Matter of Arrow Elecs., Inc. v Long Is. Power Auth.
2002 NY Slip Op 30176(U)
February 28, 2002
Supreme Court, Suffolk County
Docket Number: 63-2002
Judge: Melvyn Tanenbaum

INDEX No. 00063-2002

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

COPY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #001, 002 & 003-CASEDISP
R/D: 012002
S/D 022202

In the Matter of the Application of

ARROW ELECTRONICS, INC., SOUTH HUNTINGTON ALLIANCE FOR RESPONSIBLE ENERGY DEVELOPMENT, MARCHON EYEWEAR, INC. and GILBERT DISPLAYS, INC.

Petitioners

for judgment pursuant to Article 78 of the Civil Practice Law and Rules

- against -

LONG ISLAND POWER AUTHORITY, KEYSPAN CORPORATION, KEYSPAN ENERGY DEVELOPMENT CORPORATION, KEYSPAN GENERATION LLC, KEYSPAN ELECTRIC SERVICES LLC and KEYSPAN CORPORATE SERVICES LLC

Respondents

PLTF'S/PET'S ATTY:
CAHN, WISHOD & KNAUER, LLP
425 Broadhollow Road
Melville, New York 11747

DEFT'S/RESP'S ATTY:
LAZER, APTHEKER, FELDMAN, ROSELLA & YEDID, P.C. (LIPA)
225 Old Country Road
Melville, New York 11747

ARNOLD & PORTER, ESQS. (KeySpan)
399 Park Avenue
New York, New York 10022

MEMORANDUM DECISION, ORDER AND JUDGMENT

Records of public benefit corporations are accessible under a process described in the Freedom of Information Law ("FOIL"). Certain records are exempt from disclosure. Where a request for records is denied, the applicant is required to exhaust an administrative appeals process before applying to the Court for review.

Petitioners (private corporations and a not-for-profit unincorporated association) in this CPLR Article 78 proceeding want this Court to compel respondent Long Island Power Authority ("LIPA") to provide two sets of documents requested pursuant to the"FOIL" (Public Officers Law §85 et seq.). Those documents concern:

> 1) "LIPA's" promise to purchase electrical power from "KEYSPAN" (business corporation and subsidiaries intervenor-respondents by stipulation). The source of the power is a proposed electrical generation facility known as the "Spagnoli Road Energy Center" (first cause of action); and
>
> 2) "LIPA's" June 26, 1997 option to purchase existing electrical generating plants from respondents "KEYSPAN" ("Generation Purchase Right Agreement") (second cause of action).

On July 19, 2001 petitioners counsel made a "FOIL" request on "LIPA" to provide Spagnoli Road facility documents. Petitioners demanded copies of any and all documents relating to any agreement or contract entered into between "LIPA" and "KEYSPAN" regarding "LIPA's" promise to purchase output, or megawatts, from the proposed "Spagnoli Road Energy Center". Six days later "LIPA's" records access officer acknowledged receipt of this request and advised counsel that a response would be processed within "approximately 14 days". In an August 20, 2001 letter petitioner's counsel advised "LIPA's" chairman that the petitioners deemed its "FOIL" request denied and sought to appeal "LIPA's" denial.

Thereafter on September 7, 2001 "LIPA's" appeals officer provided petitioners a four page redacted response claiming that the redactions were necessary to maintain confidentiality and protect "commercially sensitive, trade secret information". Petitioner's first cause of action is directed to the appeals officer's determination under an assertion that it was arbitrary, capricious and violative of "FOIL's" open access purpose.

