DOCKET NO. HHB-CV-18-6043138-S : SUPERIOR COURT

ALLCO RENEWABLE ENERGY LIMITED : JUDICIAL DISTRICT
AND THOMAS MELONE : OF NEW BRITAIN

VS. :

FREEDOM OF INFORMATION COMMISSION, :
COMMISSIONER, DEPARTMENT OF ENERGY :
AND ENVIRONMENTAL PROTECTION, AND :
DEPARTMENT OF ENERGY AND :
ENVIRONMENTAL PROTECTION : MARCH 18, 2019

MEMORANDUM OF DECISION

The plaintiffs, Allco Renewable Energy Limited and its principal, Thomas Melone, brought this administrative appeal from a decision of the defendant Freedom of Information Commission (commission), which held that the defendants, the Commissioner and the Department of Energy and Environmental Protection (collectively, department or DEEP) did not violate the Freedom of Information Act by asserting the trade secret exemption for a document used by the department to evaluate responses to a request for proposals. The plaintiffs argue that the commission improperly upheld the department's assertion of this exemption because the department could not satisfy the confidentiality restrictions necessary to claim the exemption and the information at issue does not otherwise qualify for the trade secret exemption. The defendants dispute both the factual assertions underlying the plaintiffs' claims and the plaintiffs' legal analysis. For the reasons stated herein, the court concludes that the commission's decision is supported by substantial evidence and is consistent with the law. The plaintiffs' appeal is therefore dismissed.

Electronic notice sent to all counsel of record.
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I

THE COMMISSION'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The commission found the following material facts:

On November 12, 2015, the department issued a request for proposals (RFP), in coordination with Massachusetts and Rhode Island, to procure renewable energy contracts. Return of Record (ROR), pp. 1260, 259-350. The department participated in the RFP pursuant to Public Acts 2015, No. 15-107, and Public Acts 2013, No. 13-303, which authorized the commissioner to conduct renewable energy procurements. ROR, p. 1260.

The RFP was conducted to help meet the clean energy goals of Connecticut, Massachusetts, and Rhode Island in a cost-effective manner for ratepayers. The RFP stated that: "Soliciting parties[1] in the three states have decided to act jointly to open the possibility of procuring large-scale projects that no state could procure if it acted unilaterally. Although the three-state process opens up the possibility of large-scale projects, parties in each state will select the project(s) that is/are most beneficial to its customers and consistent with its particular Procurement Statutes. Consequently, evaluation and selection will involve an iterative process

[1] The RFP identified the "soliciting parties" as follows: for Connecticut, the Commissioner of the Connecticut Department of Energy and Environmental Protection; for Massachusetts, the Fitchburg Gas and Electric Light Company, doing business as Unitil, the Massachusetts Electric Company, the Nantucket Electric Company, doing business as National Grid, Nstar Electric Company and Western Massachusetts Electric Company, doing business as Eversource Energy (collectively, the Massachusetts EDCs); and for Rhode Island, the Narragansett Electric Company, doing business as National Grid.

by which, after an initial threshold examination followed by a quantitative analysis of the bids, the parties from each state will review and rank bids based on the qualitative requirements of their respective state. . . ." ROR, pp. 1260, 260.

The RFP required bidders to submit copies of a "public version" of each proposal. If a bidder chose to redact information that it deemed to be "confidential business information" from the public version of its proposal, then it was also required to submit an unredacted version of the proposal and to identify all confidential or proprietary information, including pricing. The public version of each proposal was posted on the public website established for the New England Clean Energy RFP.[2] ROR, p. 1260.

The RFP established an "Evaluation team" that consisted of representatives of the soliciting parties, electric distribution companies[3] (EDCs) in each state (e.g., Connecticut Light &

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[2] When the final decision was issued, the commission noted that the New England Clean Energy RFP website could be found at https://cleanenergyrfp.com. ROR, p. 1260. As of the date of this decision, the website was unavailable at that link.

[3] An "electric distribution company" (EDC) is defined in General Statutes § 16-1 (23) as "any person providing electric transmission or distribution services within the state, but does not include: (A) A private power producer, as defined in section 16-243b; (B) a municipal electric utility established under chapter 101, other than a participating municipal electric utility; (C) a municipal electric energy cooperative established under chapter 101a; (D) an electric cooperative established under chapter 597; (E) any other electric utility owned, leased, maintained, operated, managed or controlled by any unit of local government under any general statute or special act; (F) an electric supplier; (G) an entity approved to submeter pursuant to section 16-19ff; or (H) a municipality, state or federal governmental entity authorized to distribute electricity across a public highway or street pursuant to section 16-243aa[.]" The terms "electric distribution company," "EDC," and "utility" are informally used interchangeably.

Power Company (CL&P) and United Illuminating Company (UI) in Connecticut), the Connecticut Procurement Manager, the Connecticut Office of Consumer Counsel, the Connecticut Attorney General, and the Massachusetts Department of Energy Resources. Independent consultants, including Levitan and Associates, Inc. (Levitan), were retained to assist in the evaluation. The federally regulated regional grid operator, ISO New England (ISO-NE) also provided input. ROR, pp. 1261, 260-61. All communications regarding the RFP with the Evaluation team were required to be submitted by e-mail to the evaluation team's group e-mail address. Bidders[4] were prohibited from making direct contact with individual members of the Evaluation team or with the team's consultants. ROR, pp. 1261, 269-70.

The RFP informed bidders that: "The [e]valuation [t]eam shall use commercially reasonable efforts to treat the confidential information that it receives from bidders in a confidential manner and will not use such information for any purpose other than in connection with this RFP. . . . If confidential information is sought in any regulatory or judicial inquiry or proceeding or pursuant to a request for information by a government agency with supervisory

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[4] The court recognizes the distinction between bids submitted pursuant to an invitation for bids and proposals submitted in response to a request for proposals. See *Hartford* v. *Freedom of Information Commission*, 41 Conn. App. 67, 70 n.3, 674 A.2d 462 (1996). There is no dispute that the proceeding at issue in this appeal was a request for proposals. Nevertheless, the RFP itself described the responses to the RFP as "bids" and the developers submitting such responses as "bidders." See, e.g., ROR, pp. 260, 262. The commission followed this colloquial usage in its decision, and the court will similarly follow it herein.

authority over any of the EDCs, reasonable steps shall be taken to limit disclosure and use of said confidential information through the use of non-disclosure agreements or requests for orders seeking protective treatment, and bidders shall be informed that the confidential information is being sought." ROR, pp. 1261, 271-72.

