New York's Highest Court Holds That Reports Filed by Insurance Companies Must Be Disclosed Under State's Freedom of Information Law

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The highest court in New York recently issued a relatively rare — but important — decision under the state's Freedom of Information Law. In the ruling, the court resolved a dispute between the public's right to view "public records" and corporate privacy rights — and the corporations lost.

States and the federal government have laws, known generically as a "Freedom of Information Act" law or a "Freedom of Information Law" ("FOIL"), that require the disclosure of information to members of the public upon the filing of an appropriate request. FOILs are not open invitations for the public to roam around government files. Indeed, they contain exceptions to the obligation to disclose that can substantially limit the availability of information that must be provided.

Recently, New York State's highest court, the Court of Appeals, issued a decision involving the state's FOIL. The court's ruling, in Matter *of Markowitz v. Serio*,[1] is of interest for a number of reasons. For one thing, rulings on disputes under FOILs by the highest court of any state are relatively rare. In addition, the court seemed to understand the practi-

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cal need, given the overwhelming amount of information that businesses transmit to governments today, to balance disclosure rights under FOILs with corporate privacy rights that, if overridden, can severely — and negatively — affect a company's competitive position in the marketplace. However, the court's ultimate conclusion — that the companies in this case had failed to prove the need to keep this information confidential — suggests that there may be a high barrier for companies to meet to prove that information they turn over to government regulators should be exempt from disclosure under the state's FOIL. Unfortunately, the ruling may have significant negative implications for the business community, although the scope of its ultimate impact remains to be seen.

REDLINING INVESTIGATION

The *Markowitz* case arose after Marty Markowitz, the highest elected official in Brooklyn, one of five boroughs of New York City, filed two FOIL requests with the New York State Insurance Department seeking information for specified zip codes, "by carrier, the number of voluntary [automobile] policies issued, renewed, cancelled (other than for non-payment of premium), or nonrenewed" from 2000 through 2003. Markowitz was concerned that auto insurers had been engaging in a practice known as "redlining," which, as the term is used in the insurance industry, is an insurer's refusal to issue or renew, or its cancellation of, a policy premised exclusively on the geographic location of the risk. Markowitz claimed that the zip code reports (commonly referred to as "Regulation No. 90 reports") were available pursuant to 11 NYCRR 218.7(d), an insurance regulation that states that such reports "shall be public record."

The Insurance Department provided Markowitz with data relative to the total number of auto policies in force in New York in each county from 1999 through 2002, but refused to release any data generated after 1997 demarcating the number of policies in force broken down, by carrier, for each of the requested zip codes. This refusal was based on the Insurance Department's contention that Regulation No. 90 reports were exempt from disclosure or release under FOIL because their contents constituted either trade secrets or records that, if disclosed, "would cause substantial

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injury to the competitive position" of insurers.[2] The Insurance Department advised Markowitz that the reports would be disclosed, but only after six years.

On December 3, 2004, after exhausting his administrative remedies relative to the denials of both FOIL requests, Markowitz commenced a proceeding against Gregory V. Serio, Superintendent of the New York State Insurance Department. Markowitz's petition sought an order and judgment annulling, as arbitrary and capricious, the Superintendent's determinations that the Regulation No. 90 reports were subject to a FOIL exemption, and ordering the Superintendent to produce the reports broken down by zip code. The Department answered, asserting that its refusal to release the reports was neither arbitrary nor capricious and that its decision was reasonable and consistent with lawful procedure.

Markowitz and the Superintendent entered into a stipulation permitting several interested insurers to intervene in the proceeding. Those insurers submitted affidavits in support of their claims that the reports sought by Markowitz constituted confidential information, the release of which would result in substantial competitive harm.

The trial court granted Markowitz's petition, holding that Regulation No. 90 expressly mandated public disclosure of the reports and that the Insurance Department had failed to meet its burden of demonstrating that the Regulation No. 90 filings qualified under a FOIL exemption. An intermediate state appellate court reversed and reinstated the Insurance Department's administrative determinations, noting that although the Insurance Department had decided in 1994 that the Regulation No. 90 reports were public records as the regulation clearly stated, they were nevertheless subject to FOIL disclosure and its later reversal of position was neither arbitrary nor capricious because the Insurance Department had relied on additional evidence from insurers that the disclosure of such information would result in competitive harm to them.[3] The intermediate appellate court further held that the Insurance Department's decision to exempt the reports on the ground that their release would result in substantial competitive injury was reasonable.[4] The dispute reached the New York Court of Appeals.

