

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE  
COMMITTEE ON OPINIONS

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,

and

PSEG ENERGY RESOURCES &  
TRADE, LLC,

Defendant-Intervenor.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION-MERCER COUNTY

DOCKET No.: MER-L-2185-10

CIVIL ACTION  
OPINION

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Decided: July 12, 2011

John P. Ginty, for the plaintiff (Mr. Ginty, on the brief).

Paula T. Dow, Attorney General, for the defendant (Jung W. Kim, Deputy Attorney General, of counsel; Eileen P. Kelly, Deputy Attorney General, Christine Piatek, Deputy Attorney General and Ms. Kim, Deputy Attorney General, on the brief).

Alexander C. Stern, for the defendant-intervenor (Mr. Stern, on the brief).

FEINBERG, A.J.S.C.

I.

PROCEDURAL HISTORY

This matter is before the court on a verified complaint and order to show cause, filed by plaintiff, Mark Lagerkvist ("plaintiff"), against defendants, New Jersey Department of Environmental Protection ("NJDEP") and Matthew J. Coefer ("Coefer")(collectively "defendants"). The complaint alleges defendants failed to comply with the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"), and the common law right of access.

Plaintiff manages and operates a news-gathering enterprise called "New Jersey Watchdog." NJDEP, a public agency, is a principal department of the Executive Branch of the State government as defined by N.J.S.A 47:1A-1.1. Defendant, Matthew J. Coefer, is an employee with NJDEP and serves as the government records custodian. The Regional Greenhouse Gas Initiative ("RGGI") is a cooperative effort by ten states, including New Jersey, to establish a mandatory carbon dioxide emissions program.

On June 28, 2010, plaintiff submitted OPRA request #93900 ("June 28 OPRA request") seeking access to: (1) records pertaining to the "Global Warming Solutions Fund;" (2) public records, including the "results of the Regional Greenhouse Gas

Initiative first eight carbon auctions and the names of all bidders, the price of each bid and the quantity and type of allowances sold to each successful bidder." (Compl. Ex. A.)

On July 30, 2010, plaintiff filed a second OPRA request, identified as #94968, ("July 30 OPRA request") seeking records of written and electronic communications between defendant NJDEP and RGGI "from 2008 to present." (Compl. Ex. L.)

On July 13, 2010, defendants responded to the June 28 OPRA request. In the response, defendants redacted copies of certain records pertaining to the Fund<sup>1</sup> and denied the request for RGGI Auction records by stating NJDEP "does not have documents responsive to your request in its possession." (Compl. Ex. K.)

The Revised Addendum Disposition Notes reflected on defendants' response provides:

Even if the documents requested were in possession of NJDEP, this request item would be subject to exemptions provided by OPRA for records that if provided would give an advantage to competitors or bidders in the ongoing RGGI auction process. As such they are confidential pursuant to N.J.S.A. 47:1A-1.1. These requested items would also be subject to confidentiality as trade secrets and/or propriety commercial/financial pursuant to N.J.S.A. 47:1A-1.1, and based on and an expectation of privacy for certain information pertaining to the bidders of the auction. N.J.S.A. 47:1A-1.1. Finally, balancing the

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<sup>1</sup> These records are not in dispute.

interest of the ten Signatory States to the Memorandum of Understanding for RGGI and the potential for harm to the performance of the auctions against the private right to access and disclosure of such documents, the private right to access would be outweighed by the public interest in confidentiality of any records maintained by RGGI, Inc. Please note that there is publicly available information that might be of interest on RGGI, Inc.'s website at [www.rggi.org/co2-auctions/market\\_monitor](http://www.rggi.org/co2-auctions/market_monitor).

[Compl. Ex. K.]

On August 18, 2010, defendants responded to the July 30 OPRA request. The Revised Addendum Disposition Notes on defendants response to the OPRA request states:

Part of this request has been denied on the basis that the requested records are deliberative pursuant to N.J.S.A. 47:1A-1.1. In addition, part of this request has been denied on the basis that the requested records are within attorney-client privilege and confidential pursuant to N.J.S.A. 47:1A-1.1. In addition, part of this request has been denied on the basis that the requested records would give an advantage to competitors or bidders in the ongoing RGGI auction process. As such they are commercial/financial pursuant to N.J.S.A. 47:1A-1.1. Also part of this request would be subject to confidentiality as trade secrets and/or propriety commercial/financial pursuant to N.J.S.A. 47:1A-1.1. Finally, balancing the interests of the ten Signatory States to the Memorandum of Understanding for RGGI and the potential harm to the performance of the auctions against the private right to access and disclosure of such documents, the private right to access would be outweighed by the public interest in confidentiality of certain records

maintained by NJDEP. Based on extraordinary expenditure of time involved in the production of emails, the NJDEP would assess an Extraordinary Time (EOT) Service Charge pursuant to N.J.S.A. 47:1A-5c & N.J.S.A. 47:1A5d and required prepayment of 50% deposit up front prior to any activity. This extraordinary expenditure of time involves the physical production of the emails, the removal of non-responsive emails, and the required review and redaction of any privilege information. The result of the electronic email search has identified approximately 7,500 target emails. The NJDEP assess a processing time of 1.5 minutes per email, which equates to approximately 187.5 hours to produce the records for access. By applying an average EOT rate for the NJLPS<sup>2</sup>-Division of Law representative of \$60/hour the estimated extraordinary time service charge is approximately \$11, 250.

[Compl. Ex. M.]

On August 27, 2010, plaintiff filed a verified complaint seeking an order: (1) declaring defendants wrongfully and knowingly withheld the requested agency records; (2) directing the court to retain jurisdiction until defendants comply with OPRA and the common law right of access; (3) awarding reasonable attorney fees; (4) requiring defendants to determine and implement standard guidelines for OPRA requests consistent with the findings of this court; (5) imposing an appropriate civil penalty upon defendant pursuant to N.J.S.A. 47:1A-11; and

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<sup>2</sup> NJLPS stands for the New Jersey Department of Law and Public Safety-Division of Law.

(6) granting other relief that the court deems just and equitable. Several exhibits were attached to the complaint.<sup>3</sup>

On September 7, 2010, the court signed an order to show cause directing defendants to demonstrate why the aforementioned relief plaintiff seeks should not be granted.

On November 24, 2010, defendants filed a motion to dismiss and/or summary judgment, a brief in support of the motion and five certifications. On December 30, 2010, plaintiff filed opposition, two certifications and a cross-motion seeking a reasonable period of time to permit plaintiff to conduct discovery. R. 4:46-5. On January 14, 2011, defendants filed a reply in support of their motion to dismiss and/or for summary judgment.

On February 18, 2011, the parties appeared for oral argument. Given the complexities of the issues, after oral argument, the court directed the parties to supplement the

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<sup>3</sup> (1) Exhibit A is a copy of the June 28 OPRA request; (2) Exhibits B, C, and D are copies of the EPA online disclosure of the 2010, 2003, and 1994 ARP Auction results; (3) Exhibit E is a copy of the first page of RGGI's 2008 IRS form; (4) Exhibit F is a copy of the RGGI bylaws; (5) Exhibit G is a copy of the Memorandum of Understanding, signed by the governors of the ten Signatory States to the RGGI; (6) Exhibits H and I include copies of the first amendment and second amendment to the Memorandum of Understanding; (7) Exhibit J is a copy of the Auction results posted on the RGGI website; (8) Exhibit K is defendants' reply to the June 28 request for various records pertaining to RGGI; (9) Exhibit L is a copy of plaintiff's July 13, 2010 OPRA request; and (10) Exhibit M is a copy of defendants' response to plaintiff's July 13, 2010 OPRA request.

record. Consistent with that determination, on March 14, 2011, the court signed an order: (1) directing the parties to submit additional information; (2) directing counsel to notify the State if plaintiff decided to modify the scope of the second OPRA request; (3) directing the parties to attempt to amicably resolve the amount or rate for the Extraordinary Time Service Charge ("EOT"); (4) requiring NJDEP to provide copies of the redacted and un-redacted documents to the court, along with a privilege log identifying NJDEP's reasons for non-disclosure; and (5) establishing return dates for the supplemental papers.

On April 25, 2011, the parties filed supplemental briefs and certifications. Defendants submitted a privilege log, documents for the court to review in camera review and nine certifications. Plaintiff filed a brief and two certifications.

On May 5, 2011, plaintiff submitted a supplemental letter brief to support the request to obtain a reasonable period of time to conduct discovery and, more specifically, to depose William Shobe ("Shobe"). According to plaintiff, statements in Shobe's certification, and conclusions set forth in the RGGI report, of which he was one of five authors, were contradictory.

On May 13, 2011 defendants submitted an updated privilege log listing reasons why certain documents were withheld. In

that transmittal, defendants advised the court: (1) that the plaintiff had modified and limited the OPRA request to "all correspondence between DEP and RGGI, Inc." for a three-day period surrounding each auction; and (2) the parties had amicably resolved the EOT charge.

On May 16, 2011, the court entered an order granting the motion to intervene filed by PSEG Energy Resources & Trade, LLC ("PSEG").<sup>4</sup> On May 20, 2011, plaintiff filed a reply.

On June 3, 2011, defendants filed a final reply and two additional certifications.

On June 17, 2011 the parties appeared for oral argument. During oral argument plaintiff advised the court that New Jersey intended to withdraw from RGGI. As a result, plaintiff argued that the State no longer had an interest in withholding the information as confidential. Defendants disagreed, as did the court.

## II.

### BACKGROUND

#### A. THE REGIONAL GREENHOUSE GAS INITIATIVE

RGGI is a regional program entered into to reduce CO<sub>2</sub> emissions from large fossil fuel-fired electricity generating units ("EGUs"). As of 2008, the Governors of ten states signed

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<sup>4</sup> PSEG filed a certification supporting non-disclosure and a dismissal of the complaint.

a Memorandum of Understanding ("MOU"). The ten states include: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New Hampshire, New York, Rhode Island and Vermont ("Participating States").<sup>5</sup>

Pursuant to the MOU, each Participating State agreed to establish its own CO<sub>2</sub> budget trading program by statute and/or regulation. Such programs allow each state to implement RGGI independently, but concurrently, under its own regulations. New Jersey currently implements its CO<sub>2</sub> Budget Trading Program and participates in the RGGI pursuant to the Air Pollution Control Act, N.J.S.A. 26:2C-8, the Global Warming Solutions Fund Act, N.J.S.A. 26:2C-45 et seq., and the rules adopted pursuant to N.J.A.C. 7:27C-1.1 et seq.

