

Matter of Daily Racing Form, Inc. v. State of New York Racing and Wagering Board

Supreme Court

Justice Evans

Petitioner Daily Racing Form (Racing Form) is a newspaper that publishes information and news pertaining to horse racing. Respondent New York State Racing and Wagering Board, (State Board) is a state agency charged with overseeing, among other things, all off track betting in the state. The Catskill Regional Off-Track Betting Corp., (Catskill) is a public benefit corporation formed pursuant to §502 of the Racing, Pari-Mutuel Wagering and Breeding Law (Racing and Wagering law) to conduct off track betting in the Catskill region.

After news coverage of several fraudulent bets placed through a telephone account with Catskill, the Racing Form filed a request for various of Catskill's filings with the State Board under the Freedom of Information Law [Public Officers Law §§84 -89]. Petitioner sought access to records filed with the Board pursuant to the Racing and Wagering Law, from 1992 to the present. The records sought included Catskill's organization plan [which is required to be filed with the Board under Racing and Wagering Law §521]; names of members of the Board of Directors and Officers [required to be filed under §502]; descriptions and contracts for the transmission of racing data [required under §§507, 520, 525 & 526]; annual reports [required under §517]; monthly financial statements [required under §524]; and the method for conducting betting on races interstate [subject to Board approval under §528]. Petitioner additionally sought any reports of criminal activity or investigations of the personnel and accounting practices of Catskill, either by the Board or by law enforcement agencies.

The Racing Form's FOIL request was sent to the State Board on November 25, 2002. On November 27, 2002, the Board's records access officer notified petitioner that, pursuant to a State Board rule, notice of the request would be given to Catskill before any action was taken. On December 24, 2002, respondent wrote to notify petitioner that an additional 60 calendar days was needed to locate the material. On January 27, 2003, respondent declined to provide petitioner with information as it was located. On February 19, 2003, respondent notified petitioner that the Racing Form's request for information was being forwarded to Catskill. An additional month and a half was spent affording Catskill the opportunity to review the anticipated production and raise objections, which it did.

The records access officer's first substantive response to the FOIL request was put in the mail on March 26th and provided Racing Form with some redacted records. They included some undated lists of Catskill's directors and officers with salaries and addresses redacted, two extensively redacted letters from Catskill's CEO referring to data transmission technology; some redacted records of the Board's review of Catskill's financial statements for years 2000 and 2001, Catskill's annual audited financial statements from 1992 to 2000, with all supporting schedules removed, and copies of Reports of Examination of Catskill written by the Office of the State Comptroller, for the years 1993 through 1999. This was supplemented with copies of various provisions of the Racing and Wagering Law. On April 11, 2003, the Board additionally provided Petitioner with a copy of a 1993 contract for the development and provision of a computerized wagering system, with many substantive provisions redacted.

After an unfruitful appeal to the State Board's records access appeals officer, the petitioner brought this Article 78 petition. Respondent has cross moved for dismissal, arguing that the Board's determination was not arbitrary or capricious nor affected by an error of law. This, however, is not the correct legal standard for review of an agency's denial of a FOIL request.

The issues raised by a FOIL request for records are not within the particular and specialized expertise of an administrative agency. Since an agency's specialized expertise is not implicated, courts make their own determinations with respect to issues of FOIL coverage and exclusion. Thus, the usual "standard of review in Article 78 proceedings, i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable. Rather, the person resisting disclosure must prove entitlement to one of the exceptions." *Laureano v. Grimes*, 179 AD2d 602, 603-4 (1st Dept. 1992). This court has therefore revisited the issue of petitioner's FOIL request de novo to determine whether the Racing Board followed the procedural requirements of the Public Officers Law §87 et seq., and whether it has met its burden of proving that any records are excludable under the law.

