

**Matter of Saratoga Harness Racing, Inc. v Task
Force on the Future of Off- Track Betting in N.Y.
State**

2010 NY Slip Op 30481(U)

March 9, 2010

Supreme Court, Albany County

Docket Number: 9740-09

Judge: Joseph C. Teresi

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
SARATOGA HARNESS RACING, INC.,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION and ORDER
INDEX NO. 9740-09
RJI NO. 01-09-ST0934

-against-

THE TASK FORCE ON THE FUTURE OF OFF-
TRACK BETTING IN NEW YORK STATE,
JOHN VAN LINDT, in his capacity as Chairman and
Records Access Appeals Officer of THE TASK FORCE
ON THE FUTURE OF OFF-TRACK BETTING IN
NEW YORK STATE, and THE NEW YORK STATE
RACING AND WAGERING BOARD,

Respondents.

In the Matter of the Application of
FINGER LAKES RACING ASSOCIATION, INC.,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION and ORDER
INDEX NO. 9730-09
RJI NO. 01-09-ST0935

-against-

THE TASK FORCE ON THE FUTURE OF OFF-
TRACK BETTING IN NEW YORK STATE,
JOHN VAN LINDT, in his capacity as Chairman and
Records Access Appeals Officer of THE TASK FORCE
ON THE FUTURE OF OFF-TRACK BETTING IN
NEW YORK STATE, and THE NEW YORK STATE
RACING AND WAGERING BOARD,

Respondents.

Supreme Court Albany County All Purpose Term, February 5, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Nolan & Heller, LLP
 Richard Burstein, Esq.
Attorneys for Petitioner Saratoga Harness Racing, Inc.
 39 North Pearl Street
 Albany, New York 10026

Hodgson Russ, LLP
 Christian J. Soller, Esq.
Attorneys for Petitioner Finger Lakes Racing Association, Inc.
 677 Broadway, Suite 301
 Albany, New York 12207

Andrew M. Cuomo, Esq.
 Attorney General of the State of New York
Attorney for the Respondents
 (Michael McCartin, Esq. AAG)
 The Capitol
 Albany, New York 12224

TERESI, J.:

Petitioners¹ commenced these two CPLR Article 78 Proceedings to enjoin Respondents from disseminating their financial data. Issue was joined by Respondents in both proceedings. Respondents set forth a single unsupported objection in point of law, and otherwise contest the petitions on their merits. Because Respondents failed to substantiate their objection in point of law and Petitioners demonstrated their entitlement to judgment, the petitions are granted.

Article 6 of the Public Officers Law, New York's Freedom of Information Law (hereinafter "FOIL"), sets forth this State's policy and procedures for public access to government records. "FOIL is based on a presumption of access to the records." (Data Tree, LLC v. Romaine, 9 NY3d 454 [2007]). "[A]ll records of a public agency are presumptively

¹ Individually petitioner Saratoga Harness Racing, Inc. will be referred to as "Saratoga" and petitioner Finger Lakes Racing Association, Inc. will be referred to as "Finger Lakes".

available for public inspection and copying [under FOIL], unless the documents in question fall within one of the enumerated exemptions set forth in Public Officers Law § 87(2).” (Matter of Glens Falls Newspapers v Counties of Warren & Washington Indus. Dev. Agency, 257 AD2d 948, 949 [3d Dept. 1999] quoting Matter of New York Times Co. v New York State Dept. of Health, 243 AD2d 157 [3d Dept. 1998]). A party that seeks an exemption from access is “charged with the burden of proving their entitlement to it... meaning that they must demonstrate that the reports fall squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.” (Markowitz v. Serio, 11 NY3d 43 [2008] quoting Data Tree, LLC [internal quotations and brackets omitted], Public Officers Law § 89[5][e]).

The exception specifically relevant here is set forth in Public Officer’s Law §87(2)(d), which states that an “agency may deny access to records or portions thereof that... 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.” “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.” (Markowitz, supra at 51; Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410 [1995]).

Here, the information Petitioners seek to exempt from disclosure is contained in their 2004 - 2008 year end financial statements. Both Petitioners provided such information to The New York State Racing and Wagering Board (hereinafter “RWB”). The RWB compiled the Petitioners’ year end data into chart form and provided it to The Task Force on The Future of

Off-Track Betting (hereinafter "FOTB"). The FOTB intends to publish the chart on its website. Both Petitioners demonstrated that the information they seek to prevent from disclosure is not publically available and have exhausted their administrative remedies challenging such disclosure.