The RFP also advised bidders that: "As it has done with previous RFPs, CT DEEP intends to disclose certain bid information in its final determination once contract negotiations are completed and a filing is made with PURA [Public Utilities Regulatory Authority] for review and approval. At this time, DEEP anticipates such disclosure will include some information attributed to named projects responsive to the CT portion of the RFP: specifically, the qualitative and quantitative score and threshold eligibility determinations attributed to specific projects responsive to the CT portion of this RFP, and pricing data for winning bids. DEEP may also disclose aggregate or average pricing data for all bids responsive to the CT portion of the RFP but without attribution to specific projects." ROR, pp. 1261, 271 n. 11.

Additional state-specific information concerning the confidentiality of information pursuant to state statutes was included in Appendix G of the RFP. With respect to Connecticut, Appendix G provided: "With this submission of information claimed and labeled as confidential, you must provide the legal basis for your confidentiality claim, describe what efforts have been made to keep the information confidential, and provide whether the information sought to be protected has an independent economic value by not being readily known in the industry. With

your legal support and reasonable justification for confidentiality . . . the Connecticut state agencies participating on the Soliciting Parties will be better equipped to safeguard your confidential information should it become the subject of a Connecticut Freedom of Information Act inquiry. . . ." ROR, pp. 1261-62, 341. Appendix G further advised bidders that "[a]ll information for winning bidders, including confidential information, will be released and become public 180 days after contracts have been executed and approved by all relevant regulatory authorities, unless otherwise ordered by the Connecticut PURA." (Emphasis omitted.) ROR, pp. 1262, 341.

Under the RFP, the Evaluation team members and Levitan were required to sign nondisclosure agreements to maintain the confidentiality of redacted information. Representatives of the EDCs on the Evaluation team were additionally required to sign a "Utility Standard of Conduct" agreement that prohibited any discussion of the RFP between EDC personnel participating on the Evaluation team and EDC personnel involved in the preparation of bids in response to the RFP. ROR, pp. 1262, 269-70.

Thirty-one sets of project proposals were submitted from solar, wind, large-scale hydropower, fuel cell and transmission developers. Connecticut selected nine Class I renewable energy projects including, but not limited to, projects proposed by two wind power developers, Antrim Wind Energy, LLC (Antrim) and Cassadaga Wind, LLC (Cassadaga). ROR, pp. 1262, 105, 111. On February 28, 2017, the department's commissioner issued a letter to EDCs UI and

CL&P, notifying them that nine bids had been selected and directing them to enter into contract negotiations with the nine selected projects. The EDCs ultimately executed contracts for six of the nine projects, including Cassadaga. Two bidders, including Antrim, withdrew their proposals during contract negotiations with the EDCs. The department relinquished Connecticut's share of one of the projects to Rhode Island. ROR, pp. 1262, 140-144.

The large-scale energy resource agreements entered into by the EDCs and the selected bidders were subject to regulatory review and approval by PURA. On September 13, 2017, PURA approved the long-term contracts between UI and CL&P and the six bidders. At the time of the commission hearing underlying this appeal, regulatory reviews of those projects were still ongoing in Massachusetts and Rhode Island. ROR, pp. 1262-63, 139-150, 403.

On December 1, 2016, plaintiff Thomas Melone, on behalf of plaintiff Allco Renewable Energy Limited, e-mailed a Freedom of Information Act request to the defendants in this appeal. ROR, pp. 1258, 1-5. Melone requested copies of responses to the New England Clean Energy RFP of Antrim, Ranger Solar, Cassadaga, and RES Americas. He sought all responses to requests for further information submitted with respect to any of those responses and any record or file made by the department in connection with the contract award process. ROR, pp. 1258-59, 5.

By e-mail dated January 17, 2017, the department denied the plaintiffs' request, asserting

that the requested records were exempt under General Statutes § 1-210 (b) (4), (5), and (24).[5] ROR, pp. 1259, 7.

On February 16, 2017, the plaintiffs filed a complaint with the commission, alleging that the department had violated the Freedom of Information Act by failing to provide copies of all the records responsive to their request. ROR, pp. 1259, 1-5. The commission held a contested case hearing on October 16, November 9, and November 17, 2017. On November 6 and 7, respectively, Antrim and Cassadaga moved to intervene. Their unopposed motions were granted by the hearing officer at the November 9 hearing. ROR, p. 1258. At the November 9 hearing, the department provided the plaintiffs with copies of responsive unredacted documents for which no exemption was being claimed. At the same hearing, the plaintiffs narrowed the scope of their request to those records relating to the Antrim and Cassadaga proposals, and to a document the parties described as the "Levitan Answer Key." ROR, p. 1263.

At the November 17 hearing, the department submitted into evidence redacted copies of the records at issue, except for two Antrim records not at issue in this appeal. ROR, p. 1263. On November 30, 2017, the department submitted unredacted copies of the records at issue for in camera review, along with an in camera index.

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[5] As of the November 17, 2017 hearing, the defendants no longer claimed that any records were exempt under General Statutes § 1-210 (b) (4) or § 1-210 (b) (24), and the commission therefore did not discuss those exemptions in its final decision. ROR, p. 1259.

The only document at issue in this appeal is the Levitan answer key.[6] Pl. Br., p. 2. The Levitan answer key is a spreadsheet covering four pages. ROR, pp. 1267, 492-95. The plaintiffs contended that the records supplied in response to the RFP did not satisfy the "confidentiality" requirement and were "required by statute." The plaintiffs also contended that the Levitan answer key could not be a trade secret because the department was acting as a "regulator" in issuing the RFP, was not engaged in a "trade," and the answer key was not "of the kind" to be a trade secret, has no independent economic value, and is "not secret." ROR, p. 1267.

Before analyzing the Levitan answer key, the commission found that "the renewable energy market and the procurement process for renewable energy is highly competitive, and that the information at issue in this matter including, but not limited to, costs, pricing and bidding information, is highly market sensitive and unique to the particular RFP proposals." ROR, p. 1267. It further found that plaintiff Melone "is a solar developer, an unsuccessful past participant in DEEP's renewable energy procurements, and involved in several lawsuits with the state of Connecticut." ROR, p. 1267.

The commission then addressed the Levitan answer key. The department's in camera index described the answer key as "compilations and pattern of economically valuable data and

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[6] The commission adjudicated issues with respect to Antrim and Cassadaga records, upholding claims of exemption as to some but not all of those records, and the plaintiffs' appeal identified issues related to those records. In their brief, however, the plaintiffs assert that the record at issue in this appeal is the unredacted Levitan answer key, and at oral argument, their counsel confirmed that only the Levitan answer key is at issue. Accordingly, the court will not address the Antrim and Cassadaga records except as they relate to the Levitan answer key.

commercial and financial information, given in confidence, that constitute an agency trade secret." ROR, p. 1267. The commission found that the department retained Levitan to assist in the evaluation process. Levitan used a market simulation model known as "Aurora" to evaluate and compare the costs and benefits of bids received. The Levitan answer key is the result of the modeling performed by Levitan and used by the department to evaluate and rank bids based on their benefit-to-cost ratios. The department's witnesses testified that the Levitan answer key is a "compilation of extraordinarily complicated data – huge amounts of data." ROR, pp. 1268, 1025. It includes confidential proprietary information submitted by all bidders, and it cannot be replicated. ROR, pp. 1268, 967.