**B. CO<sub>2</sub> ALLOWANCE TRADING PROGRAM AND AUCTION**

A "CO<sub>2</sub> allowance" is a "limited authorization by the Department, or a participating state under the CO<sub>2</sub> Budget Trading Program to emit up to one ton of CO<sub>2</sub> . . . ." N.J.A.C. 7:27C-1.2.

DEP rules provide for a reduction of CO<sub>2</sub> by 2.5 percent per year to achieve a ten percent reduction by 2018. N.J.A.C. 7:27C-5.1. The CO<sub>2</sub> Budget Trading Program is defined by

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<sup>5</sup> While Governor Christie announced the State intends to withdraw participation in the RGGI effective December 31, 2011, New Jersey will still participate in the remaining auctions in 2011

N.J.A.C. 7:27C-1.2, in which CO<sub>2</sub> allowances are to be made "available for sale through an auction administered on behalf of the NJDEP, pursuant to N.J.A.C. 7:27C-5.5." N.J.A.C. 7:27C-5.4(a); see N.J.A.C. 7:27C-5.2(a).

Under N.J.A.C. 7:27C-5.5(b), NJDEP is authorized to delegate "implementation and administrative support functions" for CO<sub>2</sub> allowance auctions "to an agent qualified to conduct auctions, including a regional entity, provided that such agent shall perform all such functions under the direction and oversight of the Department." Christopher Sherry ("Sherry"), the research scientist at NJDEP, certifies that NJDEP has delegated this function to RGGI Inc., which manages the auction on behalf of all the states, but does not perform a regulatory role. (Sherry Certif. ¶ 7.)

RGGI, Inc., as distinguished from RGGI, is a nonprofit corporation formed by the Participating States to provide them with technical and administrative services. (Id. at ¶ 12; David Littell ("Littell") Aff. ¶ 11.) These services include the administration of a quarterly auction of CO<sub>2</sub> allowances from the Participating States, a carbon allowance tracking system that records private transfers, and holdings of CO<sub>2</sub> allowances for all the RGGI states.

NJDEP's rules provide standards for conducting auctions. N.J.A.C. 7:27C-5.5 through -5.18. Furthermore, NJDEP must

approve auction results. N.J.A.C. 7:27C-5.16. To participate in the RGGI auction, an Authorized Account Representative ("AAR") must submit specific corporate and financial information, including sensitive corporate business and trade secret information that the AAR often identifies as confidential. (Littell Aff. ¶ 12.)

The auction format is a sealed single-round auction in which bidders can submit multiple bids at varying prices. (Pallas LeeVanSchaick ("LeeVanSchaick") Certif. ¶ 12.) The bids are ranked by bid price from highest to lowest and allowances are awarded. (Ibid.) All allowances are sold at a uniform "clearing price," which the price is paid by allowances by all successful bidders. (Ibid.) Allowances are conveyed to the winning bidders by RGGI, Inc. in lots of 1,000. (Sherry Certif. ¶ 12.)

RGGI, Inc. has implemented its auction responsibilities through two subcontractors: World Energy, which administers the auction process; and Potomac Economics, which acts as an independent Market Monitor that reviews and evaluates conduct of the results. (Id. at ¶ 12.) The Auction Manager presents the winning bidders and the number of CO<sub>2</sub> allowances won by each bidder, but does not disclose individual bid data or the identities of the individual bidders. (Id. at ¶ 11.)

RGGI allowances that are originated by the Participating States and the allowances are held by market participants and regulated entities in the RGGI CO<sub>2</sub> Allowance Tracking System ("RGGI COATS"). (Id. at ¶ 13.) RGGI COATS' subcontractor, SRA International, which directly administers the RGGI COATS system, "executes a batch transfer of CO<sub>2</sub> allowances to all winning bidders." (Id. at ¶ 14.)

New Jersey and the Participating States accept or reject the auction results based on their concurrent review. (Id. at ¶¶ 29-31.) The bidder's behavior in the auction is evaluated to determine whether it falls within the expected range. (LeeVanSchaick Certif. ¶ 30.) Based on the analysis of the Market Monitor, NJDEP must approve or disapprove the auction results based on its evaluation as to whether the auction was conducted in accordance with the requirements of N.J.A.C. 7:27C-5.5 through -5.15. It must also determine if there "was any indication of collusive behavior among auction participants or attempts at market manipulation that impacted the results of the auction." N.J.A.C. 7:27-5.16. The auction is reviewed to determine if any inappropriate influences affected the auction results, including the clearing price. (LeeVanSchaick Certif. ¶ 30; Sherry Certif. ¶¶ 10-11.) To fully evaluate whether an action was statutorily-compliant or improperly influenced, according to NJDEP, it does not need specific information as to

the identity of individual bidders, the price they bid, and the amount of allowances sought and awarded to each. (Sherry Certif. ¶¶ 9-11.)

Other than the first two auctions, which were held in person, the review of the auction results has been conducted using a webinar. This format allows participants to jointly view a presentation on a secure website and participate on a conference call. (Id. at ¶ 9.) According to NJDEP, it does not retain or record the contents of the webinar. (Id. at ¶¶ 9, 11.)

Denise Cavallaro ("Cavallaro"), Network Administrator at NJDEP, assisted Sherry, who had participated in the webinar, to ascertain whether certain webinar information remained on his computer. (Cavallaro Certif. ¶ 2.) Cavallaro examined Sherry's "temporary internet files," which contained an "internet file folder with the log in screen for the ReadyTalk website, the host of the webinar." (Ibid.) However, when Cavallaro attempted to access the ReadyTalk website, it was a secured website that could not be accessed. (Ibid.) Therefore, Cavallaro certified that was the only information located on Sherry's computer regarding the webinar.

After each auction, RGGI publicly releases the auction clearing price and the number of allowances awarded. (LeeVanSchaick Certif. ¶ 14.) Additional auction results are

released in the Market Monitor report. (Ibid.) The Market Monitor report contains aggregate information related to the conduct of the bidders at the auction, which is posted on the RGGI, Inc. website, including: (1) dispersion of projected demand for allowances across individual compliance entities; (2) dispersion of bids by size and category of bidder; (3) a summary of purchased allowances by bidder category; (4) a list showing the amounts of allowances awarded to individual bidders, with names redacted; and (5) a summary of bid prices that shows the minimum, maximum, mean, and median bid prices. (Id. at ¶ 15; see Littell Aff. ¶ 14.)

### III.

#### ANALYSIS

##### A. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim is governed by R. 4:6-2(e). R. 4:6-2 provides:

[i]f, on a motion to dismiss based on the defense numbered in (e), matters outside the pleading[s] are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46 [governing summary judgment motions], and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.

[R. 4:6-2.]

It is similarly well-established in New Jersey case law that when a motion to dismiss relies upon facts outside the pleadings, the motion should be treated as one for summary judgment. See, e.g., Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 324, 337 (App. Div.), cert. denied, 188 N.J. 353 (2006) (citing Pressler, Current N.J. Court Rules, comment 4.1.2 on R. 4:6-2(e) (2006)); Roa v. Roa, 402 N.J. Super. 529, 537 (App. Div. 2008), aff'd 200 N.J. 55, 562 (2010); County of Warren v. State, 409 N.J. Super. 495, 504 (App. Div. 2009), cert. denied 201 N.J. 153 (2010).

Under R. 4:46-2, summary judgment shall be granted if there is "no genuine issue as to any material fact challenged and the moving party is entitled to a judgment or order as a matter of law." See Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 73 (1954). New Jersey courts have clarified the standard and process employed in a summary judgment motion. The court must engage in a weighing process analogous to that of a directed verdict and apply the "same evidentiary standard of proof by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 533 (1995). In other words, when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Id.

(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

Furthermore, in order to survive summary judgment, the factual dispute must be on material, and not insubstantial, issues. See R. 4:46-2. "A non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Liberty Lobby, supra, 477 U.S. at 529. Instead, the non-moving party has the burden "to make an affirmative demonstration, where the means are at hand to do so, that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962), cert. denied, 37 N.J. 229 (1962). Moreover, the facts in the complaint, and all reasonable inferences drawn, must be "viewed in the light most favorable to the nonmoving party." Brill, supra, 142 N.J. at 533.

In addition, summary judgment should not be granted "when the matter is not ripe for such consideration, such as when discovery has not yet been completed." Driscoll Const. Co., Inc. v. State, Dept. of Transp., 371 N.J. Super. 304, 317 (2004) (citing Salmon v. Eli Lilly & Co., 98 N.J. 58 (1984)). Therefore, the court must evaluate the presence of any material issues of fact and the need to resolve these disparities through discovery.

In the present case, the court has considered the pleadings, the relevant statutes, regulations and cases cited by the parties. Clearly, inasmuch as the parties rely on documents outside of the pleadings: to wit, certifications provided by both parties, the matter is more appropriately reviewed as a summary judgment motion.

**B. OPEN PUBLIC RECORDS ACT**

OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions . . . ." N.J.S.A. 47:1A-1. Moreover, public policy requires courts to construe narrowly OPRA's limitations on the right to access government records. Ibid.; Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005); Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)

OPRA defines a "government record" as:

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file . . . or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof . . .

[N.J.S.A. 47:1A-1.1.]

The general definition of a government record is narrowed by naming classes of records that do not qualify as government records under OPRA. When an agency invokes exemptions and denies a citizen access to requested records, "the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g).

OPRA further provides that "[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . institute a proceeding to challenge the custodian's decision by filing an action in Superior Court. . . ." N.J.S.A. 47:1A-6. During the proceeding, the records custodian bears the burden to show that OPRA authorizes nondisclosure of the requested records. Finally, if defendants fail to justify denying the record, the court shall order that plaintiff have access and award a reasonable attorney's fee. Ibid.

When OPRA was passed, the Legislature intended for OPRA "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Lafayette Yard, supra, 183 N.J. at 535 (citing Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329(Law Div. 2004)).

All "public agencies" are subject to OPRA's requirements.

OPRA defines "public agency" as:

any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, **instrumentality or agency created by a political subdivision** or combination of political subdivisions.

[N.J.S.A. 47:1A-1.1 (emphasis added).]