Governmental agencies are charged under FOIL, with establishing a procedure by which requests for information are to be processed. See 21 NYCRR Chap 25, Committee on Open Government, Part 1401 et seq. Public Access to Records of State and Local Agencies. Agencies are required to provide access to "the information and records required by the Freedom of Information Law, as well as records otherwise available by law." 21 NYCRR §1401.1(c). An agency may not establish any regulation more restrictive than those set forth in Part 1401, and "conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of records." Conflicts between the procedure established by the Racing Board and that mandated by the Public Access Law are clearly to be resolved in

favor of the latter.

Under FOIL, a records access officer's duties include maintaining an up-to-date subject matter list of all records maintained by the agency, and assisting a requester in identifying requested records. 12 NYCRR §1401.2 (b)(1) and (2). Here, the Racing Board's records access officer held petitioner's request for four months and then refused access to numerous records on the basis that they were not responsive to petitioner's request. Respondent's failure to assist in the crafting of a request tailored to the agency's record-keeping system, does not however provide a basis for excluding records from disclosure.¹¹

The Racing Board's practice pursuant to its own rule [Rule 5400.1(i)] of having its FOIL production prescreened by the entities it regulates, also violates the procedure set forth in the Freedom of Information Law. Public Officers Law §89(5)(a) and (b) prescribe the method whereby a regulated entity such as Catskill may identify, at the time of filing records, those records that contain trade secrets or other information which if disclosed would cause competitive injury. It may, at that time request exemption from the Freedom of Information Law, setting forth in writing the basis therefore. Thereafter, if those records are sought pursuant to FOIL;

"the agency shall (1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued; (2) permit the person who requested the exception, within ten days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception; (3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; . . . "

The Racing Board's practice of notifying every entity it supervises of a FOIL request for records and arranging a prior review and screening of the Board's proposed response, is in direct conflict with the Public Officers Law and so delays production of records that it vitiates the public access right it is intended to implement.

The appeal procedure followed by the Racing Board is also at odds with the law. Public Officers Law §89(4) (a) provides that a records appeals officer 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." Upon petitioner's appeal, the appeals officer questioned some of the access officer's determinations. Rather than releasing the requested records to petitioner as the law provides however, he referred the issue back to the records access officer for reconsideration; she has yet to revise her initial determination.

Respondent claims that this aspect of petitioner's Article 78 is not ripe. The appeal process cited to explain why these documents have yet to be produced is, however, in derogation of the Board's obligations under Public Officers Law §89[4](a). Respondent's failure for over 5 months to either provide petitioner with an appealable denial or turn over the records sought, is tantamount to a denial, so that petitioner may be said to have exhausted his administrative remedies. *Council of Regulated Adult Liquor Licensees v. City of New York Police Dept.*, 300 AD2d 17 (1st Dept. 2002).

The Board's procedures unduly delayed compliance with the Freedom of Information Law. Substantive errors precluded compliance altogether.

The Freedom of Information Law was enacted to enable the fullest possible public access to records and information in the possession of state and local governmental agencies. To that end, FOIL imposes "a broad duty on government to make its records available to the public." *In re Gould v. New York State Police Dept.*, 89 NY2d 267, 274 (1996). Its "declared purpose . . . requires giving its disclosure provisions an expansive interpretation [cites omitted]." *In the Matter of Newsday, Inc. v. Empire State Devel. Corp.* 98 NY2d 359, 362 (2002). Exceptions to accessibility are to be narrowly construed, and the burden is on a governmental agency to "articulate 'particularized and specific justification' for not disclosing requested documents." *Gould v. New York City Police Dept.*, supra, at 275, quoting *Matter of Fink v. Lefkowitz*, 47 NY2d at 571.

Here, Petitioner has been denied access to numerous records based on the Board's position that they were not responsive to petitioner's requests. In many cases documents were sufficiently identifiable from petitioner's FOIL requests to have been provided to Catskill for pre screening, and it was Catskill's attorney who initially contended that they were unrelated. The Board's subsequent narrow and literal reading of the requests appears to have arisen during the lengthy exchange between the records access officer and Catskill's attorney. It is unwarranted.