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REGULATION NO. 90 REPORTS

In its decision, the Court of Appeals explained that the New York State Legislature enacted New York State Insurance Law § 3429 to proscribe insurers from declining to issue or renew, or from cancelling, certain types of auto insurance "based solely on the geographical location of the risk."[5] That law directs the Superintendent to promulgate regulations establishing "procedures with respect to notification to insureds of the insurer's specific reason or reasons for refusal to issue or renew or for cancellation" of auto insurance policies.[6]

To that end, the court observed, the Insurance Department Superintendent promulgated 11 NYCRR 218.7(d), which provides that Regulation No. 90 reports must be filed annually "in a format prescribed by the superintendent" and that "every such report shall be public record."

The court ruled, however, that, contrary to Markowitz's contention, the "public record" language did not negate an insurer's right to assert that some information required to be included in the reports was exempt from disclosure under FOIL. Rather, it found, as the Insurance Department had "reasonably concluded," that such language suggested that, although Regulation No. 90 reports were submitted by a private entity at the behest of the Department, they were subject to public disclosure unless the insurer asserted that a FOIL exemption applied and was able to sustain its burden of establishing nondisclosure. Indeed, the court declared, this interpretation was consistent with its construction of the "public records" language in the context of FOIL exemptions.[7] It pointed out that it had held, more than 20 years ago, that "the FOIL exemptions must be read as having engrafted, as a matter of public policy, certain limitations on the disclosure of otherwise accessible records."[8] Accordingly, it held, the Insurance Department's interpretation that 11 NYCRR 218.7(d) did not deprive insurers of their right to contest the disclosure of Regulation No. 90 reports was neither irrational nor unreasonable and was "entitled to deference."[9]

FOIL EXEMPTIONS

The court found further evidence of the reasonableness of the Insurance Department's interpretation of 11 NYCRR 218.7(d) at 11

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NYCRR Part 241 ("Regulation No. 71"), which provides a regulatory framework concerning requests for, and the release of, Insurance Department records. It pointed out that, for instance, 11 NYCRR 241.3(a) states that "[e]xcept as otherwise provided by the Insurance Law, [Section 87(2)] of the Public Officers Law, or other provisions of law, all records produced [by the Department] shall be available for inspection and copying," thereby evidencing that FOIL exemptions are potentially applicable to all Insurance Department records, even those filed pursuant to Regulation No. 90. Moreover, 11 NYCRR § 241.6(a) explicitly permits one "who submits any information to the [D]epartment" to "request that the [D]epartment except such information from disclosure under" Public Officers Law § 87(2)(d). According to the court, several of the insurers that intervened in this case had done exactly that in the past when filing their annual Regulation No. 90 reports. Therefore, the court stated, it was apparent that the Department's interpretation of 11 NYCRR 218.7(d) reconciled, and gave effect to, the key disclosure components of Regulation Nos. 90 and 71. As such, while the "public record" language indicated that the Regulation No. 90 reports were subject to disclosure, an insurer retained the right to assert and attempt to prove that these reports fell within an applicable FOIL exemption.

THE TRADE SECRET EXEMPTION

The Insurance Department and the insurers argued that the applicable FOIL exemption in this case was Public Officers Law § 87(2)(d), which states that the Department "may deny access to records or portions thereof that…are trade secrets or are submitted…by a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." As the parties seeking the exemption, the Department and insurers were charged with the burden of proving their entitlement to it,[10] meaning that they had to demonstrate that the reports "'fall[] squarely within a FOIL exemption and by articulating a particularized and specific justification for denying access.'"[11] Because the overall purpose of FOIL is to ensure that the public is afforded greater access to governmental records, the court noted, FOIL exemptions are

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interpreted narrowly.[12] To meet its burden, the court explained, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm.