The rules governing New Jersey's participation in the program for trading CO<sub>2</sub> allowances are set forth in N.J.A.C. 7:27C-5.1 et seq. NJDEP must also follow the standards for conducting auctions, which is governed by N.J.A.C. 7:27C-5.1 to -5.18. NJDEP is authorized to delegate its functions of the CO<sub>2</sub> auction pursuant to N.J.A.C. 7:27C-5.5(b), which states in pertinent part:

Implementation and administrative support functions for any CO[2] allowance auction conducted pursuant to N.J.A.C. 7:27C-5.5 through 5.18 may be delegated by the Department to an agent qualified to conduct auctions,

including a regional entity, provided that such agent shall perform all such functions under the direction and oversight of the Department.

[N.J.A.C. 7:27C-5.5(b).]

The bid submittal requirements are as follows:

All bids shall be submitted in a form and manner prescribed by the Department, **which the Department will make available on the CO[2] allowance auction website, as appropriate.**

[N.J.A.C. 7:27C-5.15 (emphasis added).]

NJDEP must approve or disprove the auction results after the CO<sub>2</sub> allowance auction is conducted. Specifically, N.J.A.C. 7:27C-5.16 addresses this requirement:

The Department will approve or disapprove the results of a CO[2] allowance auction based on an evaluation, in consultation with a market monitor, of whether the auction was conducted in accordance with the proposed procedures and requirements at N.J.A.C. 7:27C-5.5 through 5.15 and whether there was any indication of collusive behavior among auction participants or attempts at market manipulation that impacted the results of the auction.

[N.J.A.C. 7:27C-5.16.]

Further, N.J.A.C. 7:27C-5.18 governs the publication of the auction results:

Following the approval of an auction by the Department pursuant to N.J.A.C. 7:27C-5.16(a), and no later than 10 days following the allocation of CO[2]

allowances to the CO[2] allowance accounts of winning bidders pursuant to N.J.A.C. 7:27C-5.17, the Department will publish on the CO[2] allowance auction website the auction clearing price and the number of CO[2] allowances sold in the auction.

[N.J.A.C. 7:27C-5.18.]

Plaintiff argues the records sought constitute government records inasmuch as: (1) NJDEP regulations grant NJDEP oversight of the CO<sub>2</sub> allowance auction pursuant to the CO<sub>2</sub> Budget Trading Program, therefore, defendants "should" have the documents requested; (2) the executive director of RGGI, Inc. admitted to plaintiff that the individual bidder results are routinely provided to NJDEP; and (3) individual bidder auction data is maintained by defendants' agent, RGGI COATS system.

Defendants argue the records requested in the June 28 OPRA request are not government records, as defined by OPRA, because they are not "made, maintained, or kept in the course of the [agency's] official business . . . , or received in the course of [the agency's] official business . . . ." N.J.S.A. 47:1A-1.1. Additionally, defendants submit the auction records requested are not necessary to perform their regulatory responsibilities to oversee the CO<sub>2</sub> allowance auctions.

Each OPRA case requires the court to first determine whether the records requested have been "made, maintained, or kept on file . . . or that have been received in the course of

his or its official business." See N.J.S.A. 47:1A-1. The government records definition under N.J.S.A. 47:1A-1 et seq, includes any document received in the course of the county's official business. Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005) (the court ruled that the federal subpoenas were received in the agency's official business but were exempt from disclosure because it was exempt from access under the federal Freedom of Information Act, 5 U.S.C.A. ¶ 52.)

In Lafayette Yard, the Court set forth the test to be applied in determining when an "instrumentality or an agency" is to be covered under OPRA. These factors are: (1) the "instrumentality or an agency" must be created by an entity covered by OPRA; and (2) the membership of its governing body must be controlled by an entity covered by OPRA. Lafayette Yard, supra, 183 N.J. at 535. In Lafayette Yard, the Court held the development agency was subject to OPRA because: (1) the mayor and city council had "absolute control" over its board membership; and (2) it could not have been created but for the city's approval. Ibid.

Pursuant to N.J.A.C. 7:27C-5.5(b), NJDEP delegated its implementation and administrative support functions for the auction to its agent, RGGI Inc. RGGI, Inc. manages the regional auction on behalf of all the Participatory States and

implemented its auction responsibilities through two subcontractors: (1) World Energy, which administers the auction; and (2) Potomac Economics, which acts as an independent "Market Monitor" that reviews and evaluates auction conduct and results. (Sherry Certif. ¶ 8.) In addition, "RGGI, Inc. in coordination with its auction subcontractor World Energy and its RGGI COATS subcontractor SRA International, which directly administers the RGGI COATS system, executes a batch transfer of CO<sub>2</sub> allowances to all winning bidders." (Ibid.)

RGGI, Inc. and its subcontractors, World Energy, Potomac Economics, and SRA International, all have a unique role in the CO<sub>2</sub> auction process. Importantly, they all serve as agents in administering the auction for all the Participating States. Accordingly, RGGI, Inc. and its subcontractors fit under the definition of a "public agency" inasmuch as they are an "instrumentality or agency created by a political subdivision," because they perform functions that NJDEP otherwise would have performed, had it not delegated its authority as to the CO<sub>2</sub> auctions.

Further, the Lafayette Yard test is satisfied in this case. First, RGGI, Inc. was created by NJDEP, and the Participating States, to provide the Participating States with technical and administrative services for the CO<sub>2</sub> auctions.

Second, NJDEP has control over RGGI, Inc. because pursuant to N.J.A.C. 7:27C-5.5, "the agent shall perform all such functions under the direction and oversight of the Department." NJDEP has control over RGGI, Inc. because NJDEP, along with the Participating States, have the ultimate authority to approve or disapprove the auction results.

After the results of the auction are approved by NJDEP and other Participating States, "CO<sub>2</sub> allowances are transferred from the Participating State Accounts in the RGGI CO<sub>2</sub> Allowance Tracking System ("RGGI COATS") to the RGGI COATS accounts identified in the auction qualification applications of winning bidders." (Sherry Certif. ¶ 13) Thomas A. Hewson, Jr.'s ("Hewson") certification asserts that the RGGI COATS system contains the bidder-specific records requested by plaintiff under OPRA. (Hewson Certif. ¶ 18.) Steven Jenks ("Jenks") also certified that the RGGI COATS "records and tracks data for each state's CO<sub>2</sub> Budget Trading Programs." (Jenks Certif. ¶ 2.) Shobe's supplemental certification states that detailed information is held by RGGI, Inc. and by the Market Monitor. (Shobe Supp. Certif. ¶ 15.)

Although NJDEP does not, by itself, physically store the bid specific information nor rely on individual bid auction results requested to fulfill its oversight duties of the auction process, the individual bid data is "made, maintained

or kept on file . . . or that have been received in the course of his or its official business" by NJDEP's agent, RGGI, Inc. and its subcontractors. See N.J.S.A. 47:1A-1.

The information plaintiff seeks is "stored or maintained electronically," which is the type of records that are included under the government records definition in OPRA. As previously stated, the RGGI allowances are held in the RGGI COATs, administered by SRA International, also a subcontractor of RGGI, Inc. In addition, the specific bid data is retained by World Energy, NJDEP's agent in implementing the auctions. See Material Information Management Policy, available at [http://www.rggi.org/docs/RGGI\\_Inc\\_Material\\_Information\\_Policy\\_Adopted.pdf](http://www.rggi.org/docs/RGGI_Inc_Material_Information_Policy_Adopted.pdf) (last visited June 20, 2011).

Specifically, the confidential information World Energy retains includes: the names and number of qualification applications; names and number of qualified applicants; the names and numbers of approved bidders; financial security data; and the auction clearing price. Ibid. Potomac Economics is the Market Monitor subcontractor that evaluates the auction results. RGGI, Inc., SRA International, Potomac Economics and World Energy all perform the same duties NJDEP would perform if it had not delegated its responsibilities to RGGI, Inc., which in turn, delegated certain responsibilities to the other subcontractors. Therefore, since the NJDEP's contractors and

subcontractors step in the shoes of NJDEP in performing its functions related to the auctions, they qualify as agencies that are subject to OPRA.

Moreover, this case is similar to Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Burnett stands for the proposition that when a government agency delegates its functions to an agent, the records created or maintained by the agent are considered government records. Ibid. The court in Burnett challenged the ruling by the trial court that a government agency is excused from producing documents because the documents were not in the government agency's possession. Id. at 516. Correctly, the Appellate Division held to conclude otherwise, "a governmental agency seeking to protect its records from scrutiny could simply delegate [its] creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA." Id. at 517.

As in Burnett, although the records plaintiff requested in this case are not in the possession of NJDEP, NJDEP's agent, RGGI, Inc. and its subcontractors receive the individual bidding data, maintain and keep it in the course of business of administering the auctions. The same logic from Burnett applies here because RGGI, Inc. is NJDEP's agent and the individual bid information is maintained in the regular course

of business. Thus, the individual bid data fits the definition of a government record under OPRA.

The Bent case is distinguishable from the case at bar. In Bent, the request was a general request under OPRA and did not specifically describe the records for the custodian to search. In this case a specific request was made for the records plaintiff is seeking access to. See Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005). In Bent, the court stated that "to the extent Bent's request was for records that either did not exist or were not in the custodian's possession, there was, of necessity, no denial of access at all." Ibid.

For all the foregoing reasons, while it is somewhat unclear whether NJDEP has direct access to the records plaintiff requested, its agent RGGI, Inc. and subcontractors, "made, maintained or kept on file . . . or . . . received in the course of his or its official business" the individual bidding data, thereby meeting the statutory definition of a government record under OPRA. Having determined the requested documents constitute public records under OPRA, the next step is to determine if any of the OPRA exemptions apply to prevent non-disclosure.

**C. PROPRIETARY COMMERCIAL AND FINANCIAL INFORMATION**

OPRA limits the general definition of a government record by naming classes of records that do not qualify as government records under OPRA. These include:

trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure.

[N.J.S.A. 47:1A-1.1]

Defendants argue that in the event the court determines the requested records are government records, the records, nonetheless, are exempt from disclosure. Defendants rely on the class of documents referred to as "proprietary commercial or financial information obtained from any source." Defendants assert that the release of this proprietary information could cause substantial injury to the competitive position of the enterprise and impact future bidding behavior.