On November 21, 2001 petitioner's counsel made a second "FOIL" request seeking additional documents related to "LIPA's" option to purchase 27 electrical generating from "KEYSPAN" including:

> (1) Any and all documents identifying, describing or relating to the generating facilities that were transferred to Genco as described in Section 2.1 of the Generation Purchase Right Agreement ("GPRA") dated June 26, 1997, together with the report of LIPA's consulting engineer identifying with respect to each of the said generating facilities the specific size and location of the real property required for the operation of such generating facility.
>
> (2) Any and all documents relating to any modifications to or amendment of the GPRA subsequent to June 26, 1997.
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> (3) Any and all documents identifying or relating to the fair market value of the properties that are the subject of the GPRA and which LIPA has the right to purchase under the GPRA, including any reports received to date from consultants relating thereto.
>
> (4) Any and all documents identifying or relating to the book value of the properties that are the subject to the GPRA and which LIPA has the right to purchase under the GPRA, including any reports received to date from consultants relating thereto.
>
> (5) Any and all documents identifying or relating to contracts between LIPA and KeySpan, and any such contracts themselves, including without limitation contracts for the provision by KeySpan of services to LIPA; the provision of services by LIPA to KeySpan; contracts relating to the sale or purchase of electricity; and agreements with third parties, or with any federal or state agencies, that have been executed by both LIPA and KeySpan.

(6) All opinions of bond counsel issued in connection with any bond issue of LIPA, together with copies of all documents upon which each such opinion was based.

(7) All accounting records showing the use or expenditure of all proceeds from the sale of LIPA bonds.

Six days later "LIPA's" records access officer acknowledged this second "FOIL" request and advised that it would be processed "within approximately 30 days". On December 12, 2001 before the expiration of the 30 day period, petitioners' counsel decided that "LIPA's" time to respond had expired because he considered the lack of response a denial and sought appeal of the denial. Nevertheless, "LIPA's" records access officer on December 26, 2001 provided petitioners access to 2,482 pages of materials and wrote that "LIPA" would continue to search for records.

Petitioners commenced this proceeding on January 3, 2002. Thereafter on January 28, January 31, and February 20, 2002 "LIPA" continued to provide additional documents and records. Petitioners second cause of action seeks to compel respondent to produce materials and records responsive to petitioners "FOIL" request items #1, #3, #4 and #7.

The parties appeared in Court on February 14, 2002 and stipulated to permit "KEYSPAN" to intervene as an additional party respondent. The Court directed an accelerated schedule for oral argument and submission of the issues in this proceeding.

Respondents motions each seek an order dismissing the petition. Respondent "LIPA" claims that the second cause of action must be dismissed because petitioners failed to exhaust administrative remedies. This motion is in the nature of an application for a declaratory judgment and for a protective order directed to petitioners claimed burdensome and massive document request for the production of exempt documents. Movant contends that petitioners "FOIL" request seeks very large quantities of materials which could not have been produced within the time frame fashioned by petitioners counsel. It is respondents position that it is unreasonable to require a government agency to produce a response within a two week period where such a massive request for records is made and an analysis is necessary to cull out exempt materials.

Respondent "LIPA" asserts that Public Officers Law §89(4)(a) requires a public agency to issue a denial of access to requested records prior to commencement of an administrative appeal. It is respondents contention that this proceeding is premature since "LIPA" never issued a denial of petitioners November 21, 2001 second "FOIL" request and indeed has continued to provide documents to petitioners. Respondent "LIPA" also claims that the second cause of action has been rendered moot because petitioners continued to accept delivery of these documents after commencement of this proceeding. Respondents "LIPA" and "KEYSPAN" maintain that under these circumstances petitioners are obligated to exhaust their administrative remedies and their failure to satisfy this predicate requires dismissal of this proceeding.

Respondent "KEYSPAN" also has made a cross motion joined by respondent "LIPA" which asserts that there has been an adequate response to petitioners request for documents relating to the proposed "Spagnoli Road Energy Center". Respondents claim that records sought by petitioners and not provided are exempt from disclosure pursuant to Public Officers Law §87(2)(d) since "LIPA" is a competitive commercial enterprise entitled to preserve its trade secrets and competitive information. It is respondents position that if "LIPA" is required to disclose contents of "Spagnoli Road Energy Center" letters of intent (a preliminary and non binding estimate), such disclosure would cause substantial damage to "LIPA" and "KEYSPANs'" competitive position in the marketplace and might jeopardize the parties ability to reach a final agreement for development of the electrical generating facility. Respondents contend that this loss of competitive position ultimately would harm Long Island ratepayers who as a result will be forced to pay higher electric power rates.