On this record, Saratoga set forth persuasive evidence that disclosure of the above records will cause it to suffer a competitive injury. In its administrative challenge and in this proceeding, Saratoga submits affidavits of its executives and of experts in gaming market analysis and labor negotiations. Saratoga's General Manager's affidavit establishes, by a person with first hand knowledge of its business, the competition pressures Saratoga faces. Contrary to Respondents' contentions, such affidavit is neither speculative nor conclusory but rather based upon the personal experience of Saratoga's General Manager. He details Saratoga's racing and gaming competitors, he outlines Saratoga's food and beverage competitors, he sets forth Saratoga's current and future labor negotiations (union and nonunion) and the potential for outside competitors to enter the market that Saratoga serves. The injuries that the disputed information would cause Saratoga are also detailed by its General Manager, along with a gaming market analysts' expert opinion affidavit. Moreover, the injury Saratoga would suffer by the dissemination of the disputed information in the labor market are detailed by its Human Resources Director and an expert in labor negotiations. From the foregoing, Saratoga demonstrated "specific, persuasive evidence" that Respondents' dissemination of its financial data falls "squarely within a FOIL exemption." (Markowitz, supra).

Likewise, Finger Lakes also demonstrated the applicability of Public Officer's Law §87(2)(d)'s exemption. Finger Lakes' Director of Labor Relations specifically detailed the

competitive pressures of Finger Lakes' labor market, and the injury that Finger Lakes would suffer if the disputed financial information were released. Finger Lakes also submits the affidavit of a Vice President of its parent company, who oversees its financial performance. He sets forth the specific racing and gaming venues Finger Lakes competes against, explains the potential for competition from national gaming companies and corroborates Finger Lake's labor market pressures. Finger Lakes, like Saratoga, also submits a gaming market analysts' expert opinion affidavit and the affidavit of an expert in labor negotiations. Both again outline the competitive pressures facing Finger Lakes, and the injury it would face if the disputed financial information were released. On this record, Finger Lakes demonstrated that Public Officer's Law §87(2)(d)'s exemption squarely applies.

In opposition, Respondents failed to sufficiently controvert Petitioners' showings. Respondents submit the affidavit Thomas Casaregola² (hereinafter "Casaregola"), offering first hand knowledge and expert opinion of the racing industry. To the extent that the Casaregola affidavit characterizes Petitioners' papers as insufficient, as set forth above, such contention is misplaced. Additionally, Casaregola's substantive contention, that Petitioners face no competition and thus Public Officer's Law §87(2)(d)'s exemption does not apply, is unavailing. Casaregola is correct that the Petitioners' are running "Legislatively-granted monopolies" with respect to their video lottery terminals (hereinafter "VLT"), which generate the largest component of each Petitioners' income. However, such facts do not remove the competition Petitioners face relative to all other aspects of their businesses. Nor does it adequately refute

² Cassergola is the chief auditor for the RWB and appointed member of the FOTB.

Petitioners' sworn allegations detailing the competition they each face. Petitioners' also specifically contradicted the premise of Casaregola's geographic limitation on competition argument. Casaregola had relied on a published article for this contention, however, Petitioners offered an affidavit from the author of the article who explained how his earlier conclusions were incorrect. Nor did Respondents set forth any factual refutation of Petitioners' showing of labor market competition. Moreover, Casaregola's assertion the Petitioners' could not be injured by dissemination of compiled data is speculative and unsupported by any factual showing.

Accordingly, the petition is granted and Respondents are enjoined from disseminating Petitioners' 2004 - 2008 financial statements or the chart which was created by RWB with such information. Additionally, because the papers submitted in this proceeding contain the documents Respondents are enjoined from disseminating and all submission herein have been under seal, Petitioners demonstrated "good cause" for sealing the records of this proceeding. As such, all original papers submitted in this proceeding are sealed pursuant to 22 NYCRR 216.1.

The parties' remaining contentions have been examined and found to be lacking in merit.

This Decision and Order is being returned to the attorneys for Saratoga Harness Racing, Inc. A copy of this Decision and Order and all other original papers submitted are being delivered to the Albany County Clerk for filing, and are sealed. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 9, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated November 19, 2009, Affirmation of Richard Burstein, dated November 19, 2009, with attached Exhibit A, Verified Petition, dated November 19, 2009, with attached Exhibits A-I.
2. Answer, dated January 13, 2010, Affirmation of Robert Feuerstein, dated January 11, 2010, Affidavit of Thomas Casaregola, dated January 6, 2010, with attached Exhibits A-D, Certification of Record, dated December 14, 2009.
3. Affidavit of Shannon Okada, dated January 29, 2010, Affirmation of Richard Burstein, dated February 2, 2010, with attached Exhibit A.
4. Order to Show Cause, dated November 19, 2009, Affirmation of Kevin Kearney, dated November 18, 2009, with attached Exhibit A, Verified Petition, dated November 18, 2009, with attached Exhibits A-K.
5. Answer, dated January 13, 2010, Affirmation of Robert Feuerstein, dated January 11, 2010, with attached Exhibit 1-2, Affidavit of Thomas Casaregola, dated January 6, 2010, with attached Exhibits A-D, Certification of Record, dated December 14, 2009.