Before the commission's hearing officer and in its post-hearing brief, the department argued that maintaining the confidentiality of the Levitan answer key is essential to maintaining the integrity of the state's procurement process, the confidence of prospective bidders in future RFPs, and the quality and competitiveness of the bids received. The department contended that disclosure of the answer key would have a chilling effect on the number and competitiveness of future proposals. It further contended that the disclosure of the information would also impact its ability to secure clean, renewable energy and to meet the state's aggressive renewable energy targets at a reasonable cost to ratepayers. ROR, p. 1268.

In addition to the steps described above to maintain the confidentiality of information designated as confidential in the responses to the RFP, the department presented the following

evidence of the steps it took to maintain the confidentiality of the Levitan answer key: The specific criteria and information provided by the department were shared only with individuals on the Evaluation team and with Levitan. Within the department, access to the answer key was granted only to a small set of employees within its Bureau of Energy and Technology Policy who were assigned to work on the procurement process. During the PURA regulatory review of the executed contracts, the department sought to protect the answer key by filing a motion for protective order. PURA granted that motion, and the protective order was still in effect when the commission held the hearings in this matter. ROR, p. 1268.

The department contended that there is a high value to the information in the Levitan answer key because "the RFP process involves millions of Connecticut ratepayer dollars that if mishandled could result in further burdening Connecticut ratepayers. . . . The [department] testified that the projected savings to Connecticut ratepayers from this particular RFP is $330 million." ROR, p. 1268. The department contended that disclosure of the Levitan answer key would allow bidders to adjust their proposals slightly to score higher on the evaluation but perhaps without any commensurate rise in value. It further contended that release of the answer key would negatively affect energy procurement in Connecticut, Massachusetts, and Rhode Island and would give away the answers for future solicitations. Finally, department witnesses testified that the department had invested substantial resources in developing the answer key, including the expenditure of $330,000 on the contract with Levitan and hundreds of hours by

department employees involved in the procurement process. ROR, p. 1268.

The commission considered the evidence adduced at the hearing and reviewed the Levitan answer key itself. Based on that evidence, it found that the answer key is of the type of information included in the nonexhaustive list in § 1-210 (b) (5) (A), that the answer key derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that were reasonable under the circumstances to maintain secrecy. ROR, p. 1269. Based on those findings, it concluded that the answer key is a trade secret that is exempt from disclosure under § 1-210 (b) (5) (A) and that the department did not violate the Freedom of Information Act by withholding it from the plaintiffs. ROR, p. 1269.

The commission also addressed the claims of exemption as to documents provided to the department in the proposals by Antrim and Cassadaga, concluding that much of the information, but not all, was exempt from disclosure under § 1-210 (b) (5). It ordered disclosure of the nonexempt documents and upheld the nondisclosure as to exempt documents. ROR, pp. 1269-1280. Its rulings as to the Cassadaga and Antrim documents are not at issue in this appeal.

II

SCOPE OF REVIEW

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.[7] Judicial review of the commission's decision "is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of [the Supreme Court] to retry the case or to substitute its judgment for that of the administrative agency." (Internal quotation marks omitted.) *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 517, 14 A.3d 998 (2011). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred." (Internal quotation marks omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 561,

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[7] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings."

964 A.2d 1213 (2009). This court may not "retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." (Internal quotation marks omitted.) Id. "In determining whether an administrative finding is supported by substantial evidence, the reviewing court must defer to the agency's assessment of the credibility of witnesses. . . . The reviewing court must take into account contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . ." (Internal quotation marks omitted.) *Moraski* v. *Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 266–67, 967 A.2d 1199 (2009).

"Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." (Internal quotation marks omitted.) *Lash* v. *Freedom of Information Commission*, supra, 300 Conn. 517. "Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Internal quotation marks omitted.) *Ottochian* v. *Freedom of Information Commission*, 221 Conn. 393, 397, 604 A.2d 351 (1992).

In conducting its review of decisions made by the commission under the Freedom of Information Act, the court must also be mindful of the purpose of the act. "The overarching legislative policy of the [act] is one that favors the open conduct of government and free public

access to government records. . . . The sponsors of the [act] understood the legislation to express the people's sovereignty over the agencies which serve them . . . and this court consistently has interpreted that expression to require diligent protection of the public's right of access to agency proceedings. Our construction of the [act] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed. . . . Our courts, however, have not hesitated to apply an exemption to disclosure where the party seeking the exemption has met the burden of establishing that it applies." (Citations omitted; internal quotation marks omitted.) *Stamford* v. *Freedom of Information Commission*, 241 Conn. 310, 314, 696 A.2d 321 (1997).

III

ANALYSIS

The commission found that the Levitan answer key was exempt from disclosure, in its entirety, as a trade secret under General Statutes § 1-210 (b) (5) (A). The plaintiffs challenge the commission's findings of fact and its application of the law to the facts found. Although the plaintiffs represent that the Levitan answer key is the only document still in dispute, they nevertheless devote much of their brief to arguing that the information submitted by energy developers did not satisfy the requirements of General Statutes § 1-210 (b) (5) (B) for the exemption of "commercial or financial information given in confidence, not required by statute." The plaintiffs also argue that the Levitan answer key is not a trade secret because "how an agency performs its regulatory duties can never be a trade secret." Pl. Br., p. 16. They also argue that

the information in the answer key is not of a type listed in § 1-210 (b) (5) (A) and has no independent economic value. The department and the commission disagree.

The commission correctly set forth the applicable legal principles. General Statutes § 1-210 (b) (5) (A) exempts from disclosure "[t]rade secrets, which for the purposes of the Freedom of Information Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy . . . ." As our Supreme Court has held, "[t]his definition, on its face, focuses exclusively on the nature and accessibility of the information, not on the status or characteristics of the entity creating and maintaining that information. More particularly, there is no requirement, express or implied, that the entity generally must be engaged in a 'trade,' however one might define that term. In the absence of any such limitation, it is self-evident that there cannot be any basis to apply that limitation to public, but not private, entities." *University of Connecticut* v. *Freedom of Information Commission*, 303 Conn. 724, 734, 36 A.3d 663 (2012).