In opposition to both motions petitioners claim that they are entitled to production of the requested records and documents since "LIPA" is a state government agency and under "FOIL" is obligated to disclose such materials. Petitioners also claim that no basis exists to support respondents assertion of document exemption pursuant to Public Officers Law §87(2)(d) since neither "LIPA" or "KEYSPAN" have commercial competitors in the electrical generation business within "LIPA's" service territory and therefore disclosure would not result in economic injury. Petitioners argue that the claimed competitive injury exception to "FOIL" is inapposite since the state's energy plan requires competition in the open market and that a failure to disclose such information would preserve the Long Island monopoly of "KEYSPAN"/"LIPA". Petitioners also assert that they have exhausted their administrative remedies by appealing "LIPA's" denials of their "FOIL" requests and that time is of the essence since a decision by the "LIPA" Board to exercise its option to purchase 27 electrical generating facilities from "KEYSPAN" is imminent. Petitioners claim that the requested records must be disclosed prior to the Board's decision to afford the public knowledge about the purchase price (fair market value or book value) "LIPA" intends to pay for these "KEYSPAN" facilities.

The Long Island Power Authority, a not-for-profit public corporation was created in 1986 during a period of crisis which affected the ability of the Long Island Lighting Company to provide utility service at reasonable rates. PAL §1020-c created a "corporate municipality instrumentality of the state to be known as the Long Island Power Authority" which "shall be a body corporate and politic and a political subdivision of the state, exercising essential governmental and public powers." The "sine qua non objective of the Act was to give "LIPA" the authority to save ratepayers money by controlling and reducing utility costs." (CITIZENS FOR AN ORDERLY ENERGY POLICY v. CUOMO, 78 NY2d 398, 414, 576 NYS2d 185 (1991). The legislation's primary statutory objectives were: 1) closing the Shoreham Nuclear Power Plant; 2) replacing LILCO as the provider of gas and electric power on Long Island, and 3) reducing power costs (PAL §§1020-f, 1020-g and 1020-h).

The Court of Appeals in CITIZENS FOR AN ORDERLY ENERGY POLICY v. CUOMO, supra at p.411, recognized the unique status of "LIPA" referring to the not-for-profit public corporation as a "specialized entity" created by the Legislature to concentrate and resolve matters within a reasonably specified and delegated range of expertise. Defined as a "corporate municipality instrumentality" and "a political subdivision of the state" respondent "LIPA" is subject to the provisions of the Freedom of Information Law (Public Officers Law §84 et seq.)

Public Officers Law §84 provides:

> **"Legislative declaration**
>
> The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is within its citizenry, the greater the understanding and participation of the public in government.
>
> As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.
>
> The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basis to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.
>
> The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article."

Public Officers Law §§89(3) and (4) describe the procedure for securing records, the administrative appellate process and ultimate review by the Court in an Article 78 proceeding and provide:

> "3. Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. Upon payment of, or offer to pay, the fee prescribed therefore, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight.

> 4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefore designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon.
>
> (b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two."

Petitioners November 21, 2001 Freedom of Information Law claim (second cause of action) is not properly before this Court. Public Officers Law §89(4)(a) provides that a person denied access to requested information under "FOIL" must appeal the denial in writing to the chief executive or governing body within 30 days. Petitioners served their "FOIL" request on November 21, 2001 and were furnished a written acknowledgment within five business days by "LIPA's" records access officer containing an estimate of the approximate time period (30 days) within which the request would be processed. Fourteen days later petitioners counsel unilaterally declared that "LIPA" had constructively denied the request and commenced this proceeding.