To the contrary, plaintiff argues: (1) public disclosure of the identity of bidders, price of bids and quantity and type of allowances sold to successful bidders will improve the auction process and enable market participants and third parties to verify transactions and monitor allowance holdings; (2) disclosure of bidder-specific information is appropriate, because the RGGI bidding process is essentially a system of

public contract bidding; and (3) the EPA Guide promotes transparency as one of the key standards upon which to foster environmental compliance and efficient markets under the cap and trade program, and this should apply to RGGI as well.

Before assessing whether defendants properly invoked this exemption, first, the court will address the meaning of "proprietary commercial or financial information." Neither of these terms is defined in OPRA. As well, there are no reported decisions in New Jersey, interpreting the exemption.

Courts interpret words in a statute according to their plain meaning. White v. Mattera, 175 N.J. 158, 165 (2003), Town of Morristown v. Women's Club of Morristown, 124 N.J. 605, 610 (1991); Kimmelman v. Henckels & McCoy, Inc., 108 N.J. 123, 128 (1987). Plain meaning has been defined as the "ordinary and well-understood meanings," Great Atl. & Pac. Tea Co. v. Borough of Point Pleasant, 137 N.J. 136, 143-44 (1994).

In New Jersey, the plain language of OPRA identifies the following elements to qualify for the exemption: (a) proprietary; (b) commercial or financial information; and (c) obtained from any source. When the party denying access proves those elements, the record is "deemed to be confidential for the purposes of [OPRA]." N.J.S.A. 47:1A-1.1. Clearly, under OPRA, confidentiality attaches as a consequence of a record being proprietary and commercial or financial; in other

jurisdictions, confidentiality is a precondition, along with proprietary and commercial or financial, for non-disclosure. This significant difference in terminology and phrasing signals no legislative intent to add a confidentiality requirement to OPRA for proprietary commercial or financial information.

The following standard is used when courts interpret the legislative intent of a statute.

[W]hen interpreting a statute, our overriding goal must be to determine the Legislature's intent. As a general rule, the Court must first look to the plain language of the statute. If that language is clear on its face, the sole function of the court[] is to enforce it according to its terms.

[White, supra, 175 N.J. at 165.]

OPRA excludes from the definition of government record all "proprietary commercial and financial information and it "deems" all such information to be confidential. N.J.S.A. 47:1A-1. In contrast, the federal court, applying the Freedom of Information Act ("FOIA") standard considers whether requested records are: (a) proprietary; (b) commercial or financial; and (c) confidential for the purpose of the FOIA. Nat'l Parks & Conservation Assoc. v. Morton, 498 F.2d 765 (D.C. Cir. 1974). This three-step analysis does not apply in New Jersey. The Legislature is presumed to be aware of the federal

statute, and it chose not to adopt the federal statutory language to include the term "confidential."

In any event, the federal courts exempt private commercial information from disclosure under the FOIA if disclosure would impair the government's ability to obtain such information in the future, or disclosure will cause substantial harm to the competitive position of the person from whom the information was obtained. Nat'l Parks, supra, 498 F.2d at 770.

The American Heritage Dictionary of the English Language provides the following definitions for "proprietary:"

1. Of, relating to, or suggestive of a proprietor or to proprietors as a group: had proprietary rights; behaved with a proprietary air in his friend's house.
2. Exclusively owned; private: a proprietary hospital.
3. Owned by a private individual or corporation under a trademark or patent: a proprietary drug.

[The American Heritage Dictionary of the English Language (4th ed. 2006).]

Clearly, from these definitions, "proprietary" denotes something privately owned and not communally shared.

Commercial information, according to its plain meaning is information that "relate[s] to commerce," id. at 380, and "financial" information is information "of, relating to, or involving finance, finances, or financiers," Id. at 682.

Commerce means "an interchange of goods or commodities . . . ; trade; business."<sup>6</sup> "Finance" means "the management of money, banking, investments and credit." The American Heritage Dictionary of the English Language, supra, at 682.

Here, first, the release of public information for the CO<sub>2</sub> auctions is codified in two sections of the New Jersey Administrative Code for CO<sub>2</sub> Budget Trading Programs. N.J.A.C. 7:27C-5.15 states:

All bids shall be submitted in a form and manner prescribed by the Department, **which the Department will make available on the CO[2] allowance auction website, as appropriate.**

[N.J.A.C. 7:27C-5.15 (emphasis added).]

N.J.A.C. 7:27C-5.18 also provides:

Following the approval of an auction by the Department . . . the Department will **publish on the CO[2] allowance auction website the auction clearing price and the number of CO[2] allowances sold in the auction.**

[N.J.A.C. 7:27C-5.18 (emphasis added).]

Second, the RGGI, Inc. website published the Material Information Management Policy.<sup>7</sup> Under section three, the

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<sup>6</sup>Dictionary.com, Unabridged, <http://dictionary.reference.com/browse/commerce> (last visited July 11, 2011).

<sup>7</sup>See Material Information Management Policy [http://www.rggi.org/docs/RGGI\\_Inc\\_Material\\_Information\\_Policy\\_Adopted.pdf](http://www.rggi.org/docs/RGGI_Inc_Material_Information_Policy_Adopted.pdf) (last visited June 20, 2011).

policy classifies three categories of material information:

**Public information:** information which RGGI, Inc. and/or any of the participating states have intentionally released to the public. For example, public information includes the dates of future auctions, the auction reserve price, or the number of allowances for sale in an auction.

RGGI, Inc. employees and contractors can generally disclose public information, but should coordinate media communications through Executive Committee protocols.

**Sensitive information:** information related to implementation of the RGGI auction that has not been intentionally released to the public.

RGGI, Inc. employees and contractors are authorized to disclose sensitive information only to other RGGI, Inc. employees and contractors as well as Participating State agency heads and agency staff.

**Confidential information:** specific types of information directly related to the auction or secondary markets for RGGI allowances as defined below:

1. The names and number of qualification applications for each auction;
2. The names and number of approved bidders for each auction;
3. Information related to financial security including the names of parties who have provided financial security, the amount of each bidder's financial security, and the aggregate amount of financial security for each auction;

4. The auction clearing price, until the Board announces the results of an auction, and

5. on-going market monitoring investigations.

RGGI, Inc. employees and contractors are not authorized to disclose confidential information to any person beyond the specific guidelines detailed in section 5 of this policy.

[Ibid.]

Section five, entitled Management of Confidential Information, states that sensitive information is restricted in the following ways:

5.1 The names and number of qualification applications. This information will be retained by World Energy and may be disclosed only to the members of the Agency Staff Team, the RGGI, Inc. Executive Director and the RGGI, Inc. Auction Manager.

5.2 The names and number of qualified applicants. This information will be retained by World Energy and not disclosed, except to the market monitor and as part of the auction administrator and market monitor's confidential report to Agency Heads. Statistical information about the industry sector, state of origin, etc. of qualified applicants may be disclosed to members of the Agency Staff Team.

5.3 The names and number of approved bidders. This information will be retained by World Energy and not disclosed, except to the market monitor and as part of the auction administrator and market monitor's confidential report to Agency Heads.

5.4 Financial security data. Information about cash financial security will be available only to those individuals who the Executive Committee has authorized to view the auction proceeds account. This will include the Executive Committee, the Executive Director, and World Energy. Information about Letters of Credit and Bond Surety will be available only to the employees of RGGI, Inc. and to World Energy. Evaluations of Letters of Credit and Bond terms will be made from documents with the amount of financial security excluded. Information about the aggregate amount of financial security will be retained by World Energy and not disclosed, except to the market monitor and as part of the auction administrator and market monitor's confidential report to Agency Heads.

5.5 The auction clearing price. This information will be retained by World Energy and shall be disclosed only to the market monitor and as part of the auction administrator and market monitor's confidential report to Agency Heads until the Board announces the results of an auction.

[Ibid.]

Third, throughout all of the auctions to date, RGGI, Inc., the auction participants and the states have expressly indicated their intent to respect valid claims of confidentiality related to sensitive business and trade information. In fact, the Notice for CO<sub>2</sub> Allowance Auction includes the following language:

Confidential information includes, but is not limited to, qualification status, bidding strategy, bid price and/or bid quantity information, and information on

financial security to the extent the information is not generally available to the general public.

. . .

An applicant may assert that it considers information submitted in the *Qualification Application* and *Intent to Bid* to be confidential by checking the box at the bottom of each form. Information contained in the *Qualification Application* and *Intent to Bid* will be held confidential by the Participating States to the extent permitted by applicable state laws, except that after the close of the auction, the Participating States may release aggregate information concerning the Auction 12 results as well as the names of potential bidders.

[See, e.g., Notice for CO<sub>2</sub> Allowance Auction 12 on June 8, 2011, April 8, 2011. sec. 3, [http://ww.rggi.org/docs/August Apr\\_8\\_2011.pdf](http://ww.rggi.org/docs/August_Apr_8_2011.pdf)).] (Notice

Thus, it is the reasonable expectation of potential bidders in the CO<sub>2</sub> auction that the individual bidding information will be kept confidential by RGGI, Inc. and the Participating States. (See David Applebaum ("Applebaum") Certif. ¶¶ 10, 15, 17, 24; Robert D. Teetz ("Teetz") Certif. ¶ 7; Christopher Bursaw ("Bursaw") Certif. ¶¶ 9-11, 25.) The information specifically requested by plaintiff including the names of all bidders, the price of each bid and the quantity and type of CO<sub>2</sub> allowance sold to each successful bidder, is not required to be disclosed to the public by statute or in the notice to the bidders.

In further support of the assertion that the records the June 28 OPRA request consists of proprietary and commercial or financial information, certifications have been provided by the chair of the RGGI, RGGI auction applicants and others.

Raymond V. Depillo ("Depillo"), Vice-President of Operations and Trading for PSEG, submitted a certification on behalf of the intervenor, PSEG, a participant in the RGGI auction program. The certification states that PSEG's primary focus is "the sale of power and energy and certain ancillary services at market-based rates." (Depillo Certif. ¶ 3). According to Depillo, the information is considered confidential by participants and damage could be caused if this information is released:

(1) The information submitted for the auction includes sensitive business and trade information, including the amount of collateral on security provides that PSEG identifies as "confidential." (Depillo Certif. ¶ 9.)

(2) If the information was released it would indicate the number of allowances PSEG intends to procure and amount it is willing to pay. (Ibid.)

(3) Throughout all of the RGGI Auctions, RGGI, Inc., the auction participants and the states have expressed its intent to respect claims of confidentiality related to sensitive business and trade information as portrayed in the Auction Notice for Co<sub>2</sub> Allowance. (Id. at ¶ 10.)

