

petitioner in this proceeding, filed two Freedom of Information Law (FOIL) requests with the State Insurance Department seeking information "for each Kings County zip code, including 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 claimed that such zip code reports (commonly referred to as "Regulation No. 90 reports") were available pursuant to 11 NYCRR 218.7(d), an insurance regulation which states that such reports "shall be public record."

The 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 Kings County zip code. This refusal was based on the Department's contention that Regulation No. 90 reports are exempt from disclosure or release under FOIL because their contents constitute either trade secrets or records that, if disclosed, "would cause substantial injury to the competitive position" of insurers (Public Officers Law § 87[2][d]). The 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 this CPLR article 78 proceeding

against respondent Gregory V. Serio, Superintendent of the Insurance Department. The petition seeks an order and judgment annulling, as arbitrary and capricious, the Superintendent's determinations that the Regulation No. 90 reports are 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.¹ 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.

Supreme Court granted the petition, holding that Regulation No. 90 expressly mandated public disclosure of the reports and that the Department failed to meet its burden of demonstrating that the Regulation No. 90 filings qualified under a FOIL exemption. The Appellate Division reversed and reinstated the Department's administrative determinations, noting that although the Department had decided in 1994 that the Regulation No. 90 reports were public records as the regulation clearly

¹ The intervenor-insurers are Farmers New Century Insurance Company, State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Insurance Company, and Chubb & Son.

stated, they were nevertheless subject to FOIL disclosure and its reversal of position in 2000 was neither arbitrary nor capricious because the Department had relied on additional evidence from insurers that the disclosure of such information would result in competitive harm to them (39 AD3d 247, 248 [1st Dept 2007]). The Appellate Division further held that the Department's decision to exempt the reports on the ground that their release would result in substantial competitive injury was reasonable (*id.* at 248-249). This Court granted leave to appeal and we now reverse.

The Legislature enacted 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" (Insurance Law § 3429[a][2]). 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 (Insurance Law § 3429[b]).

To that end, the 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" (emphasis supplied). Contrary to Markowitz's contention, however, the "public record" language does not negate an insurer's right to assert that some information required to be included in the

reports are exempt from disclosure under FOIL. Rather, as the Department has reasonably concluded, such language suggests that, although Regulation No. 90 reports are submitted by a private entity at the behest of the Department, they are subject to public disclosure unless the insurer asserts that a FOIL exemption applies and is able to sustain its burden of establishing non-disclosure. This interpretation is consistent with this Court's construction of the "public records" language in the context of FOIL exemptions (see e.g. Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 132 [1985]; Matter of New York Tel. Co. v Pub. Serv. Commn., 56 NY2d 213, 219-220 [1982]). Indeed, this Court has held 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" (Matter of Xerox Corp., 65 NY2d at 132). Accordingly, the Department's interpretation that 11 NYCRR 218.7(d) does not deprive insurers of their right to contest the disclosure of Regulation No. 90 reports is neither irrational nor unreasonable and is "entitled to deference" (Gaines v New York State Div. of Hous. & Community Renewal, 90 NY2d 545, 549 [1997]).

Further evidence of the reasonableness of the Department's interpretation of 11 NYCRR 218.7(d) is found at 11 NYCRR Part 241 (Regulation No. 71), which provides a regulatory framework concerning requests for, and the release of, Department records. 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 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). Indeed, several of the insurers here have done so in the past when filing their annual Regulation No. 90 reports. Therefore, it is apparent that the Department's interpretation of 11 NYCRR 218.7(d) reconciles, and gives effect to, the key disclosure components of Regulation Nos. 90 and 71. As such, while the "public record" language indicates that the Regulation No. 90 reports are subject to disclosure, an insurer retains the right to assert and attempt to prove that they fall within an applicable FOIL exemption.

The Department and insurers argue that the applicable FOIL exemption here is 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 are charged with the burden of proving their entitlement to it (see Public Officers Law § 89[4][b]; [5][e]), meaning that they must demonstrate that the reports "'fall[] squarely within a FOIL exemption and by articulating a particularized and specific justification for denying access'" (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]). Because the overall purpose of FOIL is to ensure that the public is afforded greater access to governmental records, FOIL exemptions are interpreted narrowly (see Matter of Washington Post Co. v New York State Ins. Dept., 61 NY2d 557, 564 [1984]). To meet its burden, 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.

Here, the Department and insurers have failed to meet this burden. The evidence suggesting they will suffer a competitive disadvantage is theoretical at best. The insurers' key argument is that if they are forced to reveal zip codes of areas where relatively few policies are issued, competitors could use this information to exploit an insurer's geographic weakspot. It has not been shown that zip code data, without more, would necessarily put the insurer at a competitive disadvantage. Because neither the Department nor insurers have met their burden

of justifying the exemption of the reports under Public Officers Law § 87(2)(d) (see Matter of Washington Post Co., 61 NY2d at 567), the order of the Appellate Division should be reversed, with costs, and the order and judgment of Supreme Court reinstated.

Matter of Marty Markowitz v Gregory V. Serio, Superintendent of
the State of New York Insurance Department, et al.