Pubic Officers Law §89(3) contains no time limitation within which a government agency is required to either grant or deny access to records sought in a "FOIL" request. (See LECKER v. NY CITY BOARD OF EDUCATION, 157 AD2d 486, 549 NYS2d 673 (1st Dept., 1990); LEGAL AID SOCIETY v. NY CITY POLICE DEPT., 274 AD2d 207, 713 NYS2d 3 (1st Dept., 2000) leave to appeal denied, 95 NY2d 956, 722 NYS2d 469 (2000). It requires that the person requesting a record be furnished with a statement of the approximate date when such request will be granted or denied. An agency's subsequent failure to provide a responsive determination within a reasonable time period may be considered a denial. Where the public records sought can be easily located, collected and evaluated, the agency's failure to provide a timely response may be deemed a constructive denial. (See MATTER OF NEWTON, 183 AD2d 621, 624 (1st Dept., 1992). However where a request is made seeking disclosure of massive quantities of records and materials from various locations and agencies, the government agency is required only to provide its determination to grant or deny the request within a reasonable time frame relative to the breadth and volume of the request. Respondent "LIPA" asserts that it acted reasonably in responding to petitioner's "FOIL" request for extensive materials and records. In this instance petitioners remaining requests seek:

> "1) Any and all documents identifying, describing or relating to the generating facilities that were transferred to Genco....together with the report of LIPA's consulting engineers.....".
>
> 3) Any and all documents identifying or relating to the fair market value of the properties.....".
>
> 4) Any and all documents, identifying, or relating to contracts between LIPA and KeySpan....and any such contracts themselves....relating to the sale or purchase of electricity....and agreements with third parties, or with federal and state agencies, that have been executed by both LIPA and KeySpan."
>
> 7) All accounting records showing the use or expenditure of all proceeds from the sale of LIPA bonds."

The broad scope of petitioners document request is evidenced by their repeated use of the phrase "any and all documents" and clearly seeks an enormous quantity of materials from "LIPA" concerning activities with "KEYSPAN", and other third parties and government entities. "LIPA's" records access officer's affidavit explains that not only must these records be located and collected, but also analyzed by authority attorneys, accountants and advisors to determine whether disclosure is appropriate. The evidence reveals that "LIPA" has produced 8,482 pages of documents and must still review an additional 80,000 hard copy pages in addition to 1.58 million pages stored electronically. Under these circumstances "LIPA's" agent's statement that it would "review" within approximately 30 days was not unreasonable.

Petitioners are obligated to fully exhaust their administrative remedies by following the procedural requirements of "FOIL" prior to seeking Court review. Although movants may be entitled to some or all of the requested records, that determination is not ripe for review since "LIPA" is entitled to a reasonable time period within which to collect, review and analyze the requested records and to make its determination of the scope of disclosure. Following "LIPA's" threshold decision petitioners have a right to an administrative appeal and ultimately to commence a CPLR Article 78 proceeding. Since petitioners failed to exhaust the procedural requirement of an administrative appeal described in Public Officers Law §89 the petition second cause of action must be dismissed. (TINKER STREET CINEMA v. NY STATE DEPARTMENT OF TRANSPORTATION, 254 AD2d 293, 678 NYS2d 124 (2d Dept., 19198); MATTER OF KURLAND, 122 AD2d 947 (2d Dept., 1986).

Petitioners first cause of action seeks review of "LIPA's" appeals officer's September 7, 2001 determination limiting disclosure of terms contained in two documents: 1) a "LIPA/KEYSPAN" letter of intent; and 2) the project term sheet, concerning "LIPA's" promise to purchase electrical power from "KEYSPAN" to be produced at the proposed Spagnoli Road Energy Center electrical generating facility. Unlike its massive November 21, 2001 document request petitioners July 19, 2001 "FOIL" request sought limited ascertainable records. This claim is ripe for judicial review since petitioners have exhausted their administrative remedies and are appealing the determination of "LIPA's" appeals officer to redact portions of the records.

Respondent's appeals officer claimed that such redaction was necessary to protect commercially sensitive trade secret information (citing Public Officers Law §87(2)(d)). The articulated basis was that "disclosure would cause substantial injury to the competitive position of both parties...seriously jeopardize "LIPA's" ability to negotiate effectively with other electric suppliers in order to obtain the lowest possible rates...and would seriously injure KeySpan because its competitors would then have detailed knowledge of the rate, cost, financial and other key commercial terms that KeySpan was willing to agree to and they (the competitors) could use such information to KeySpan's disadvantage in competing against KeySpan in the future".