(4) Release of the information would be detrimental to the auction process for some of the following reasons: (1) it could reveal how a generator expects to operate its units; (2) reconstruct PSEG's cost structure; (3) detrimental to PSEG's bargaining position in the private secondary market; could reveal a company's RGGI allowance market outlook; (4) decrease participation in the RGGI Auction program; and (5) if PSEG did not participate in the auction it would make it more difficult or costly for PSEG to obtain allowances. (Id. at ¶ 21.)

(5) The information sought has been disclosed to PSEG employees and agents only on a need-to-know basis (Id. at ¶ 20.)

Kathleen Trolley ("Trolley"), emissions trader for NRG Energy, Inc. ("NRG"), is one of the participants in the quarterly RGGI CO<sub>2</sub> allowance auctions. Trolley submitted a certification expressing the following concerns if the information plaintiff seeks is disclosed:

(1) It would allow competitors to more accurately estimate a firm's cost structure and use this information to their advantage. (Trolley Certif. ¶ 8.)

(2) Revealing the bid prices would reveal NRG's specific bidding strategy and competitiveness of the auction. (Id. at ¶ 17.)

(3) Revealing the quantity of the allowance would place NRG at a risk if it did not purchase enough allowances to cover its regulatory obligations. (Id. at ¶ 18.)

(4) If third parties would know which companies would have the greatest need for

allowances, this may cause price discrimination in over-the-counter-allowance sales. (Ibid.)

Teetz, Vice-President of National Grid Generation LLC., another participant in the RGGI Auction, in a certification, addresses the importance of retaining the confidentiality of individual bidder information. These factors include:

(1) Bids are customarily submitted on a confidential basis and are seen only by the entity that identifies the winning bidder. (Teetz Certif. ¶ 4.)

(2) If bids were made public, National Grid would be at a competitive disadvantage and would be inhibited from bidding in certain markets. (Ibid.)

(3) Public release of the information could allow competitors to estimate a firm's cost structure. (Id. at ¶ 10.)

(4) The cost of RGGI allowances, fuel prices, generator operating efficiency, location and other environmental compliance considerations all contribute to the unit operating cost, which determines the price that the unit will generate electricity. Data of these factors is considered proprietary. (Id. at ¶ 11.)

(5) Releasing the information that plaintiff requests causes various forms of market manipulation, which makes the RGGI auction less competitive. (Id. at ¶ 9.)

Applebaum, Regional Director, Regulatory and Political Affairs for NextEra Energy Power Marketing, LLC, ("NEPM"), is a regular participant in the RGGI Auction. Applebaum asserts the following in regards to disclosure of individual bid data:

(1) Information regarding the price and number of allowances may reveal whether the energy supplier expects revenues and profits to increase, decrease or remain constant. (Applebaum Certif. ¶ 12.)

(2) Competitors can reconstruct the firm's cost structure if the price and quantity of bids are revealed. (Id. at ¶ 13.)

(3) Disclosure of the information will be detrimental to NEPM's bargaining position in the private secondary market for resale of RGGI CO<sub>2</sub> allowances. (Id. at ¶ 14.)

(4) NEPM consistently asserted the confidential nature of the information it submits for the auctions and stated that if there would no longer be protection of the proprietary information, it would decrease participating in the RGGI Auction program. (Id. at ¶ 15.)

(5) The information sought by plaintiff is only provided to its firm and firm's affiliates' employees and agents on a "need to know" basis. (Id. at ¶¶ 14, 24.)

David Hunter ("Hunter"), United States Director of International Emissions Trading Association ("IETA"), also participates in the RGGI auctions. Regarding the negative impacts from disclosure of confidential information, he certifies:

(1) Revealing the bid prices would essentially reveal the company's specific bidding strategy and the competitiveness of the auctions would be compromised. (Hunter Certif. ¶ 15.)

(2) Some companies could be at risk if they do not purchase enough allowances to

cover their regulatory obligations. (Id. at ¶ 16.)

(3) If third parties would know which companies would have the greatest need for allowances, this may cause price discrimination in over-the-counter-allowance sales. (Id. at ¶ 17.)

Bursaw, Senior Manager of Regulatory Affairs (East) for Capital Power Corporation ("CPC"), also participates in the RGGI auctions. In a certification, Bursaw emphasizes the following:

(1) CPC considers the information it submits to the AAR to be sensitive business information, which is confidential. (Bursaw Certif. ¶ 8.)

(2) Disclosing the price and quantity of allowances would allow competitors to determine that participant's expected energy production, information regarding a participant's cost structure and participant's financial status or position in the marketplace. (Id. at ¶ 12.)

(3) Energy suppliers that do not participate in RGGI auctions have fewer opportunities to get allowances and some companies may not participate in the auctions due to concerns of disclosing confidential information. (Id. at ¶ 17.)

(4) Any disclosure of the requested information would result in direct and substantial harm to CP Energy and would compromise the competitiveness and integrity of the auction themselves. (Id. at ¶ 25.)

James F. Hayes ("Hayes"), Director of Power Asset Management for Dominion Energy Marketing, Inc. ("DEM"), as a participant in the RGGI auctions, certifies to the following:

(1) Publicly releasing the information would allow competitors in any one of the RGGI states to more accurately estimate a firm's cost structure and use this information to its advantage. (Hayes Certif. ¶ 8.)

(2) Disclosing the price and quantity of allowances reveal DEM's specific bidding, and result in less competitive behavior. (Id. at ¶¶ 16, 17.)

With regard to the RGGI auction program, Littell, chair of the RGGI, Inc. Board of Directors, submitted a certification addressing the proprietary nature and commercial or financial information related to the auction process:

(1) In order to participate in the RGGI auction program, an Authorized Account Representative is required to submit corporate and financial information about a firm specified under the rules of each of the ten RGGI states. (Littell Certif. at ¶ 12.)

(2) The information submitted under the auction procedures typically includes sensitive corporate business and trade information that is often identified as "confidential." (Ibid.)

(3) Prior to the first auction in September 2008, the Participating States indicated that they would respect valid claims of confidentiality related to sensitive business and trade information. (Ibid.)

(4) The release of these bidder documents with sensitive business and trade information could cause substantial injury to the competitive position of enterprise, would impact bidder's future bidding behavior and would likely result in decreased participation in the RGGI. (Ibid.)

(5) Decreased participation in the RGGI auction program will undoubtedly undermine the ten states' statutory and regulatory goals. (Ibid.)

(6) Potomac Economics, the Market Monitor, has advised RGGI, Inc. that the disclosure of the requested Auction information has a detrimental effect on the competitiveness and efficiency of the RGGI Auctions. (Id. at ¶ 14.)

Additionally, Sherry certifies that the bidding information plaintiff requested is "confidential:"

(1) The Market Monitor evaluates the results to identify whether there was any indication of collusive behavior among auction participants or attempts at market manipulation. (Sherry. Certif. ¶ 10.)

(2) If the individual bid data is released to the public, it would create a risk of bidder collusion and increase market manipulation. (Id. at ¶ 17.)

(3) Such confidential and market sensitive information includes: bidder information in auction quantification applications, bidding data—such as number of bids, bid volume, bid prices submitted by individual bidders and bidder's identities—the identity of winning bidders, and the amount of CO<sub>2</sub> allowances awarded to each bidder. (Ibid.)

(4) To satisfy its regulatory obligation, NJDEP relies on aggregate bidding data and results, but does not review individual bid data. (Id. at ¶ 10 (emphasis added).)

(5) RGGI, Inc. releases as much information about CO<sub>2</sub> allowance auction results as the Participating States have determined to be consistent with protecting the integrity and competitiveness of the auctions. (Id. at ¶ 20.)

LeeVanSchaick, Vice President of Potomac Economics, also submitted a certification regarding the proprietary nature of the auction process and the harmful effects of releasing the CO<sub>2</sub> allowance auction specific bid data:

(1) First, because the firms will believe they will be harmed by disclosure of confidential information, firms will not participate in the RGGI auctions to avoid having to disclose confidential information (LeeVanSchaick ¶ 10.)

(2) Second, because CO<sub>2</sub> emissions are the result of electricity generation, the CO<sub>2</sub> allowance market is closely linked to regional markets for electricity, and may put bidders at a competitive disadvantage in the electricity market. (Ibid.)

(3) Third, RGGI allowances are sold in frequently repeated auctions, which increases the likelihood that disclosure of information would undermine the competitiveness of subsequent auctions, thereby thwarting the public policy at the heart of the auction process. (Ibid.)

(4) The specific prices and quantities of the bid by each auction participant and the amount of allowances awarded to each is

information that firms may consider proprietary. (Id. at ¶ 15.)

(5) Release of this information may both damage the interests of firms that wish to avoid its release, and decrease auction participation by firms who wish to avoid having this information made public, which may make the auction less efficient and competitive. (Ibid.)

(6) Individual bidding firms may be harmed by the release of confidential information because it might put them at a competitive disadvantage vis-à-vis competing firms. (Id. at ¶ 22.)

(7) In his experience as a Market Monitor and his work in the wholesale electricity market, the market participants frequently stressed the importance of keeping their information confidential. (Id. at ¶ 23.)

(8) Disclosure would harm bidders for three reasons: (1) the information regarding the price and the number of allowances sought by that firm may reveal whether the firm expects revenues and profits from the sale of electricity to increase, decrease, or remain constant in the future; (2) information regarding the prices and quantities of a firm's bids on CO<sub>2</sub> allowances are among the types of information that can be compiled by other firms to reconstruct a firm's cost structure; and (3) information as to price, quantity and number of allowances can be detrimental to the firm's bargaining position in the private secondary market for resale of RGGI CO<sub>2</sub> allowances. (Id. at ¶¶ 24-26.)

(10) The Market Monitor "does not identify the participating bidders, the amounts they bid, the number of bids submitted by each, or the number of allowances awarded to each, since this information is not

necessary to effectively evaluate auction performance and the integrity of the auction." (Id. at ¶ 31.)

Shobe, in conjunction with five other authors, produced a research report for RGGI, Inc. Regarding the proprietary nature of the information, he certifies:

1. Private firms spend huge amounts of money each year on information and expert advice on: information about their internal operations, information about the markets in which they operate and information about likely future values of economic variables important to them. Therefore, revealing this information would no longer give the firms incentives to generate this information. (Shobe Certif. ¶ 26.)

