPRA request with Defendant NJDEP, and sought access to (1) various records pertaining to the “Global Warming Solutions Fund” in the possession of Defendant NJDEP, in addition to (2) various public records, including

“... the results of the Regional Greenhouse Gas Initiative’s (RGGI) first eight carbon auctions, including the names of all bidders, the price of each bid and the quantity and type of allowances sold to each successful bidder.” Defendant NJDEP acknowledged Plaintiff’s request and assigned it an OPRA Request Tracking Number of 93900 (the “June 28 Request”). A copy of this OPRA Request is attached here as **Exhibit A**.

7. Plaintiff asserts that Defendant NJDEP holds the responsibility to manage and supervise the state’s participation in the Regional Greenhouse Gas Initiative and/or Regional Greenhouse Gas Initiative, Inc. (hereinafter “RGGI”), based in part upon Plaintiff’s review of the New Jersey Administrative Code regulating the state’s “CO-2 Budget Trading Program”, N.J.A.C. 7:27C.

8. Plaintiff asserts that Defendant NJDEP must reasonably have in its possession the RGGI auction records requested by Plaintiff in order for Defendant NJDEP to perform its duties under the applicable New Jersey Administrative Code and applicable enabling statutes, based in part upon Plaintiff’s review of the New Jersey Administrative Code regulating the state’s “CO-2 Budget Trading Program”, N.J.A.C. 7:27C.

9. Plaintiff asserts that the requested records are not reasonably subject to any exceptions to the OPRA or the common law right to know. Plaintiff further asserts that the records for similar emissions allowance auctions are subject to routine and longstanding public disclosure, based in part upon Plaintiff’s review of the United States Environmental Protection Agency’s (hereinafter “EPA”) U.S. Acid Rain Program (hereinafter “ARP”) and the EPA’s practice of regular production and public release of detailed auction information, such as names of bidders, price of individual bids, quantity and types of allowances

(hereinafter “acid rain allowances”) sold relating to allowable levels of production of sulfur dioxide emissions. Copies of EPA’s online disclosure of the 2010, 2003 and 1994 ARP Auction results are attached here as **Exhibit B**, **Exhibit C** and **Exhibit D**, respectively.

10. Ten (10) states, including New Jersey, currently comprise the participating “Signatory States” which govern the operation of the RGGI, which is a 501(c)(3) tax exempt corporation with offices in New York State. The RGGI board of directors consists of the leaders of each state’s energy regulatory agency (in New Jersey, the Board of Public Utilities) and state environmental regulatory agency (in New Jersey, Defendant NJDEP). A copy of the first page of RGGI’s 2008 IRS Form 990 is attached here as **Exhibit E**. A copy of the RGGI by-laws is attached here as **Exhibit F**.

11. RGGI is a cooperative effort to establish a mandatory carbon dioxide emissions program, entered into by the governors of the Signatory States through a Memorandum of Understanding (hereinafter the “MOU”) signed on December 20, 2005, as amended. A copy of the MOU is attached here as **Exhibit G**. A copy of the initial amendment to the MOU is attached here as **Exhibit H**. A copy of the second amendment to the MOU (not including signature pages) is attached here as **Exhibit I**.

12. Plaintiff made the OPRA records requests to Defendants because the information contained therein is important to the public policy formation process in New Jersey concerning the CO-2 auction market. To date, New Jersey has sold almost \$73 Million in governmental allowances at RGGI managed CO-2 emissions auctions, according to RGGI disclosures. A copy of the “Auction Results” posted on the RGGI website is attached here as **Exhibit J**.

13. On July 13, 2010, Defendant NJDEP and Defendant Coefer denied Plaintiff's June 28 Request for access to records pertaining to the CO-2 allowance auctions conducted for Defendant NJDEP by RGGI ("RGGI auction records"). Defendants' response to Plaintiff's June 28 Request is attached here as **Exhibit K**.

14. On July 13, 2010, Defendants responded to Plaintiff's June 28 Request for various records pertaining to the "Global Warming Solutions Fund" (hereinafter the "Fund") in the possession of Defendant NJDEP by providing Plaintiff with redacted copies of some records pertaining to the Fund. While not fully responsive to the Plaintiff's request for such records, this response by Defendants is not contested in this action by Plaintiff. See **Exhibit K**.