All records of a public agency are presumptively available for public inspection and copying under "FOIL" unless the documents fall within one of the enumerated exemptions set forth in the Public Officers Law (see MATTER OF ENCORE, 87 NY2d 410, 417, 639 NYS2d 990 (1995); TROY SAND v. NY STATE DEPT., 277 AD2d 782, 716 NYS2d 772 (3rd Dept., 2000)).

Public Officers Law §§87(2)(c) & (d) provide:

> "2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:
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> (c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
>
> (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.

A party seeking to take advantage of this exemption (POL §87(2)(d)) must demonstrate the existence of actual competition and the likelihood of substantial competitive injury (MATTER OF GLENS FALLS NEWSPAPERS, 237 AD2d 948, 949, 684 NYS2d 321 (3rd Dept., 1999)). In MATTER OF GLEN FALLS, supra, the petitioner/newspaper made a "FOIL" request seeking disclosure of the terms of a confidential settlement agreement between a county industrial agency and a private power company containing agreed upon energy pricing terms. In upholding the agency's denial, the Court determined that public disclosure would result in substantial injury to the power company, jeopardizing its ability to negotiate with other producers to obtain the lowest rates for its customers.

The issue presented is whether a public agency having a unique legislative mandate as a public benefit corporation and a municipal subdivision can be required under "FOIL" to disclose the terms of a confidential agreement and to reveal the structure and mechanics of pricing information, normally a confidential business secret. Such proprietary secrets are normally crucial to competitive success in the business community. "LIPA" has submitted proof that it does business with various private companies which provide it with otherwise unavailable confidential information relating to fixed and variable costs which if revealed to other parties would remove "LIPA's" ability to effectively negotiate in the electric power spot and futures market.

"LIPA" has also established that it is a commercial enterprise engaged in actual competition, functioning in two separate markets: 1) the wholesale electric market, and 2) the retail electric market. Within the wholesale market "LIPA" purchases more than 18,500 gigawatt hours of energy per year with approximately 16,000 gigawatt hours met through bilateral contracts with independent power producers (such as "KEYSPAN"). The remaining 10-15% of energy requirements are purchased in the competitive marketplace operated by independent system operators. "LIPA" also sells surplus energy estimated to be approximately 600 gigawatt hours on the wholesale market to defray its retail customer costs. In addition, "LIPA" competes on a daily basis with 35 other registered entities for wholesale energy in the New York Independent System Operator ("NYISO") capacity, energy and ancillary service markets. "NYISO" rules require that all energy used in New York State must be competitively scheduled or bid into the market including the energy contracted for through bilateral contracts to meet load serving entities (such as "LIPA"). "LIPA" is required to submit their load requirements and to maintain a specified minimum of installed capacity (amount of generating resources and/or contractual commitments available to meet "LIPA's" peak load requirements plus mandated reserves) to "NYISO". Based upon the bids for energy supply submitted by the generators together with the state's load requirements, "NYISO" determines which generated units will operate and sets the market clearing price. Bids for energy are then made to "NYISO" energy market in strict confidence based upon various cost factors. "LIPA's" active participation in this electrical energy marketplace satisfies the "FOIL" exemption related to disclosure of material which would impair present or imminent contract awards POL §87(c) in an environment of actual competition. MATTER OF GLEN FALLS, supra.

The courts in construing the second factor required for exemption pursuant to Public Officers Law §87(2)(d) have upheld a public agency's denial of access to confidential documents on the basis of a likelihood of substantial competitive injury to either the public agency or to the private company dealing with the agency. In MATTER OF PASSINO, 277 AD2d 1028, 716 NYS2d 729 (4th Dept., 2000) leave denied, 96 NY2d 709, 725 NYS2d 639 (2001)) the documents of a municipal cooperative health benefit plan containing trade secrets were determined to be exempt since disclosure could cause substantial injury to the public agency's ability to compete as a commercial enterprise.