Information claimed to be a trade secret must be of the kind included in the nonexclusive list in § 1-210 (b) (5) (A). *See Elm City Cheese Co.* v. *Federico*, 251 Conn. 59, 70, 752 A.2d

1037 (1999). To qualify as a trade secret exemption under § 1-210 (b) (5) (A), "[a] substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means." (Internal quotation marks omitted.) *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 194, 874 A.2d 785 (2005).

The Supreme Court's decision in *University of Connecticut* v. *Freedom of Information Commission*, supra, instructs the commission and reviewing courts to consider the nature and accessibility of the information at issue in a Freedom of Information Act request. In this case, to address the nature of the information at issue, the analysis must consider the competitive nature of the industry involved and the type of information that was input into the modeling program that produced the Levitan answer key.

All of the information that went into the Levitan answer key relates to the competitive proposals for clean energy projects. As several witnesses testified at the hearing, the market for clean energy is intensely competitive. Development costs are high and the availability of opportunities to contract with utilities for the sale of electricity are very limited. The RFP required developers to provide highly sensitive commercial information, including operational and financial information that were closely guarded by the developers.

Although specific documents provided by developers are not at issue in this appeal, the testimony of witnesses for the two developers that intervened in the hearing provided a great deal

of information about the nature of competition in the industry and about the necessity of protecting confidential information to avoid being placed at a competitive disadvantage. Cassadaga's witness testified that it cost hundreds of thousands if not millions of dollars to develop wind farming facilities and that the information Cassadaga had developed was specific to its organization and not otherwise available. ROR, pp. 817-18. The information it regarded as highly confidential competitive information included development information, some operational information, and pricing information. ROR, pp. 818-19. The information reflected the company's specific knowledge and the financial and personnel resources the company could expend and still produce a satisfactory level of economic returns. ROR, p. 830. Some information in its proposal was subject to confidentiality agreements that Cassadaga had with other parties, such as wind turbine manufacturers. ROR, p. 840. Antrim's witness similarly testified that the detailed energy production information in its proposal was highly confidential information that was subject to confidentiality agreements with turbine manufacturers. Those agreements required Antrim to seek confidentiality protections when submitting the information in connection with a proposal. ROR, pp. 890-93. Antrim's witness testified that it had invested nearly $10 million in developing its proposed project over nine years. If Antrim's confidential information were disclosed, the information could be used to undermine commercial contracts that were necessary for the project but not yet all in place. Antrim's witness testified that because of Antrim's contractual obligations to third parties whose information was incorporated

into the proposal, Antrim could not have submitted the proposal if the RFP had not contained confidentiality provisions. ROR, p. 885.

According to the department's witnesses, the Levitan answer key itself is the output of an extensive and complicated computer modeling of energy production for every hour of twenty years, calculated for each of the projects proposed in response to the RFP. The input that went into the modeling included the confidential information provided by developers. The department consulted with Levitan to develop the assumptions that would be used in the analysis. In addition, the department itself conducted the qualitative analysis of the projects and provided the qualitative scoring used in the Levitan modeling. The output itself – that is, the four-page spreadsheet for which the department asserted the trade secret exemption – discloses the final ranking of the projects, information about the costs and benefits of each proposal, and quantitative and qualitative scores for each project. A person knowledgeable about the industry could use the information presented in the Levitan answer key to back out other information that would reveal confidential pricing information submitted by the various developers.

The department raised two primary concerns about disclosure of the Levitan answer key. First was its concern that disclosure of the Levitan answer key would result in the disclosure of information deemed highly confidential by the developers. Second was its concern that disclosure of the answer key would provide a level of detail about the department's own analyses that would allow bidders for future projects to modify their proposals to obtain a higher score

without a concomitant increase in value to the ratepayers.

The department's witnesses testified that the department's ability to protect the confidentiality of information that had been submitted on a confidential basis was a paramount concern for future RFPs; if it was not perceived as trustworthy by developers in the market, it would be unable to attract a full range of competitive proposals. Its concern that bidders would not submit proposals at all without some protection for confidential information was supported by the testimony of the Antrim and Cassadaga witnesses.

The department's witnesses also testified that additional RFP processes were under way and more were expected in order to meet the state's comprehensive clean energy goals. Although the criteria used by the department in analyzing the proposals were set out in statutes and described in substantial detail in both the RFP and the department's final determination, the department was concerned that if the Levitan answer key was released, bidders would have access to a level of detail about the department's analysis that would allow bidders to shape future proposals to obtain higher scores without a commensurate increase in value to ratepayers.

From all the evidence presented, the court concludes that the information in the Levitan information key is evidence of the kind identified in § 1-210 (b) (5) (A). That is, it is a compilation of information that includes confidential and commercially sensitive information received from others and as well as information developed by the department itself concerning the viability, the costs, and the benefits of proposed projects.

In determining whether information qualifies as a trade secret, the courts and the commission consider, among other things, several factors set out in *Town & Country House & Homes Service, Inc.* v. *Evans*, 150 Conn. 314, 189 A.2d 390 (1963). Those factors, drawn from comment *b* to § 757 of the 1939 Restatement of Torts,[8] include "(1) the extent to which the information is known outside the business, (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Town & Country House & Homes Service, Inc.* v. *Evans*, supra, 150 Conn. 319. Financial details, such as costs, pricing, and bidding, "fully meet the definition of trade secrets . . . ." *Triangle Sheet Metal Works* v. *Silver*, 154 Conn. 116, 126, 222

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[8] The Supreme Court's 1963 decision in *Town & Country House & Homes Service, Inc.* v. *Evans*, supra, 150 Conn. 319, cited "Restatement, 4 Torts § 757, comment *b*," as the source of the factors it considered. That section of the 1939 Restatement of Torts was subsequently transferred to the Restatement (Third) of Unfair Competition (1995) and modernized to reflect changes in both law and commerce. The modernized definition of a trade secret is as follows: "A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." Restatement (Third), Unfair Competition, § 39, p. 425 (1995). The Restatement comments that "[i]t is not possible to state precise criteria for determining the existence of a trade secret. The status of information claimed as a trade secret must be ascertained through a comparative evaluation of all the relevant factors, including the value, secrecy, and definiteness of the information . . . ." Restatement (Third), Unfair Competition, § 39, comment *d*, p. 430 (1995).

A.2d 220 (1966).