15. In its denial of Plaintiff's June 28 Request for access to the RGGI auction records, Defendant NJDEP and Defendant Coefer a) contended that the Defendant NJDEP "does not have the documents responsive to your request in its possession." See **Exhibit K, page 3**. Defendants also contended that the requested records, even if in the possession of Defendants, would not be made available to Plaintiff under OPRA "confidentiality" exceptions to the definition of "public record" intended to protect: b) trade secrets and/or proprietary commercial or financial information, and c) information which, if disclosed, would give an advantage to competitors or bidders. Defendants also denied the June 28 Request based upon d) a balancing of the interests of the ten Signatory States to the RGGI MOU and the potential harm to the performance of the auctions against the private right to access and disclosure of such documents, and Defendants' decision that the private right of access would be outweighed by the public interest in confidentiality of certain records

maintained by Defendant NJDEP, and e) a claim that the disclosure of subject records to Plaintiff would violate an expectation of privacy held by bidders in the RGGI auctions. See **Exhibit K pages 3 and 4.**

16. On or about July 13, 2010, Jonathan Schragg, executive director of RGGI, placed a telephone call to Plaintiff in response to various Plaintiff inquires directed to RGGI. Mr. Schragg told Plaintiff that RGGI routinely provided to Defendant NJDEP the informational details of CO-2 auctions facilitated by RGGI, including information concerning participating purchasers and the number of allowances purchased by each.

17. On or about July 30, 2010, Plaintiff filed a subsequent OPRA request (hereinafter the "July 30 Request") and sought records of the written and electronic communication between Defendant NJDEP and RGGI "from 2008 to the present". Defendant NJDEP acknowledged Plaintiff's request and assigned it an OPRA Request Tracking Number of 94968. A copy of this OPRA Request is attached here as **Exhibit L.**

18. Defendants responded to Plaintiff's July 30 Request by electronic form letter dated August 18, 2010. Defendants a) partially denied the July 30 Request under the deliberative records exception to the OPRA, b) partially denied the July 30 Request under the confidentiality exception to the OPRA based upon Defendant NJDEP's claim of attorney-client privilege, c) partially denied the July 30 Request under the confidentiality exception to the OPRA based upon Defendant NJDEP's claim that the records, if made available to Plaintiff, would give an advantage to competitors or bidders in the ongoing RGGI auction process, d) partially denied the July 30 Request under the confidentiality exception to the OPRA based upon Defendant NJDEP's claim that the records constituted trade secrets and/or

proprietary commercial or financial information, e) partially denied the July 30 Request based upon a balancing of the interests of the ten Signatory States to the RGGI MOU and the potential harm to the performance of the auctions against the private right to access and disclosure of such documents, and Defendants' decision that the private right of access would be outweighed by the public interest in confidentiality of certain records maintained by Defendant NJDEP, and f) informed Plaintiff that an "Extraordinary Time Service Charge" (hereinafter "service charge") of approximately \$11,250 would be imposed upon Plaintiff should Plaintiff request that Defendants commence efforts to produce an undetermined number of records, if any, deemed by Defendants to be appropriate for public disclosure. Defendants' response to Plaintiff's July 30 Request is attached here as **Exhibit M**.

19. Defendants failed to provide Plaintiff with any basis or information to support Defendants' assertion, in the July 13 response to Plaintiff, of the "expectation of privacy" exception to the OPRA based upon the claim that bidders in the RGGI auctions have an expectation of privacy for certain information.

20. Defendants failed to provide Plaintiff with any basis or information to support Defendants' assertion, in both the July 13 and August 18 responses to Plaintiff, of the confidentiality exception to the OPRA based upon the claim that the records constituted trade secrets and/or proprietary commercial or financial information.

21. Defendants failed to provide Plaintiff with any basis or information to support Defendants' assertion, in both the July 13 and August 18 responses to Plaintiff, of the confidentiality exception to the OPRA based upon the claim that the records, if disclosed to

Plaintiff, would give an advantage to competitors or bidders in the ongoing RGGI auction process.

22. Defendants failed to provide Plaintiff with any basis or information to support Defendants' assertion, in both the July 13 and August 18 responses to Plaintiff, that a balancing of the interests of the ten Signatory States to the RGGI MOU and the potential harm to the performance of the auctions against the private right to access and disclosure of such documents, resulted in a reasonable conclusion that the private right of access would be outweighed by the public interest in confidentiality of certain records maintained by Defendant NJDEP, necessitating the denial of requested records to Plaintiff.

23. Defendants failed to provide Plaintiff with any basis or information to support Defendants' assertion, in the August 18 response to Plaintiff, of the confidentiality exception to the OPRA based upon the claim of attorney-client privilege.

24. Defendants failed to provide Plaintiff with any basis or information to support Defendants' assertion, in the August 18 response to Plaintiff, that the deliberative process exception to the OPRA necessitated the denial of at least some of the requested records to Plaintiff.

25. In the August 18 response to Plaintiff, Defendants presented Plaintiff with an unreasonably high service charge of \$11,250 to be imposed upon Plaintiff should Plaintiff request that Defendants commence efforts to produce records requested in the July 30 Request.