The court then held that here, the Insurance Department and insurers had failed to meet this burden. In the court's view, the evidence suggesting they would suffer a competitive disadvantage was "theoretical at best." The insurers' key argument was that if they were forced to reveal zip codes of areas where relatively few policies were issued, competitors could use this information to exploit an insurer's geographic weakspot. In the court's opinion, however, it had "not been shown that zip code data, without more, would necessarily put the insurer at a competitive disadvantage." Because neither the Insurance Department nor insurers met their burden of justifying the exemption of the reports under Public Officers Law § 87(2)(d),[13] the court ruled that the order of the intermediate appellate court should be reversed, with costs, and the order and judgment of the trial court reinstated. Markowitz therefore was entitled to the information he had requested.

CONCLUSION

One judge on the Court of Appeals, Judge Robert S. Smith, writing in a separate opinion, stated that he believed that the insurers had made an "ample showing" that the records were exempt from disclosure under Public Officers Law § 87(2)(d) because they were "submitted to an agency by a commercial enterprise…and…if disclosed would cause substantial injury to the competitive position of the subject enterprise." In Judge Smith's view, the insurers' submissions made a specific and persuasive showing of competitive injury. The affidavit of one executive of the State Farm Mutual Automobile Insurance Company explained in detail how a State Farm competitor could gain an advantage from State Farm's Regulation No. 90 reports. Such a competitor, according to this executive, would compare and merge its zip code data with State Farm's, would use that data to estimate its and State Farm's market share in each zip code, would determine from that which areas to target, would do a tar-

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geted marketing campaign, and would use the results to create a statistical model to guide future marketing. The executive added that Regulation No. 90 reports would help competitors assess the weaknesses and strengths of particular State Farm agents' performance, using techniques that he described at length. He also explained how, by tracking changes disclosed by the reports in "risk placement" between State Farm and an affiliated company, a competitor could detect a new State Farm marketing strategy, for example "a shift toward youthful, higher risk customers in specific zip codes." Affidavits submitted by officials of the other insurer-intervenors also contained explanations of the harm they would suffer, Judge Smith stated.

Judge Smith also noted that the insurers' factual submissions totaled 19 pages, but that the majority of the Court of Appeals had brushed them aside "in three sentences." The majority had stated that the insurance companies' showing was "theoretical at best," but Judge Smith stated that that was true only in the sense that any attempt to predict the consequences of disclosure had to be theoretical. In his view, FOIL required such a prediction in that the exemption created by Section 87(2)(d) was available only on a showing that the information "if disclosed would cause substantial injury."

Judge Smith pointed out that the majority mentioned only one of the insurers' points, which the majority chose to call their "key argument," and that the majority then responded with the "unsupported assertion" that it had "not been shown that zip code data, without more, would necessarily put the insurer at a competitive disadvantage." In Judge Smith's opinion, however, that was "exactly what the insurers have shown, in extensive detail — and even without that showing, it would be self-evident that a business can get a substantial advantage from information about its competitor's success or lack of it in particular locations."

In concluding his separate opinion, Judge Smith stated that he had "little doubt" that insurers would suffer some significant competitive injury from the public disclosure of Regulation No. 90 reports. However, his view was the minority view, and pursuant to the majority view, the Regulation No. 90 reports must be disclosed under the state's FOIL.

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NOTES

[1] 2008 NY Slip Op. 05775 (June 26, 2008).
[2] NY Public Officers Law § 87(2)(d).
[3] 39 A.D. 3d 247, 248 (1st Dept. 2007).
[4] *Id. a*t 248-249.
[5] NY Insurance Law § 3429(a)(2).
[6] NY Insurance Law § 3429(b).
[7] *See, e.g., Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132 (1985); *Matter of New York Tel. Co. v. Pub. Serv. Commn.*, 56 N.Y.2d 213, 219-20 (1982).
[8] *Matter of Xerox Corp.*, 65 N.Y.2d at 132.
[9] *Gaines v. New York State Div. of Hous. & Community Renewal,* 90 N.Y.2d 545, 549 (1997).
[10] *See* Public Officers Law § 89(4)(b); (5)(e).
[11] Matter of Data Tree, LLC v. Romaine, 9 NY3d 454, 463 (2007), *quoting Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 NY2d 562, 566 (1986).
[12] *See Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 564 (1984).
[13] *See Matter of Washington Post Co.*, 61 N.Y.2d at 567.

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