The first factor concerns the extent to which the information is known outside the entity claiming the trade secret. The plaintiffs assert that the Levitan answer key cannot be a trade secret because, among other reasons, it was known outside the department. The department does not dispute that the Levitan answer key was accessible to members of the evaluation team, including individual members representing utilities in Massachusetts and Rhode Island, but argues that the individuals who had access to the answer key were bound not to disclose it or to use it for any purpose other than the RFP. According to the Restatement from which the Supreme Court drew the six-factor test, knowledge of a trade secret need not be limited only to the owner of the trade secret; the owner of a trade secret "may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy." 4 Restatement, Torts, § 757, comment *b*, p. 6 (1939). The department's witnesses testified that the Levitan answer key was accessible only to members of the evaluation team who were bound not to disclose the information or use it other than for the purposes of the RFP. The members of the evaluation team who were associated with the electric distribution companies – including those in Massachusetts and Rhode Island – signed a utility standard of conduct, agreeing not to disclose information received by the evaluation team. Indeed, the utilities that participated on the evaluation team submitted a letter to the department urging the department to protect the confidentiality of evaluative materials, including the Levitan answer

key, because disclosure of evaluative materials would undermine the competitiveness of future solicitations. They reported that the Massachusetts electric distribution companies had successfully obtained protection for the confidentiality of such evaluative materials from the Massachusetts Department of Public Utilities. ROR, pp. 401-02. Thus, the evidence supported a finding that the Levitan answer key was known outside the department only by those individuals who were on the evaluation team and who agreed to maintain its secrecy.

The second factor concerns the extent to which the Levitan answer key was known within the department. The department's witnesses testified that it was known only to individuals within the department's Bureau of Energy Technology Policy who were assigned to work on the procurements at issue. It was not accessible to other departmental staff.

The third factor concerns the extent to which the owner of a trade secret takes measures to guard the secrecy of the information. The law does not require absolute secrecy; it requires efforts that are reasonable under the circumstances to protect the secrecy of the information. *See Elm City Cheese Co.* v. *Federico*, supra, 251 Conn. 80. "The question of whether, in a specific case, a party has made reasonable efforts to maintain the secrecy of a purported trade secret is by nature a highly fact-specific inquiry. . . . What may be adequate under the peculiar facts of one case might be considered inadequate under the facts of another." (Citations omitted; internal quotation marks omitted.) Id. In this particular case, there was testimony that the department limited access to the Levitan answer key to members of the evaluation team bound by

confidentiality agreements and that it limited access within the department to only those persons who were working directly on the RFP. In addition, the department moved for a protective order to prevent disclosure of the Levitan answer key when the power purchase agreements were submitted to PURA for review. The motion for protective order and PURA's ruling granting the motion were introduced as exhibits. The department also asserted exemptions to the Freedom of Information Act when it received the plaintiffs' request. Substantial evidence supports a finding that the department's efforts to maintain the confidentiality of the Levitan answer key was reasonable under the circumstances.

The fourth factor addresses the value of the information to the person or entity asserting the trade secret exemption and to competitors. "The value of information claimed as a trade secret may be established by direct or circumstantial evidence." Restatement (Third), Unfair Competition, § 39, comment *e*, p. 431 (1995). Circumstantial evidence of value includes the amount of resources invested by the person claiming the trade secret in the production of the information as well as the precautions taken by that person to protect the secrecy of the information. See id. "Identifiable benefits realized by the trade secret owner through use of the information are also evidence of value." Id.

In this case, the chief of the department's Bureau of Energy Technology Policy testified that the Levitan answer key was the product of the department's contract with Levitan, on which the department expended $330,000 over the various stages of the RFP. She further testified that

the department devoted hundreds of staff hours to the RFP process. That process culminated in the production of the Levitan answer key. In addition, the bureau chief testified that the projects selected through the RFP process would, over the life of the projects, save Connecticut ratepayers $330 million. The department also presented evidence that, in the competitive renewable energy industry, the Levitan answer key would be highly valuable to developers, like the plaintiffs here, who could use it to structure future proposals to score higher on subsequent RFPs.

The evidence of value proffered by the department is unusual in that the primary economic value identified is the value to Connecticut ratepayers, rather than the value to the department itself. Unlike the various university programs that claimed trade secrets in their lists of ticket purchasers or donors in *University of Connecticut* v. *Freedom of Information Commission*, supra, 303 Conn. 724, here the department does not directly generate revenue for its own purposes. Nor does the department *itself* have competitors; rather, the competition exists in an industry in which the department is not a market participant in its own right.

The plaintiffs argue that the information comprising the Levitan answer key does not meet the "independent economic value" test for a trade secret because it does not confer a "competitive advantage" upon the entity claiming the trade secret. As defined by § 39 of the Restatement (Third), Unfair Competition, a "trade secret" is "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." Restatement (Third), Unfair

Competition, § 39, p. 425 (1995). As the Restatement also notes, however, nonprofit and governmental entities "can also claim trade secret protection for economically valuable information such as lists of prospective members or donors." Restatement (Third), Unfair Competition, § 39, comment *d*, p. 429 (1995). Nothing in the Restatement indicates that governmental trade secrets are limited to member or donor lists; that is merely the example given in the comment.

The question here is whether the resources expended on developing the information at issue, the value of the resulting projects to ratepayers, and the value of the information to businesses in a highly competitive market can properly be deemed to be substantial evidence of the economic value of the information to the department. The court concludes that the answer is yes; such evidence provides a substantial basis for the commission's finding that the information at issue has independent economic value derived from its secrecy.

In reaching this conclusion, the court relies, as did the commission and the department, on the Supreme Court's decision in the *University of Connecticut* v. *Freedom of Information Commission*, supra, 303 Conn. 732, where the court stated: "[W]e consider whether a public agency that creates and maintains information that would constitute a trade secret if created by a private entity must engage in a 'trade' in order to shield such information from disclosure under the act. We answer that question in the negative." *University of Connecticut* v. *Freedom of Information Commission*, supra, 303 Conn. 732. It focused on the statutory definition in

§ 1-210 (b) (5), which requires that trade secrets "derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use . . . ." (Internal quotation marks omitted.) Id., p. 734. The court observed: "This definition, on its face, focuses exclusively on the nature and accessibility of the information, not on the status or characteristics of the entity creating and maintaining that information. . . . If the information meets the statutory criteria, it is a trade secret and the entity creating that information would be engaged in a trade for the purposes of the act even if it was not so engaged for all purposes." Id.