The Freedom of Information Law defines a record as, "any information kept, held, filed, produced or reproduced by, with or for an agency . . . in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms" . . . etc. Public Officers Law §86(4). "The requirement of Public Officers Law §89(3) that documents

be 'reasonably described' is to enable the agency to locate the records in question." *Konigsberg v. Coughlin*, 68 NY2d 245, 249 (1986). It does not afford a ground for redacting identifiable material that is subject to public access.

An allegation that a record is not responsive does not substitute for proof that it falls within one of the narrowly drawn exceptions to FOIL. Respondent located relevant documents and provided them for Catskill's review. Alleged inadequacies or a "literal" reading of petitioner's FOIL request do not warrant nonproduction. The materials withheld or redacted based upon a determination that they are not responsive are therefore subject to disclosure and shall be made available to petitioner, except insofar as they are demonstrated to be subject to statutory exclusion, as discussed below. To hold otherwise would frustrate the goal of liberal disclosure.

Public Officers Law §87 delineates several specific exceptions to the general rule that governmental records are to be made available for inspection. Those exceptions are not subject to the expansive interpretation they are given by respondent, however, and serve to exclude very little of the material reviewed by this court.

Respondent's general claims of privacy do not warrant nonproduction of the names, titles, and salaries of Catskill's directors and officers. See, *Kwasnik v. New York*, 262 AD2d 171 (1st Dept. 1999); *Hopkins v. Buffalo*, 107 AD2d 1028 (4th Dept. 1985). As respondent's argument implies, this information could be obtained by a FOIL request served on Catskill directly. It is therefore not subject to exclusion under Public Officers Law §87[2](b) and §89[2](b). *Belth v. New York Dept. Of Insurance*, 189 Misc 2d 508 (NY Co. 2001).

Respondent has redacted much of the contract between Catskill and Autotote asserting that it is excludable under Public Officers law §87[2](d) which exempts trade secrets and protects against competitive injury. To sustain its burden with respect to this exclusion, respondent must demonstrate that ascertainable and substantial competitive injury would result from disclosure. *Encore College Bookstores v. Auxiliary Service Corporation*, 87 NY2d 410, 421 (1995).

Respondent argues that release of the price Catskill pays for data services, will injure its potential future negotiations with Autotote's competitors. To invoke this exemption to FOIL, respondent must demonstrate both "the existence of actual competition and the likelihood of substantial competitive injury. *Troy Sand and Gravel Co. v. NYS Dept. Of Transportation*, 277 AD2d 782, 784 (3rd Dept. 2000). Respondent's showing to this court appears to be speculative. The question of whether respondent could meet its burden of proving competitive injury in this case need not be reached, however, as petitioner has excluded the price term of the contract from its FOIL request.

Upon review of the balance of the contract provided to the court, the remaining redacted provisions have no direct bearing on price but simply describe the services contracted for. The contract shall therefore be turned over in its entirety, except that two numbers contained in Attachment I may be redacted. The first is the decimal figure appearing beneath the words "Fee as percent of all monies wagered" and the second is in the third line from the bottom, appearing after the words "an additional fee of". No other redactions of the contract are warranted. The board shall additionally provide petitioner with copies of the other three Attachments listed in paragraph 4 of the contract, which have been supplied neither to petitioner or the court, as well as any revisions, extensions, drafts or modifications of the contract, with comparable specific price terms redacted.

The Board relied on Public Officers Law §87[2](d) as a reason for excluding all of Catskill's monthly financial statements and supporting documentation. Catskill's monthly financial statements are designated as public records in §524 of the Racing and Wagering Law. Respondent has failed to articulate any basis for the exclusion of these records from production pursuant to FOIL, and has omitted these records from its in camera production. To reiterate, the agency has the burden of proving the applicability of any exception set forth in §87[2], and must "articulate 'particularized and specific justification' for not disclosing specific documents." *Matter of Gould v. New York City Police Department*, 89 NY2d 267, 275 (1996). In the absence of any demonstration that these records should be excluded from production, respondent has failed to meet its burden. The board shall therefore turn over to petitioner all of the documents requested in category 4, giving that request the widest, most inclusive possible interpretation to petitioner's request.