2. Encouraging firms to develop new information provides one of the key rationales for protecting proprietary information. (Id. at ¶ 27.)

3. If this information would be release to competitors, it would reduce the firm's incentive to produce this information or from participating in the auction. (Id. at ¶ 28.)

Taken as a whole, the certifications establish that the individual bid information plaintiff has requested constitutes proprietary commercial or financial information. Therefore, pursuant to OPRA, it is not subject to disclosure.

Interestingly, Laurie Burt ("Burt"), the Commissioner of the Department of Environmental Protection of the Commonwealth of Massachusetts, certifies that under Massachusetts Public Records law, the information sought by plaintiff is classified

as confidential and exempt from public disclosure. (Burt Certif. ¶ 5.)

Finally, this case is similar to Commc'ns Workers of Am. v. McCormac ("CWA"), 417 N.J. Super. 412 (Law Div. 2008), aff'd, 417 N.J. Super. 341 (App. Div. 2010), in which this court found the documents to be excluded from OPRA under the "proprietary commercial or financial information" category and the Appellate Division affirmed. In that case, the court concluded agreements relating to investments made by the New Jersey Division of Investment in private equity funds with money from State employee pension funds were not government records. CWA, supra, 417 N.J. Super. 341.

On appeal, based on several certifications that the requested records were confidential and were not meant for public disclosure, and an in camera review of the records, the Appellate Division concluded there was ample evidence to establish that the records were proprietary in nature. Ibid.

Similar to CWA, defendants here have presented persuasive certifications and arguments to support classification of the requested records as proprietary. Clearly, the RGGI auction information is often identified as confidential due to the detrimental effect its release would have on the auction process. Winning bid information is not communally shared;

rather, it is privately owned.<sup>8</sup> See id. at 356. As discussed above, bidders reasonably expect this information will remain confidential based on the Auction Notice and Material Information Management Policy. The Material Information Management Policy explicitly states the requested information is confidential and should not be disclosed to anyone other than the persons listed in section five of the policy. Specifically, section 5.3 only allows the names and number of bidders to be disclosed to "the market monitor and as part of the auction administrator and market's monitor's confidential report to Agency Heads."<sup>9</sup>

Moreover, as in CWA, the intervenor, PSEG, certifies that the documents sought for disclosure here are only provided on a need-to-know basis to employees and agents of a firm. See CWA, supra, 417 N.J. Super. at 359. The Appellate Division stated that "the fact that intervenors consider and treat the documents as confidential, even within their organization, is central to any confidentiality determination." Ibid. (citing

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<sup>8</sup> The RGGI website publicly reveals as much information about the allowance auctions as the Participating States have determined to be consistent with protecting the integrity and competitiveness of the auctions. However, the auction results state that the identities of the bidders are masked. (Sherry Certif. ¶20; Market Monitor Report for Auction 1, Oct. 16, 2008, [http://www.rggi.org/docs/Auction\\_1\\_MM\\_Report.pdf](http://www.rggi.org/docs/Auction_1_MM_Report.pdf))

<sup>9</sup> See Material Information Management Policy, [http://www.rggi.org/docs/RGGI\\_Inc\\_Material\\_Information\\_Policy\\_Adopted.pdf](http://www.rggi.org/docs/RGGI_Inc_Material_Information_Policy_Adopted.pdf) (last visited June 20, 2011).

Lamorte Burns & Co. v. Walters, 167 N.J. 285, 299-301(2001)). Thus, the court agrees with defendants that the June 28 OPRA request—including the names of the bidders, individuals bids, and amount and type of allowances requested are proprietary commercial or financial information and should be not be disclosed.

**D. COMPETITIVE ADVANTAGE**

OPRA deems confidential "information which, if disclosed, would give an advantage to competitors or bidders." N.J.S.A. 47:1A-1.1. The reasons offered for withholding documents must be specific. Indeed, "[c]ourts will 'simply no longer accept conclusory and generalized allegations of exemptions but will require a relatively detailed analysis in manageable segments.'" Loigman v. Kimmelman, 102 N.J. 98, 110 (1986) (quoting Vaughn v. Rosen, 484 F.2d 820, 826 (1973)). However, the court is satisfied that the claims of confidentiality are sufficient, under the competitive advantage exemption to support non-disclosure.

Defendants argue disclosure of the records sought by plaintiff would "give an advantage to competitors or bidders." To support this defendants submit: (1) the uniform-price sealed bid auction format selected by the Participating States may be vulnerable to market manipulation such as "demand reduction" by submitting artificially lower bids and collusion; (2)

maintaining the confidentiality of the sensitive information is consistent with OPRA and promotes the goals of the Global Warming Solutions Fund Act; and (3) the release of the bidder documents that plaintiff requests with sensitive business and trade information could cause substantial injury to the competitive position of the enterprise, would impact bidder's future bidding behavior and would likely result in decreased participation in the RGGI auction program.

Plaintiff challenges the reasons for withholding the documents. For example, plaintiff disputes a statement made by Littell that the requested information is "sensitive business and trade secret information" and is often classified as "confidential." Moreover, plaintiff's expert, Hewson, disagrees with LeeVanSchaick that releasing the requested information causes market collusion and manipulation. In contrast, Hewson certifies that more bidder specific market transparency is needed to assure existing and potential bidders that there is no collusion in the RGGI auction market.

Based on the record, the court finds that the individual bidding auction information plaintiff seeks is excluded from OPRA under the "advantage to competitors or bidders" exemption. In addition to the reasons stated in the previous section to support non-disclosure of the requested information, all of the auction bidders that submitted certifications in this matter

represent that publicly releasing the information would allow competitors to more accurately estimate a firm's cost structure and use this information to their advantage. (Depillo Certif. ¶ 13; Trolley Certif. ¶ 8; Teetz Certif. ¶ 10; Applebaum Certif. ¶ 13; Hunter Certif. ¶ 8; Bursaw Certif. ¶ 19; Hayes Certif. ¶ 7.) Disclosing the bidder specific information could adversely affect participants and make the RGGI allowance auctions less competitive. (Depillo Certif. ¶ 11.) More specifically, revealing the "bid prices and quantities sought in the RGGI Auction would essentially reveal company specific bidding strategy." (Id. at ¶ 15.)

The release of such information could affect the energy supplier's position in the financial market and could lead to a reduction in the energy supplier's stock price or its ability to secure credit. (See Applebaum Certif. ¶ 12; LeeVanSchaick Certif. ¶ 5.) Further, competitors would be able to ascertain, among other things, the structure and size of the RGGI allowances needed by a firm and a firm's "investment criteria and strategy and use them for direct and substantial competitive advantage." (Applebaum Certif. ¶ 16; Depillo ¶ 17.) If the price and number of allowances are released, the information could be used by competitors to "determine that participant's expected energy production, information regarding a participant's cost structure, and related information

regarding the participant's status and/or position in the market place." (Applebaum Certif. ¶ 12.)

Shobe also certified that revealing the information would facilitate collusion, "market sharing," and hide the bidders' true values from public view. (Shobe Certif. ¶ 10-21.) Release of the bid and winnings information would reduce participation in the auction, and in turn, would reduce the competitiveness of the auction, which would be contrary to public policy. (Id. ¶ 22.)

Moreover, as defendants' expert, LeeVanSchaick certified, releasing the individual bidding information may cause market manipulation such as "demand reduction." Similar to CWA, where the court ruled that disclosing the agreements would give an advantage to competitors by offering an artificially lower price, in demand reduction manipulation, bidders in the Co<sub>2</sub> auctions may attempt to lower the overall auction price by submitting artificially lower bids. See CWA, supra, 417 N.J. Super. at 362. Maintaining the confidentiality of the information deters cheating that goes undetected. Release of the proprietary information could cause substantial injury to the competitive position of the enterprise and impact future bidding behavior. (Littell Aff. ¶ 12.)

Furthermore, in order to approve or disapprove the auction, NJDEP does not evaluate the results based on the

individual data; rather it considers the aggregate bidding data. (Id. at ¶¶ 10-11.) The RGGI Participating States jointly review and approve the CO<sub>2</sub> auction allowance either in a face-to-face meeting or through a webinar. (Sherry Supp. Certif. ¶¶ 3.) During both the face-to-face meeting and webinar session, the Auction Manager displays aggregate information and does not identify specific bidders. (Id. at ¶¶ 9-12.) The Market Monitor only discusses one or two individual bids that deviated from the bidding patterns to discuss the deviation. (Id. at ¶ 12.) The individual bid data is also not provided to the Participating States. (Id. at ¶ 9.) This proves that measures are taken to prevent the specific bid information from being revealed.

The individual bid data is commingled with all of the Participating States and the information plaintiff seeks cannot be provided separately. Sherry explained RGGI, Inc.'s policy in responding to document requests from the Participating States. The policy directs the RGGI, Inc. to identify "the potential impact of supplying the requested document" on other states, and the Executive Director must obtain Executive Committee approval before complying with a request. (Id. at ¶ 15; Policy for Compliance with Requests for Documents from

Participating States.<sup>10</sup> As a matter of fact, RGGI, Inc. provides the public with an abundance of auction information on its website after the results of the auction are completed. In particular, after each auction, RGGI Inc. publicly releases information about the auction including:

- (1) the auction clearing price and the number of CO<sub>2</sub> allowances sold;
- (2) identities of potential bidders;
- (3) number of bidders dispersion of projected demand for CO<sub>2</sub> allowances with bidder identities masked;
- (4) quantity of CO<sub>2</sub> allowances for which bids were submitted relative to the available supply of allowances (ratio of bids to supply);
- (5) summary of bid prices that shows the minimum, maximum, mean, and median bid prices,
- (6) concentration of bids;
- (7) share of bids by percentage by compliance entities;
- (8) list of CO<sub>2</sub> allowances awarded by bidder, with bidder identities masked;
- (9) percentage of CO<sub>2</sub> allowances awarded to various categories of bidders; and
- (10) percentage of overall CO<sub>2</sub> allowances in circulation that will be held by compliance

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[http://www.rggi.org/docs/Compliance\\_with\\_Document\\_Requests\\_Interim\\_Policy\\_ADOPTED.pdf](http://www.rggi.org/docs/Compliance_with_Document_Requests_Interim_Policy_ADOPTED.pdf) (last visited June 20, 2011.)

entities following financial settlement of the auction.

[LeeVanSchaick Certif. ¶ 15; Littell Certif. ¶ 14.]