In this case, the department functioned at least in part as a procurement agent for Connecticut's electric distribution companies (EDCs). The soliciting parties for Massachusetts and Rhode Island, in fact, were not government agencies but were the Massachusetts and Rhode Island EDCs that would ultimately enter into the power purchase agreements. In a letter to the department's bureau chief that was entered into evidence in the commission hearing, all of the EDCs that participated in the RFP process[9] asserted that disclosure of confidential information received from energy market participants would undermine the EDCs' negotiating positions in the market and would jeopardize their ability to ensure that their customers are served by the lowest cost options. ROR, pp. 400-05. They objected to disclosure of evaluative materials, including the Levitan materials, because a sophisticated bidder could use the information in such

[9] Connecticut EDCs CL&P and UI were not "soliciting parties" in the RFP but did have representatives on the evaluation team. They joined in the letter submitted by all EDCs.

materials to determine the selection price point. The electric distribution companies contended that this would have the net effect of reducing the competitiveness of future solicitations, allowing prospective bidders to bid at or around this value. The electric distribution companies reported that PURA had previously granted protection of such information, and that motions for protective treatment were then pending (on November 8, 2017) with the Massachusetts Department of Public Utilities and the Rhode Island Public Utilities Commission. They further stated that the Massachusetts Department of Public Utilities had previously granted protection for similar confidential materials in other proceedings.

The evidence presented to the commission supports a finding that the nature of the information in the Levitan answer key is such that it derives value from not being generally known to competitors in the market for renewable energy contracts with utilities. Knowledge of the level of detail provided in the evaluative materials, including the Levitan answer key, would undermine the negotiating positions of the utilities as they seek to obtain the most cost-effective contracts for renewable energy sources. The information in the Levitan answer key has value for the department because the department's interest is to ensure that the most cost-effective sources of renewable energy are identified for power purchase agreements with the utilities.

The fifth factor to be considered under *Town & Country House and Homes Service, Inc.* v. *Evans,* supra, 150 Conn. 319, is the amount of money or effort expended in developing the information. The department's witnesses testified that the department spent approximately

$330,000 on the Levitan contract and invested hundreds of hours in staff time in the evaluation phase of the RFP process. The Levitan answer key can fairly be regarded as the culmination of the effort expended by the department in consultation with Levitan and with the use of the modeling program licensed by Levitan.

The sixth factor is the ease or difficulty with which the information could be properly acquired or duplicated by others. The department's witnesses testified unequivocally that the information in the Levitan answer key could not be replicated by anyone. The plaintiffs' counsel questioned the witnesses as to whether anyone with access to the RFPs and the modeling system used by Levitan could generate the same information. The department's technical analyst explained that the department provided information, including both certain base assumptions and the qualitative scoring of the RFPs, that were integral to the final product produced by the Levitan modeling; without the inputs provided by the department, the results could not be replicated. This evidence supports the commission's finding that the Levitan answer key derives economic value "from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use."

The plaintiffs assert several challenges to the commission's decision with respect to the secrecy of the information at issue. They claim that the Levitan answer key was accessible to members of the evaluation team, which included representatives of the electric distribution companies and various other state officials in the three states, and further claim that there was no

evidence of nondisclosure agreements. Although only indirectly relevant to their single issue on appeal, the plaintiffs also argue that neither the bidders submitting proposals nor the department had any reasonable basis for believing that information in the proposals could be kept confidential. As to that point, the plaintiffs claim that the RFP promised disclosure, not confidentiality. They also argue that the Massachusetts public records law does not contain an exemption for trade secrets and there was therefore no reasonable expectation that any information disclosed to the Massachusetts Department of Energy Resources could be kept confidential. They argue, finally, that the department's claim of a trade secret, if accepted, would eviscerate General Statutes § 1-210 (b) (24), which permits the nondisclosure of responses to RFPs prior to the conclusion of the process.

As to the Levitan answer key, which is the only document at issue in the appeal, the department's bureau chief and the department's technical analyst testified that the Levitan answer key was accessible only by individuals on the evaluation and selection teams, who were required to sign nondisclosure agreements. ROR, pp. 931, 1024. The department restricted staff access to the document to those individuals who were assigned to work on the RFP process. The department sought and obtained a protective order when it submitted the Levitan answer key to PURA as PURA was considering whether to approve the negotiated power purchase agreements. This evidence distinguishes this case from *Department of Public Utilities of Norwich* v. *Freedom of Information Commission*, 55 Conn. App. 527, 739 A.2d 328 (1999), on which the plaintiffs

rely. In the *Norwich* case, the commission had concluded that a municipal utility's study of the costs of serving a particular customer was not a trade secret because the facts did not "reveal discernible measures taken to guard the secrecy of the information." Id., 533. The court in that case found that there were no nondisclosure agreements, no warnings to individuals to whom the study was disclosed that it was confidential, and no strict limits on its distribution. Here, to the contrary, there was evidence of efforts to maintain the secrecy of the Levitan answer key, including evidence of restricted distribution, of nondisclosure agreements, and of successful efforts to obtain protective orders in regulatory proceedings.

The commission did not clearly err in concluding that substantial evidence supported a finding that the Levitan answer key was "the subject of efforts that are reasonable under the circumstances to maintain secrecy," as required by § 1-210 (b) (5) (A) (ii). The secrecy required to preserve a trade secret is not absolute. Indeed, as the Supreme Court has held, "[A]bsolute secrecy is not essential and the [person claiming the trade secret] does not abandon his secret by delivering it or a copy to another person for a restrictive purpose, nor by a limited publication." (Internal quotation marks omitted.) *Plastic & Metal Fabricators, Inc.* v. *Roy*, 163 Conn. 257, 303 A.2d 725 (1972). "The question of whether, in a specific case, a party has made reasonable efforts to maintain the secrecy of a purported trade secret is by nature a highly fact-specific inquiry. . . . What may be adequate under the peculiar facts of one case might be considered inadequate under the facts of another. . . . [T]he efforts need only be 'reasonable *under the*

circumstances . . . .'" (Citations omitted; emphasis in original; internal quotation marks omitted.) *Elm City Cheese Co.* v. *Federico*, supra, 251 Conn. 80. "Precautions to maintain secrecy may take many forms, including physical security to prevent unauthorized access, procedures intended to limit disclosure based upon the 'need to know,' and measures that emphasize to recipients the confidential nature of the information such as nondisclosure agreements, signs, and restrictive legends." Restatement (Third), Unfair Competition, § 39, comment g, p. 435 (1995).

The plaintiffs argue that the RFP addressed only the confidentiality of information supplied by bidders, not the evaluative information developed by the soliciting parties, such as the Levitan answer key. The department's witnesses testified, however, that disclosure of the Levitan answer key would expose confidential information submitted by the bidders. There is evidence in the record, moreover, that the Levitan answer key was regarded as highly confidential by all members of the evaluation team. The Levitan answer key is labeled "CONFIDENTIAL" in its upper left hand corner. The department's technical analyst testified that Levitan was required to execute a nondisclosure agreement to obtain information from Navigant, another evaluative consultant retained to assist all the soliciting parties in the RFP process. The EDCs' letter to the chief of the department's Bureau of Energy Technology Policy, introduced as an exhibit in the hearing, expressly states that the EDCs that participated on the evaluation team regarded the evaluative materials developed by Levitan as highly confidential. ROR, pp. 400-05. A formal nondisclosure agreement is not necessarily required if there is

evidence of a clear understanding that specific information is shared under an expectation of confidentiality. See *Elm City Cheese Co.* v. *Federico*, supra, 251 Conn. 80-86 (affirming trial court's finding of confidential treatment, despite absence of nondisclosure agreements, based on an "agreement implicit in the relationships between the parties . . . .").