Respondent also shields records from disclosure asserting that they are inter or intra- agency materials and are exempt pursuant to §87[2](g). The scope of this exception to the general rule of disclosure has been set forth by the Court of Appeals. "Consistent with th[e] limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' Factual data, therefore, simply means objective information" *Matter of Gould v. New York City Police Dept.*, supra at 276-77 (1996).

Upon reviewing the material provided to the court, I find the two letters from Donald Groth to the Chief of Racing Operations, dated November 26, 2001, and November 13, 2002 to be factual accounts of Catskill's operations that are responsive to request categories 1, 2, 3, 10 and 11. They contain a report of objective

information about Catskill's organizational plan, staff arrangements, operation, computer systems, rules for accepting individual and combined wagers. Given the intensively factual nature of the letters, they are not subject to exclusion as inter-agency records. They shall therefore be turned over to petitioner in their entirety, except that the addresses of the Board members set forth in paragraph 15 may be redacted. Two additional documents have been provided to the Court. One, dated July 26, 2001 from John Vale clearly contains factual tabulations and is therefore subject to disclosure. The second, an internal memorandum of a meeting with Catskill on October 1, 1998, appears to memorialize board members' internal deliberations, and is therefore exempt from FOIL disclosure.

In sum, upon reviewing the material provided by respondent, this court is of the opinion that that material is responsive to petitioner's requests and is subject to disclosure pursuant to FOIL, and that nothing contained therein is subject to redaction, other than the the memorandum and the addresses and numbers detailed above. The Board is therefore directed to make that material available to petitioner within 10 days of receipt of a copy of this order with notice of entry.

The Board is additionally directed to make available all other materials discovered subsequent to petitioner's original FOIL request, all Reports of Independent Accountants and the Supplementary schedules to Annual Reports that this court views as an integral part of the material requested in Category 7, all monthly reports with supplementary materials and schedules, and, any more recent contract or extension of the contract requested in Categories 4 and 5, with the percentage fee redacted.

Respondent has taken the position that it does not have numerous records legally required to be submitted to it by the regional corporations it supervises pursuant to laws that the Board characterizes as "obsolete." [Racing and Wagering Law §§521et seq.], The Board's records officer failed to assist in identifying the records the Board does keep and has yet to make determinations on disclosure issues submitted last November. Respondent has persisted in an unjustifiably narrow and literal reading of petitioner's FOIL requests, stating on that basis that it has no documents responsive to categories 12 and 13. Respondent has limited the records submitted to this court for in camera review, excluding numerous financial schedules, monthly filings, supplemental schedules, correspondence and memoranda colorably within the ambit of petitioner's request that were supplied to Catskill.

Therefore, to expedite the completion of respondent's FOIL application, the Board shall provide petitioner with the list required to be maintained pursuant to Public Officers Law §87[3](c), of all records in its possession, within 10 days after being served with a copy of this order with notice of entry. To the extent that this requires respondent to prepare or update such a list to include particular categories of documents sought by petitioner, it is directed to do so pursuant to FOIL §§87[3](c) and 89(3).

Therefore, upon submission of respondent's records and the court's in camera review, it is

ORDERED that the petition is granted and respondent's cross motion denied, and it is

FURTHER ORDERED that respondent shall make its document list and all records deemed by this court to be subject to FOIL disclosure available to petitioner in accordance with this order within 10 days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

FootNotes:

[1]

As respondent's records access officer wrote to Catskill of its' claims that parts of documents were not relevant to petitioner's request: ". . . the other information within a document is not deemed excepted from disclosure unless it falls within the exceptions to FOIL." Letter of Sheila H. Osterhout, Rrecords Access Officer, to Mark D. Stern, Attorney for Catskill, dated March 25, 2003.