26. Plaintiff asserts that the Defendants are required to provide all the requested records pursuant to the OPRA because none of the records qualify for exemption from the OPRA under the statutory “expectation of privacy” exception to the OPRA.

27. Plaintiff asserts that the Defendants are required to provide all the requested records pursuant to the OPRA because none of the records qualify for exemption from the OPRA under the statutory confidentiality exception based upon the claim that the records constituted trade secrets and/or proprietary commercial or financial information.

28. Plaintiff asserts that the Defendants are required to provide all the requested records pursuant to the OPRA because none of the records qualify for exemption from the OPRA under the statutory confidentiality exception based upon the claim that the records, if disclosed to Plaintiff, would give an advantage to competitors or bidders in the ongoing RGGI auction process.

29. Plaintiff asserts that Defendants are required to provide all the requested records pursuant to the common law right to know because none of the records qualify for exemption based upon a balancing of the interests of the ten Signatory States to the RGGI MOU and the potential harm to the performance of the auctions against the private right to access and disclosure of such documents.

30. Plaintiff asserts that the Defendants are required to provide all the requested records pursuant to the OPRA because none of the records qualify for exemption from the OPRA under the statutory confidentiality exception based upon the claim of attorney-client privilege.

31. Plaintiff asserts that the Defendants are required to provide all the requested records pursuant to the OPRA because none of the records qualify for exemption from the OPRA under the deliberative process exception to the OPRA.

32. Plaintiff asserts that Defendants are required to provide all the requested records at no cost to Plaintiff or at minimal cost to Plaintiff because none of the records qualify for exemption from either the OPRA or the common law right to know and therefore no extraordinary expenditure of time or effort is necessary for Defendants to accommodate the Plaintiff's requests.

33. All records and documents requested by Plaintiff are subject to the disclosure requirements of the OPRA.

34. All records and documents requested by Plaintiff are subject to the disclosure requirements of the common law right to know.

35. Defendants' refusal to make all the records requested by Plaintiff available for onsite access, inspection, examination or copying, at either no cost or minimal cost to Plaintiff, constitutes a violation of the OPRA.

36. The Defendants' refusal to make all the records requested by Plaintiff available for onsite access, inspection, examination or copying, at either no cost or minimal cost to Plaintiff, constitutes a violation of the common law right to know.

37. Plaintiff asserts that both Defendant NJDEP and Defendant Coefer have knowingly and willfully violated the OPRA, as amended and supplemented, and have unreasonably denied access to Plaintiff under the totality of the circumstances.

**WHEREFORE**, Plaintiff Mark Lagerkvist respectfully asks that this Court enter final judgment as follows:

A. Entering an Order declaring that Defendants have wrongfully and knowingly withheld the requested agency records;

B. Directing Defendants to provide access to true and exact copies of all the requested records to the Plaintiff;

B. Maintaining jurisdiction over this action until Defendants comply with the OPRA, the common law right to know, and every order of this Court;

C. Awarding to Plaintiff all reasonable attorney's fees and costs incurred in this action, pursuant to N.J.S.A. 47:1A-6;

D. Ordering Defendants to determine and implement standard guidelines for OPRA requests consistent with the findings of this Court;

E. Imposing an appropriate civil penalty upon Defendant Coefer pursuant to N.J.S.A. 47:1A-11;

F. Granting to Plaintiff all other relief deemed just and proper by this Court.

JOHN P. GINTY  
Attorney for Plaintiff

By: 

JOHN P. GINTY




DATED: August 26, 2010

**DESIGNATION OF TRIAL COUNSEL**

*PLEASE TAKE NOTICE* that pursuant to the provisions of R. 4:5-1(c) and R. 4:25-4, JOHN P. GINTY, Esq., is hereby designated as trial counsel for Plaintiff Mark Lagerkvist in the this matter.

DATED: August 26, 2010



JOHN P. GINTY  
Attorney for Plaintiff Mark Lagerkvist

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**CERTIFICATION**

The undersigned hereby certifies the following, pursuant to R. 4:5-1(b)(2) and R. 1:4-4(b):

1. To the best of my knowledge and belief, this matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding, nor is any such proceeding contemplated.

2. To the best of my knowledge and belief, there are no other parties who must be joined in this action.

I certify that the foregoing statements are true. I am aware that if any one of the foregoing statements is willfully false, I am subject to punishment.

DATED: August 26, 2010



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JOHN P. GINTY  
Attorney for Plaintiff Mark Lagerkvist

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**CERTIFICATION OF COMPLIANCE WITH RULE 1:38-7(c)**

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with R. 1:38-7(b).

DATE: August 26, 2010



JOHN P. GINTY  
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