The plaintiffs further argue that "how an agency performs its regulatory duties can never be a trade secret." They assert, correctly, that the purpose of the Freedom of Information Act is to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." But they ignore countervailing principles. The Freedom of Information Act "does not confer upon the public an absolute right to all government information." *Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 328, 435 A.2d 353 (1980). "Its careful delineation of the circumstances in which . . . agency records . . . may properly remain undisclosed . . . reflects a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality. . . . [I]t is this balance of the governmental and private needs for confidentiality with the public right to know that must govern the interpretation and application of the Freedom of Information Act." Id., 328-29. The court is not persuaded that applying the trade secret exemption to the Levitan answer key subverts the purposes of the act. The criteria governing the selection process are set forth in detail in the RFP itself and in more substantial detail in the department's final determination, both of which are public documents included in the record before the commission. Those documents provide a

substantial degree of detail as to how the department performed its function in the RFP process. The court has reviewed both the evidence concerning the Levitan answer key and the Levitan answer key itself, which was reviewed in camera by the commission and is a sealed exhibit in this court. The court's review of all the evidence leads it to the conclusion that the Levitan answer key simply presents a higher level of detail than the information in the public record, including information relating to non-winning bids that was not presented in the final determination. There was substantial evidence at the hearing that disclosure of this higher level of detail would allow a sophisticated industry participant to back out sensitive commercial data about the competing bidders, which would undermine the trust of potential bidders in future RFP processes; that it would disclose the selection price point and thereby impair the negotiating positions of the EDCs in ongoing or subsequent negotiations; and that it would confer a competitive advantage on an industry participant who was able to obtain such information.

The plaintiffs are sophisticated participants in the renewable energy industry. Plaintiff Melone is an attorney who is admitted to the bar in seven states and owns several affiliated companies, including the plaintiff company in this case. As the Supreme Court observed in *University of Connecticut* v. *Freedom of Information Commission*, supra, 303 Conn. 728 n.5, "disclosure under the act does not turn on the motive for the request. Nevertheless . . . the question whether [the requester], or other persons similarly situated, could obtain economic value from the disclosure would be relevant in assessing whether the information constitutes a trade

secret."

"In determining whether an administrative finding is supported by substantial evidence, the reviewing court must defer to the agency's assessment of the credibility of witnesses. . . . The reviewing court must take into account contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . ." (Internal quotation marks omitted.) *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 411-12, 94 A.3d 588 (2014). Moreover, administrative tribunals "are not strictly bound by the rules of evidence and . . . they may consider evidence which would normally be incompetent in a judicial proceeding, as long as the evidence is reliable and probative." (Internal quotation marks omitted.) *Jutkowitz* v. *Dept. of Health Services*, 220 Conn. 86, 108, 596 A.2d 374 (1991). In light of the fact-bound nature of the reasonableness of efforts to maintain secrecy, the evidence of such efforts, and the applicable standard of review in an administrative appeal, the court concludes that substantial evidence supported the commission's findings and that its conclusions of law follow logically and legally from such findings.

The plaintiffs spend a substantial portion of their brief arguing that the bidders could not have a reasonable expectation of confidentiality in the information in their bids because the RFP indicated that certain information would be disclosed when the selection process would be complete, potentially including information designated as confidential in the winning bids.

These arguments are only tangentially relevant to their claim on appeal, because the department claimed, and the commission agreed, that the Levitan answer key as a whole was the department's trade secret under § 1-210 (b) (5) (A). The commission did not make an express finding with respect to the department's claim that disclosure of the Levitan answer key would disclose information submitted by bidders that was confidential under § 1-210 (b) (5) (B). The commission did find, however, that both Antrim and Cassadaga had submitted information that qualified for exemption under § 1-210 (b) (5) (B). Although the plaintiffs acknowledge that the Antrim and Cassadaga records are no longer at issue, they nevertheless advance this argument as part of their general attack on the confidentiality of the Levitan answer key, through which some confidential information submitted by bidders could be derived.

As the department argues, the RFP represents an agreement among the soliciting parties – the department, the Massachusetts EDCs, and the Rhode Island EDC. In the RFP, the soliciting parties set out certain limited assurances of confidentiality to bidders. The RFP permitted bidders to submit a "public version" of the proposal, from which information claimed to be confidential or proprietary could be redacted, and an unredacted version for review by the evaluation team. The RFP provided an assurance that "[t]he [e]valuation [t]eam shall use commercially reasonable efforts to treat the confidential information that it receives from bidders in a confidential manner and will not use such information for any purpose other than in connection with this RFP." ROR, p. 271. The RFP required bidders to consent to disclosure of

confidential information to the evaluation team and the regional grid operator and indicated that the evaluation team might seek consent, in some cases, to disclose certain other information. The RFP assured bidders that in such circumstances, the evaluation team "would work with bidders on developing appropriate means to protect and limit disclosure of confidential information." ROR, p. 272. This included taking reasonable steps to limit disclosure of confidential information through nondisclosure agreements or, when dealing with regulatory agencies, with requests for protective orders. The RFP placed on the bidder the responsibility to file motions for protective orders or to provide supporting materials, such as affidavits, to the EDCs to justify protective orders or other relief. The RFP's Appendix G, "Confidential Information," advised bidders to provide the legal basis for a confidentiality request, to describe the efforts they had taken to keep the information at issue confidential, and state whether the information at issue had independent economic value by not being readily known in the industry. The court concludes that the soliciting parties committed, in the RFP, to making commercially reasonable efforts to protect the confidentiality of material properly designated as confidential by the bidders and to advise the bidders of requests for disclosure of confidential materials. While this was not a *guarantee* of confidentiality, it provided reasonable assurance to bidders that material they believed to be confidential could be protected.

The department's technical analyst testified as to the procedures used to maintain the confidentiality of the unredacted proposals. He testified that unredacted proposals were logged

in and placed in locked cabinets. Access to the unredacted proposals was controlled through a single person. All staff members who were given access to the unredacted proposals were required to sign nondisclosure agreements. The analyst understood that maintaining the confidentiality of the unredacted proposals was critical to the integrity and competitiveness of the RFP process; without it, some bidders would be unable or unwilling to submit bids.