Therefore, based on all these reasons, the court is satisfied that the information requested in the June 28 OPRA request is excluded under the competitive advantage exemption. Finally, the decision by the Governor to withdraw New Jersey's participation in the RGGI does not change the court's decision.

**E. CO<sub>2</sub> AUCTIONS COMPARED TO EPA'S SULFUR DIOXIDE (SO<sub>2</sub>) ALLOWANCE AUCTIONS**

Plaintiff's experts, Hewson and Thomas Tanton ("Tanton"), argue that disclosure is warranted because the RGGI is similar to EPA's SO<sub>2</sub> allowance auction, in which the identity of the bidders and number of price of their bids are revealed. (Hewson Certif. ¶¶ 3 to 8; Tanton Certif. ¶ 13.) The court disagrees.

First, the EPA's CO<sub>2</sub> auction disclosure policy is set forth in the 1990 Amendment to the Clean Air Act, 42 U.S.C. 7651o(d)(2), in which the EPA did not have authority to determine if the bidder information should be confidential. (LeeVanSchaick Certif. ¶ 36.)

Second, SO<sub>2</sub> auctions do not use a uniform price auction format but "are auctioned using a pay-as-bid format whereby the winning purchase allowances according to their actual bid

process, rather than a single clearing price.” (Id. at ¶ 34; see Shobe Supp. Certif. ¶ 8.) Uniform price auctions make collusion and demand reduction more effective due to the dispersion of bid prices. (LeeVanSchaick Certif. ¶ 34.)

Third, the RGGI auctions allocated eighty-seven percent of 2009 allowances through the CO<sub>2</sub> allowance auctions, versus less than three percent of SO<sub>2</sub> allowances for sale through the EPA SO<sub>2</sub> allowance auction. (Id. at ¶ 35; see Shobe Supp. Certif. ¶ 6.) In contrast, the SO<sub>2</sub> allowance auctions heavily trade in the secondary market, which reduces anticompetitive bidding behavior. (LeeVanSchaick Certif. ¶ 35.)

Fourth, the nationwide Clean Air Act, SO<sub>2</sub> program has a large geographic scope, making it less susceptible to collusion and demand reduction than the RGGI auctions. (Id. ¶ 36.) Essentially, more firms compete in the large geographic market in the So<sub>2</sub> auctions than in the CO<sub>2</sub> auctions and as the number of competing firms increases, market shares of individual firms decrease and firms are less likely to profit from anticompetitive behavior. (Ibid.)

Fifth, the So<sub>2</sub> auction is annual, whereas the CO<sub>2</sub> auctions are quarterly. (Shobe Supp. Certif. ¶ 7.) This is significant because studies show that the more frequent an auction is held, the “more case must be taken to avoid facilitating collusive bidding.” (Ibid.)

In fact, as defendants argue, the CO<sub>2</sub> auctions in this case are more similar to the U.S Treasury Auctions. Like the RGGI auctions, the "U.S. Treasury Department sells bonds and other debt securities to the public through uniform-price, sealed bid, single round auctions." (Id. at ¶ 38.) The bids in the Treasury auctions are awarded to bidders until the supply of the securities is exhausted. (Ibid.) In addition, all bidders pay the same clearing. (Ibid.) The U.S. Treasury Department releases similar information publicly about the bidding results, but like the CO<sub>2</sub> auction, it neither releases the bids of individual bidders nor identifies who owns the debt securities. (Ibid.) Therefore, the differences between the Co2 auction and the So2 auction warrant a different result.

#### **F.    DISCOVERY**

OPRA matters must proceed "in a summary or expedited manner." N.J.S.A. 47:1A-6. Absent a showing of legitimate need, taking depositions and other discovery "is not permissible in actions, like OPRA proceedings, that are inherently summary by nature and expedited in manner." MAG Entm't LLC. v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 552 (App. Div. 2005).

Seeking discovery, plaintiff argues: (1) there are material issues of fact in dispute as to whether the requested records are "government records" as defined by OPRA; and (2)

before the court decides the substantive issue, the court should resolve conflicting statements by Shobe, concerning individual bidding information, set forth in his certification and report, for which he served as one of the five authors. Defendants disagree.

In response to plaintiff's concern regarding Shobe's alleged inconsistent statements, defendants submitted a supplemental certification. Shobe was one of the five authors of the October 2007 report titled "Auction Design for Selling CO<sub>2</sub> Emission Allowances under the Regional Greenhouse Gas Initiative." Shobe asserts the report was a compromise recommendation to disclose the identities of winning bidders and the quantity of allowances obtained by each auction. (Shobe Supp. Certif. ¶ 14.) However, the report did not recommend disclosure of the actual value bid by each auction participant, or information about losing bidders. In addition, Shobe certifies that after further evaluation, the recommendation was unanimously changed to limit public disclosure of the bidding information. (Id. at ¶ 14.)

Specifically, Shobe asserts:

After the Participating States chose the single round fixed price auction, the question of disclosure was raised again just prior to the implementation of the first RGGI auction. At that time I spoke with members of the team and worked with Potomac Economics, the market monitor, to evaluate

more closely the information disclosure policy. It was the unanimous opinion of those participating in these discussions that limited public exposure of bid and winning information along with routine market monitoring would enhance the price discovery and fairness attributes of the RGGI Auction. RGGI, Inc. would release any array of summary information from which the public and members of the press could access the overall performance of the auction.

[Id. at ¶ 15.]

Based on this record, the court finds discovery unwarranted. Pursuant to N.J.S.A. 47:1A-6, OPRA matters are to proceed in a summary manner.

**G. JULY 30 OPRA REQUEST**

OPRA states that when a response to an OPRA request “[i]nvolves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies.” N.J.S.A. 47:1A-5(c). In addition, “[t]he requestor shall have the opportunity to review and object to the charge prior to it being incurred. Ibid.

In the case at bar, plaintiff requested a second set of records under the July 30 OPRA request, seeking access to all email and correspondence sent by NJDEP officials to the RGGI. Defendants did not deny the request. Instead, defendants

requested an extraordinary time special service charge to produce the requested documents in the sum of \$11,250. (Cofer Certif. ¶11.) At the time the complaint was filed, plaintiff had not paid the EOT charge nor contacted defendants to object to the charge. While plaintiff argued he was entitled to the records at no charge, reasonable service charges have been upheld as proper by the courts and Government Records Council. See Fisher v. Div. of Law, 400 N.J. Super. 61 (App. Div. 2008).

At the time of oral argument, on June 17, 2011, the parties had reached an amicable resolution, the fees were paid and the records were produced in redacted, un-redacted form and certain documents were withheld. These are the documents reviewed in Section J of this opinion.

#### **H. COMMON LAW RIGHT OF ACCESS**

To constitute a public record under the common law, the record must be "a written memorial . . . made by a public officer, and . . . the officer [must] be authorized by law to make it." Nero v. Hyland, 76 N.J. 213, 222 (1978). The common law right of access to public records requires the court to balance the public interest in non-disclosure against the private interest in securing access to the information. Keddie v. Rutgers State Univ., 148 N.J. 36, 51 (1997); Homes News, Inc. v. Dept. of Health, 144 N.J. 446, 454 (1996).

To secure access to records, three requirements must be met: "1) the records must be common law public documents; 2) the person seeking access must establish an interest in the subject matter of the material; and 3) the citizen's right to access must be balanced against the State's interest in preventing disclosure." N. Jersey Media Group Inc. v. New Jersey Dept. of Personnel, 389 N.J. Super. 527, 537 (Law Div. 2006) (citing Keddie, supra, 148 N.J. at 50).

Where a public agency asserts a claim of confidentiality:

a court must balance the plaintiff's interest in the information against the public interest in confidentiality of the documents, including a consideration of whether the demand for inspection is premised upon a purpose [that] tends to advance or further a wholesome public interest or a legitimate private interest. Where reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than [the] citizen's status and good faith are necessary to call for production of the documents.

Conversely, . . . [a]s the considerations justifying confidentiality become less relevant, a party asserting a need for the materials will have a lesser burden in showing justification. If the reasons for maintaining confidentiality do not apply at all in a given situation or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a compelling need.

[S. New Jersey Newspapers v. Twp. of Mt. Laurel, 141 N.J. 56, 72-74 (1995)(internal quotations and citations omitted)].

A non-exhaustive set of factors the court may consider when balancing interests in confidentiality versus disclosure include:

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[Loigman ,supra, 102 N.J. at 113.]

First, the records in the July 30 OPRA request are "written material[s] . . . made by a public officer" as discussed above. Although the materials are not provided in hard copy form, the information sought by plaintiff is retained electronically through RGGI and its subcontractors. Therefore, the first element is met because the documents are considered common law public documents. In addition, under the second

element plaintiff, as a new reporter in New Jersey, has an interest in the records. As well, the court recognizes plaintiff's interest in the public policy formation process in New Jersey as it pertains to the CO<sub>2</sub> auction market. (See Compl. ¶ 12.) As to the third element, plaintiff argues his interest in disclosure outweighs the interest of the defendants in non-disclosure.

Defendants have repeatedly argued the interest by the State in maintaining the confidentiality of CO<sub>2</sub> auction bidding information. Pursuant to the third element of the common law right of access test, the court finds that plaintiff's interest in the records do not outweigh the state's interest in preventing disclosure, because as defendants represent, the release of the records would have a harmful effect on the RGGI allowance auction, the RGGI allowance market and the Participating States.

Considering some of the Loigman factors, disclosure is not warranted for the following reasons: (1) the disclosure of the information will discourage the bidders from submitting their proprietary commercial and financial information, which the Participating States indicated it intended to be kept confidential; (2) the bidders relied on representations that individual bidding information would remain confidential according to the Material Information Management Policy and the

Auction Notice for CO<sub>2</sub> Allowance; and (3) disclosure may chill decision-making by NJDEP and other Participating States with respect to auction results.

In fact, defendants release auction results to the public on their website, which includes the mean, median minimum and maximum of the CO<sub>2</sub> bidding prices and other information that is not confidential. As discussed fully above, these records fall within the proprietary and competitive advantage exemption under OPRA and should not be disclosed. Defendants' arguments and certifications contain detailed, concrete and plausible explanations of the adverse consequences likely to result from disclosure of the auction bidding information under the common law. Therefore, while plaintiff has an interest in the records requested, the court concludes the balance of interests weighs in favor of defendants.