No. 111

SMITH, J. (concurring):

The majority concludes that Regulation No. 90 reports are available to the public only if the Freedom of Information Law (FOIL) makes them so. It also concludes that the insurers have failed to show that the reports are exempt from FOIL.

I disagree with both conclusions. I think that

Regulation No. 90, by its own force, makes the reports "public record." But if I were to consider the FOIL issue, I would find that the insurers had made an ample showing that disclosure of the records "would cause substantial injury to [their] competitive position" within the meaning of Public Officers Law § 87 (2) (d). Ironically, I end up agreeing with the majority's result -- but only because the majority's two errors, as they affect this case, cancel each other out.

I

Regulation No. 90 requires insurers to submit certain reports and says: "every such report shall be public record." The majority holds that this means only that the records are public unless a FOIL exemption applies. If that is all it means, the authors of the regulation were wasting their time writing the words, because all records of state agencies are public unless a FOIL exemption applies. But "public record" and "subject to FOIL" do not mean the same thing.

A public record, in ordinary speech, refers to a record that any member of the public can look at and copy. Deeds on file at the county clerk's office are public records; so are the pleadings filed in most litigations. A clerk who is the custodian of public records will show them to anyone who walks into his or her office -- or, if the office is technologically advanced, the documents may be available online to anyone with a computer. This is very different from documents subject to FOIL

-- as to which members of the public may only submit a FOIL request, which will be dealt with, often in cumbersome and time-consuming fashion, by the official assigned by the agency to deal with such things.

The majority cites Matter of Xerox Corp. v Town of Webster (65 NY2d 131 [1985]) and Matter of New York Tel. Co. v Public Serv. Commn. (56 NY2d 213 [1982]) for the proposition that "public records" and "subject to FOIL" have the same meaning. That is not what these cases hold. Xerox interpreted General Municipal Law § 51, a statute enacted before FOIL, which declared a broad category of documents to be "public records." We held that, since the Legislature was "presumably aware of General Municipal Law § 51 at the time it enacted FOIL," the later statute "must be read as having engrafted . . . certain limitations" on the earlier one (65 NY2d at 132). New York Tel. Co. involved a statute saying that all proceedings, documents and records of the Public Service Commission "shall be public records." We held that, while the proceedings of the Commission are generally public, the statute does not prohibit the Commission from making exceptions for evidence "which falls within the category of trade secrets" -- just as a court, whose proceedings are generally public, might put some sensitive information under seal (56 NY2d at 219). New York Tel. Co. says nothing about FOIL.

Xerox and New York Tel. Co. stand for the proposition

that, where a broad category of material is declared to be "public record," exceptions may be made, based on FOIL exemptions or simply on public policy. That proposition has no relevance to this case, for Regulation No. 90 establishes as "public record" not a broad category to which the insurers ask for an exception but the precise documents that they want to keep confidential for six years: reports showing insurers' agents, brokers, policies and applications broken down by zip code. The insurers are seeking not an exception to the "public record" requirement but the virtual nullification of it.

I would hold that reports under Regulation No. 90 are public, as the regulation says they are, and would not reach any question under FOIL.

II

If I did reach the FOIL issue, however, I would hold that the documents in issue here are exempt from disclosure under Public Officers Law § 87 (2) (d), because they "are submitted to an agency by a commercial enterprise . . . and . . . if disclosed would cause substantial injury to the competitive position of the subject enterprise."

The insurers' submissions make a specific and persuasive showing of competitive injury. The affidavit of Eric Webster, an official of intervenor State Farm Mutual Automobile Insurance Company, explains in detail how a State Farm competitor could gain an advantage from State Farm's Regulation No. 90

reports. Such a competitor, Webster says, 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 targeted marketing campaign, and would use the results to create a statistical model to guide future marketing. Webster adds that Regulation No. 90 reports would help competitors assess the weaknesses and strengths of particular State Farm agents' performance, using techniques that Webster describes at length. He also explains 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 contain explanations of the harm they will suffer.

The insurers' factual submissions total 19 pages. The majority brushes them aside in three sentences. It says their showing "is theoretical at best" (majority op at 7), but that is true only in the sense that any attempt to predict the consequences of disclosure must be theoretical. The statute requires such a prediction. The exemption created by section 87 (2) (d) is available only on a showing that the information "if disclosed would cause substantial injury."

The majority mentions only one of the insurers' points,

which it chooses to call their "key argument" (majority op at 7). The majority then responds with the unsupported assertion that "it has not been shown that zip code data, without more, would necessarily put the insurer at a competitive disadvantage" (id.). But that is 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.

I have little doubt that insurers will suffer some significant competitive injury from the public disclosure of Regulation No. 90 reports. I would order those reports disclosed anyway, because I read the regulation as a policy determination by the Insurance Department, acting under the authority given it by the anti-redlining statute (Insurance Law § 3429), that the reasons for making this information public outweigh the insurers' legitimate reasons for keeping it confidential. But the majority's attempt to pretend that no policy choice need be made, because no competitive injury has been shown, simply ignores the record.

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Order reversed, with costs, and order and judgment of Supreme Court, New York County, reinstated. Opinion by Judge Pigott. Chief Judge Kaye and Judges Ciparick, Graffeo, Read and Jones concur. Judge Smith concurs in result in an opinion.

Decided June 26, 2008