The RFP did state, in a footnote, that the department did intend to disclose "certain bid information" in its final determination, including "pricing data for winning bids" and "aggregate or average pricing data for all bids responsive to the CT portion of the RFP but without attribution to specific projects." ROR, p. 271. This statement was more fully explained in Appendix G, which cautioned in bold print that "[a]ll information for winning bidders, including confidential information, will be released and become public 180 days after contracts have been executed and approved by all relevant regulatory authorities, unless otherwise ordered by the Connecticut PURA." The plaintiffs argue that these statements obviated any reasonable expectation of privacy. The court disagrees.

Appendix G to the RFP stated that confidential information regarding winning bids would be made public, but it contained an important qualifier: it indicated that information would be disclosed "unless otherwise ordered by PURA." Cassadaga's witness testified that Cassadaga submitted its bid in reliance on the phrase "unless otherwise ordered by PURA." ROR, pp. 822-23. He testified that Cassadaga intended to seek, and did seek, a protective order for its

confidential information, and that PURA granted its motion. ROR, p. 823. Cassadaga's motion for protective order and its supporting affidavit were submitted as exhibits in the commission proceeding. ROR, pp. 660-67. Cassadaga's witness further testified that because of Cassadaga's nondisclosure agreements with turbine manufacturers, Cassadaga would not have been able to submit necessary information for the RFP without some assurance that confidentiality could be maintained. ROR, pp. 815-16.

The plaintiffs also argue that the bidders could have no reasonable expectation of confidentiality because the public records law in Massachusetts does not contain a trade secret exemption. The plaintiffs cited Massachusetts General Laws ch. 4, § 7, and ch. 66, § § 1-18,[10] in support of this claim. The plaintiffs disregard the specific statute cited in the RFP. In Appendix G, in the section dealing with Massachusetts, the RFP stated that the Massachusetts Department of Energy Resources had statutory authority, pursuant to Massachusetts General Laws ch. 25A, § 7, to protect "price, inventory and product delivery data" collected by the department. In relevant part, that provision authorizes the Massachusetts department to "collect price, inventory

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[10] Massachusetts General Laws ch. 4, § 7, subdivision 26 broadly defines "public records," in relevant part, to include "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth," subject to enumerated exceptions. Massachusetts General Laws ch. 66 is the Commonwealth's Public Records Law. Section 10 of chapter 66 governs requests to inspect or obtain copies of public records, and, like Connecticut's Freedom of Information Act, affords a broad right of public access to public records.

and product delivery data . . . and other information which is specifically necessary and material regarding . . . electricity . . . ." It then provides that "such information shall not be deemed to be a public record as defined in clause Twenty-sixth of section seven of chapter four and shall not be subject to demand for production under section ten of chapter sixty-six . . . ." In other words, price, inventory, and product delivery data and other necessary information obtained by the Massachusetts Department of Energy Resources is simply not a public record as defined by Massachusetts law.

The plaintiffs also claim that the information they requested was shared with the Massachusetts attorney general, as a member of the evaluation team, and with the Massachusetts Department of Public Utilities. The plaintiffs erroneously state that the Massachusetts attorney general was a member of the evaluation team; the only attorney general identified as a member of the evaluation team is Connecticut's attorney general. The department's bureau chief, Tracy Babbidge, affirmatively testified that the Massachusetts attorney general did not have access to the Levitan answer key. ROR, p. 957. As for the Massachusetts Department of Public Utilities, which had regulatory authority over the approval of the power purchase agreements, there was evidence that in the past that department, like PURA, had granted protective orders for confidential information, and that requests for confidential treatment were pending with that department at the time of the commission's hearing in this case.

The plaintiffs also argue that the information submitted by bidders could not be

"commercial or financial information given in confidence, not required by statute," as protected by the exemption in § 1-210 (b) (5) (B), because the RFP was conducted pursuant to statutes and the commercial and financial information provided by the bidders was required by the RFP. The commission correctly rejected this argument. It commented that there is no direct appellate authority construing the phrase "commercial or financial information, given in confidence," and consequently turned to Connecticut trial court decisions construing the term. It also looked to the federal Freedom of Information Act for interpretive guidance, as our Supreme Court often has done. See *Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 333. It similarly determined that the phrase "required by statute" is not further defined in the Freedom of Information Act. The commission therefore considered the Supreme Court's construction of the same phrase in General Statutes § 4-166 (2) in *Lewis* v. *Connecticut Gaming Policy Board*, 224 Conn. 693, 706, 620 A.2d 780 (1993). It concluded that certain information provided by Antrim and Cassadaga was "commercial or financial information given in confidence, not required by statute," within the meaning of § 1-210 (b) (5) (B). Although the Cassadaga and Antrim information is not directly at issue in this appeal, the commission's construction of the phrases "given in confidence" and "not required by statute" was careful, thorough, and consistent with the principles of statutory construction applied by Connecticut's courts.

Finally, the plaintiffs argue that recognizing a trade secret exemption for material submitted in a response to an RFP would swallow up the limited exemption for RFPs provided in

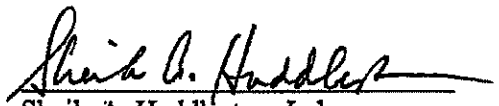
General Statutes § 1-210 (b) (24). That subdivision provides an exemption for "[r]esponses to any request for proposals or bid solicitation issued by a public agency or any record or file made by a public agency in connection with the contract award process, until such contract is executed or negotiations for the award of such contract have ended, whichever occurs earlier, provided the chief executive officer of such public agency certifies that the public interest in the disclosure of such responses, record or file is outweighed by the public interest in the confidentiality of such responses, record of file . . . ." By the time of the commission hearing, the department was no longer claiming any exemption under § 1-210 (b) (24), and the commission therefore did not address it. The court does not agree that recognition of the trade secret exemption for a limited subset of information involved in an RFP process is inconsistent with the exemption provided in § 1-210 (b) (24). The exemption in § 1-210 (b) (24) is limited in time but unlimited in scope; provided that an agency provides the required certification, the entirety of responses to RFPs can be withheld during the pendency of the RFP process. The trade secret exemption, on the other hand, is narrowly tailored in scope but indefinite in time; information that is proven to qualify for exemption under § 1-210 (b) (5) can legally be withheld as long as the requisite secrecy is maintained. Although some information may be protected by both exemptions during the pendency of an RFP process, the two exemptions serve separate purposes and the trade secret exemption can logically apply to specifically identified information even after the exemption for the RFP process has ended.

IV

CONCLUSION

In sum, the record establishes that the commission carefully considered the evidence and analyzed the applicable law. The commission's factual findings are supported by substantial evidence, and its conclusions of law follow logically and legally from those findings. The plaintiffs' appeal is therefore dismissed.

BY THE COURT,



Sheila A. Huddleston, Judge