**I. IN CAMERA REVIEW**

The court has conducted an in camera review of each of the documents listed in the privilege log. For most of the withheld, NJDEP relies on the deliberative process privilege. This includes, draft regulations and draft reports, which fall within the deliberative process privilege.

OPRA, N.J.S.A. 47:1A-1.1, provides that government records "shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." The deliberative

process privilege was formally recognized in New Jersey in In Re the Liquidity of Integrity Co., 165 N.J. 75 (2000). In Integrity, the New Jersey Supreme Court held that while relevance generally creates a presumption of discoverability, confidentiality should nevertheless be maintained if the government establishes that the privilege exists. Id. at 83. The Court defined the privilege as a "doctrine that permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Ibid. The Court articulated two initial requirements for the deliberative process privilege to apply. First, the document must have been generated before the adoption of the agency's decision. Id. at 84. Second, the document must be "deliberative." Ibid. (citing Coastal States Gas Corp v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)). The Court described documents "containing opinions, recommendations, or advice about agency policies" as deliberative in nature. Integrity Co., supra, 165 N.J. at 85.

If the deliberative process privilege applies, a party seeking to pierce the privilege may overcome the presumption against disclosure only if "the need for fact-finding override[s] the government's significant interest in non-disclosure." Ibid. The standard for overcoming the burden

against the party seeking the documents is "substantial" or "compelling." Ibid. It is against the public interest "in all but exceptional cases" to allow disclosure if the privilege exists. Ibid. (quoting E.W. Bliss Co. v. United States, 203 F. Supp 175, 176 (N.D. Ohio 1961)).

When determining whether a litigant has overcome the presumption against non-disclosure, factors to consider include: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. Integrity, supra, 165 N.J. at 85-86. The Court cautioned against a "wooden" application of the notion of confidentiality and warned that merely characterizing a document as deliberative is not dispositive, and that withholding discoverable factual material by placing it in a deliberative document would not be countenanced. Id. at 86 (citing McClain v. College Hosp., 99 N.J. 346, 360-61 (1985)).

Courts have repeatedly recognized the need for government agencies to engage in the free and open exchange of ideas in the development and implementation of new policies and procedures. In Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 151, n.18 (1975), the United States Supreme Court stated:

Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies.

The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. The purpose of the privilege is to "prevent injury to the quality of agency decisions." Ibid. Frank discussion of legal or policy matters in writing might be inhibited if the discussions are made public; and the discussions and policies formulated would be the poorer as a result. Ibid. Thus, to protect the "decision making process of government agencies, documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated" comprise deliberative process material and are entitled to non-disclosure under common law privilege principles. Ibid.

Despite this protection, factual information is discoverable unless it is "inextricably intertwined" with the deliberative information. Env'tl. Prot. Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 837(1973). Courts have historically taken the position that factual information that is not subject to the deliberative process privilege, can "be separated out

and disclosed, without impinging on the policymaking decisional processes intended to be protected by this exemption." Ibid.

If the court determines that a privilege exists or that an agency is entitled to withhold documents, the next issue is whether the applicant has demonstrated a compelling need to disclose the documents that substantially outweighs the agency's interest in protecting them. As noted by Justice Long in Integrity:

Despite the existence of the privilege, with its concomitant presumption against disclosure, a litigant may obtain deliberative process materials if his or her need for the materials and the need for accurate fact-finding override the governments' significant interest in non-disclosure.

As with any privilege, the party seeking such documents bears the burden of showing a substantial or compelling need for them. **In all but exceptional cases it is considered against the public interest to compel government to produce inter-agency advisory opinions.**

[Integrity, supra, 165 N.J. at 85, (citations omitted)(emphasis added).]

"The initial focus must be upon the nature of the materials sought . . . [and] the relative interests of the parties in relation to these specific materials." Id. at 87.

Implicit in each assessment is a consideration of consequences -- i.e., the consequences to the litigant of nondisclosure, and the consequences to the public of disclosure.

The consideration of the consequences of disclosure to the public will involve matters relative to the effect of disclosure upon the integrity of public processes and procedures. This standard . . . is flexible and adaptable to different circumstances and sensitive to the fact that the requirements of confidentiality are greater in some situations than in others

As the considerations justifying confidentiality become less relevant, a party asserting a need for the materials will have a lesser burden in showing justification. If the reasons for maintaining confidentiality do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a compelling need.

[Ibid. (citations omitted and emphasis added).]

**J. REVIEW OF EACH DOCUMENT**<sup>11</sup>

**DOCUMENTS 086-095; 2574-2582**

The initial draft of the Accreditation Process for Co<sub>2</sub> Offset Verifiers was originally excluded under the deliberative process privilege pursuant. In response to this court's inquiry requesting a copy of the final version, on June 15, 2011, defendants advised the court that a final Accreditation

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<sup>11</sup> As noted heretofore, the court has conducted an in camera review to determine whether materials identified in the privilege log should be disclosed under OPRA or the common law right of access. For information found by the court to fall within the deliberative process privilege, the court has also considered the release of the information under the common law right of access.

Report was never produced. In the letter, the Deputy Attorney noted, "for that reason, we have determined to treat 086-095 as a final document and are releasing it to plaintiff, via counsel by copy of this letter. Kindly therefore eliminate this entry from our privilege log."

**DOCUMENTS 099-210**

The document contains copyrighted materials that has not been copied and produced to comply with federal copyright laws. Inasmuch as these materials are available for public onsite inspection, these documents need not be physically reproduced.

**DOCUMENTS 537-602**

Memorandum with no date, to Sherry from ICF International, with attachment: Draft Consistency Application Forms and Draft Monitoring and Verification Report. The final versions of these reports are available online. Drafts of documents that result in a final version are not subject to disclosure under the deliberative process privilege. N.J.S.A. 47:1A-1.1.

**DOCUMENTS 616-644**

The email thread with a cover letter and resume of Elizabeth Coleburn has been provided to plaintiff. The applicant's private phone number and email address were redacted. Pursuant to OPRA, unlisted telephone numbers are excluded from disclosure. N.J.S.A. 47:1A-1.1. Therefore,

disclosure will depend on whether the number identified is a listed or unlisted telephone number.

Email addresses are not included as confidential. N.J.S.A. 47:1A-1.1. Furthermore, the Legislative findings set forth in N.J.S.A. 47:1A-1, in pertinent part, provides that a public agency has a responsibility and obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy.

Given the media and communication technologies of today and the internet-based community in which we live, the court finds that a citizen does not have a reasonable expectation of privacy as it relates to an email address. See Atlantic County SPCA v. City of Absecon, et al., 2009 N.J. Super. Unpub. LEXIS 1370(App. Div. June 5, 2009)(the court held there is no reasonable expectation of privacy in names or addresses, unless it is combined with personal identifiers that would place the citizen's privacy at risk).

Furthermore, here, the applicant submitted a resume to a public agency where transparency is much more likely.

**DOCUMENTS 776, 777, 778, 779 AND 780-787**

Documents dated, March 19, 2009, were released to plaintiff.

**DOCUMENTS 1162-1163; 1193-1194; 1142-1202**

Documents dated, March 2009, were released to plaintiff.

**DOCUMENTS 2340-2341**

The email thread, dated September 11, 2009, between Sherry and Paul Bailey of ICF International regarding development of guidance documents for the CO2 auction program is not subject to disclosure under the deliberative process privilege. The email thread includes recommendations, advice and suggestions. Here, the court finds that the reasons for non-disclosure outweigh the benefits of disclosure under the common law right of access.

**DOCUMENTS 2510-2516; 2523-2529**

The document contains copyrighted materials that have not been copied and produced to comply with federal copyright laws. Inasmuch as these materials are available for public onsite inspection, physical reproduction is not required.

**DOCUMENTS 2556-2558**

The documents, dated August 5, 2009, were released to plaintiff.

**DOCUMENTS 2572**

The document dated December 19, 2008 is an email thread between Sherry and other individuals from the Participating States, including the Executive Director of RGGI, Inc. While the email has been provided to plaintiff, the website that

includes the current draft of the COATS offset module design has been redacted. This document is excluded under the deliberative process privilege.

**DOCUMENTS 2587-2698**

The document contains copyrighted materials that have not been copied and produced to comply with federal copyright laws. Inasmuch as these materials are available for public onsite inspection, physical reproduction is not required.

**DOCUMENTS 2993-3074**

The document dated February 26, 2010, is a draft of the "Offset Program Guidance Manual." Inasmuch as the final version of the manual is available online, under the deliberative process privilege, the draft is not subject to release under OPRA.

**DOCUMENTS 3078-3079; 3083-3084; 3086-3087**

The email thread dated March 12, 2010, pertains to the RGGI Proceeds Report. This email thread was provided to plaintiff with the exception of comments made about the report that were redacted from plaintiff's copy. The comments fall within deliberative process privilege and are not subject to disclosure. Furthermore, the court is satisfied that the interest in non-disclosure outweighs the interest of the plaintiff in disclosure.

**DOCUMENTS 3271-3279**

The documents, dated March 2010, were released to plaintiff.

**DOCUMENTS 3271-3279; 3323-3327**

The documents, dated March 11, 2010, were released to plaintiff.

**DOCUMENTS 3553-3569**

The email thread dated March 10, 2010, with a document entitled Summary of Considerations for LCFS Development are not responsive to the OPRA request because it is outside the scope of documents that plaintiff seeks, which is between RGGI, Inc. and NJDEP. The email is between PEW Center on Global Climate Change and other individuals in other jurisdictions. NJDEP was copied on the email but the subject of the email was the Low Carbon Fuel Standard. Therefore, this document does not have to be released to plaintiff.

**DOCUMENTS 3653-3682; 3808-3855**

The document is a draft of the Basic Knowledge of Project Level GHG Verification. Drafts of reports that result in final reports released to the public are not subject to disclosure under OPRA and fall within the deliberative process privilege. The final version of the manual is available online. Therefore, these documents are not subject to disclosure.

**DOCUMENTS 3739-3745; 3759-3765; 3777-3783**

The document contains copyrighted materials that have not been copied and produced to comply with federal copyright laws. Inasmuch as these materials are available for public onsite inspection, these documents need not be provided.

**IV.**

**CONCLUSION**

For the reasons set forth herein, defendants' motion for summary judgment is granted. Plaintiff's cross-motion for discovery is denied. Defendants shall submit an order consistent with this opinion.