In this action respondents claim that "LIPA" and "KEYSPAN" will sustain competitive injury if the confidential documents are disclosed. They assert that those documents (a letter of intent and accompanying project term sheet) contain negotiated terms between "LIPA" and "KEYSPAN", contains pricing details, boundary rights, pricing and costs, all of which were disclosed upon an expectation and understanding that confidentiality would be preserved. Public disclosure of the redacted portions of the documents could jeopardize "LIPA's" ability to negotiate effectively with other private power firms in order to obtain the lowest rates for its customers and would likely cause substantial competitive injury to "LIPA" in the market place. This possibility would compromise its business and financial status and its legislative mandate to provide low electric rates to its consumers. In addition private companies seeking to do business with "LIPA" may be substantially injured by public disclosure of their confidential cost and pricing information which will unfairly unilaterally benefit their competitors by giving them otherwise unavailable confidential information.

Exemption of confidential information has been found justified where a substantial likelihood of competitive injury exists to a private company doing business with a public agency in situations where the private company has a reasonable expectation of privacy. The Court of Appeals in MATTER OF ENCORE, supra at page 421 upheld a public agency's (State University of New York "SUNY") refusal to disclose a private company's (Barnes & Noble) booklists to a competing company (Encore) reasoning that release of such information "would enable 'Encore' to offer the precise inventory that its target clientele ("SUNY" students) is required to purchase and that is currently offered by Barnes & Noble. The potential damage to Barnes & Noble as a result is the loss of student customers to its competitor and a corresponding loss of profits". Similarly in MATTER OF NEW YORK STATE ELECTRIC & GAS CORP. v. NY STATE ENERGY PLANNING BOARD, 221 AD2d 121, 645 NYS 2d 145 (3rd Dept., 1996), the Court affirmed the State Energy Planning Board's refusal to disclose confidential information (efficiency data) required to be filed by a privately owned electrical generating business ("Indeck") with the "Board" under state regulations. "Indeck" had entered into a mandated power purchase agreement with another privately (investor) owned electrical generating business (NY State Electric & Gas Corp.) to sell all the electricity generated from its facility. In upholding the Board's POL §87(2)(d) denial, the Court stated:

> "disclosure of the requested information would not only give steam host competitors an undue advantage in knowing a part of the steam host's production costs, it would also violate any confidentiality agreements Indeck entered into with Morton Salt. While this, by itself, would not constitute competitive harm as between Indeck and petitioner, it is eminently reasonable to conclude that Indeck would be unable to fairly compete for steam customers in the future if such customers would not be fully assured that their confidentiality agreements would remain inviolate."

The evidence presented demonstrates that public disclosure of cost confidential proprietary and pricing information contained in the "Spagnoli Road Energy Center" letter of intent and project term sheet would unfairly benefit "KEYSPAN's" competitors giving them an unfair competitive edge in the market place and would violate the confidentiality "non-disclose" terms of the "LIPA/KEYSPAN" agreement. Based upon these circumstances, respondents have met their burden of demonstrating the likelihood of competitive harm sufficient to uphold the partial redaction of the "Spagnoli Road Energy Center" documents. Accordingly, it is

ORDERED AND ADJUDGED that this CPLR Article 78 petition seeking a judgment annulling and setting aside the determination of the respondent LONG ISLAND POWER AUTHORITY dated September 7, 2001 and December 31, 2001 respectively denying the majority of petitioners Freedom of Information Law July 19 and November 21, 2001 requests for documents and materials and requiring respondent "LIPA" to provide adequate responses to petitioners request is denied, and it is further

ORDERED AND ADJUDGED that respondent "LIPA's" motion or an order pursuant to CPLR §7804 in the nature of an application for a declaratory judgment seeking a protective order pursuant to the procedural requirements of "FOIL" dismissing the second cause of action is granted to the extent that the second cause of action is dismissed without prejudice to renewal upon exhaustion of all administrative remedies, and it is further

ORDERED AND ADJUDGED that respondents motion for an order pursuant to CPLR §7804(f) dismissing the first cause of action in the petition is granted. The first cause of action is hereby dismissed.

Dated: February 28, 2002

MELVYN TANENBAUM

J.S.C.