STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
THE NEW YORK RACING
ASSOCIATION, INC.,

Petitioner,

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

DECISION AND JUDGMENT

Index No. 6580-09
RJI No. 01-09-ST0919

-against-

STATE OF NEW YORK DIVISION OF THE BUDGET, STATE OF NEW YORK FRANCHISE OVERSIGHT BOARD, and LAURA ANGLIN, in her capacities as Director of State of New York Division of the Budget and Chairperson of State of New York Franchise Oversight Board,

Respondents,

-and-

THE HEARST CORPORATION and JIM ODATO,

Intervenors.

(Supreme Court, Albany County)

APPEARANCES:

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Connolly, J.:

Petitioner The New York Racing Association ("NYRA") commenced this CPLR article 78 to prohibit respondent Laura Anglin, in her capacity as Director of the State of New York Division of the Budget ("DOB") and Chairperson of the State of New York Franchise Oversight Board ("FOB"), from enforcing a February 13, 2009 determination that granted, in part, a Freedom of Information Law ("FOIL") request for disclosure of NYRA's 2009 operating budget and to vacate that determination. Supreme Court, New York County (Mills, J.) temporarily enjoined respondents from enforcing its February 13, 2009 determination pending resolution of this proceeding. Upon respondents' motion, Supreme Court, New York County (Emead, J.), ordered that venue be changed to Albany County. Thereafter, The Hearst Corporation and Jim Odato (collectively, "Hearst") moved to intervene in this proceeding. The Court heard argument regarding this matter during its December 18, 2009 article 78 calendar, during which the Court granted the intervention motion and requested further submissions from the parties. Now that the matter is fully submitted, the Courts' Decision and Judgment follows.

BACKGROUND

NYRA is a not-for-profit corporation, which, pursuant to an agreement with the State of New York, holds a franchise through the year 2033 to conduct thoroughbred horse racing operations at three locations – Aqueduct Racetrack, Belmont Park Racetrack, and Saratoga Race Course (see Verified Petition at ¶ 5; Racing, Pari-Mutuel Wagering and Breeding Law §§ 206; 208). In addition,

NYRA sells the simulcasts of its races to other racing and gaming entities within the State, nationally and internationally (see Verified Petition at ¶ 5).

The FOB essentially oversees much of NYRA's franchise operations pursuant to authority granted it in Article Two of the Racing, Pari-Mutuel Wagering and Breeding Law. The FOB consists of five members appointed by the governor, who serve without financial compensation (see Racing, Pari-Mutuel Wagering and Breeding Law § 212 [1]; [2]; and [4]). Further, the governor selects the chairperson of the FOB, who serves at the governor's pleasure (see id. at [1]). During the relevant time of the petition, respondent Laura Anglin served on the FOB and was its chairperson, along with serving as the Director of the DOB. According to the affirmation of NYRA's counsel, "[e]mployees of the [DOB] are also employed by or otherwise affiliated with the [FOB]" (Viscusi Affirmation at ¶ 3 [affirmed 2-24-09]).[1]

On December 5, 2008, NYRA submitted its 2009 proposed operating budget ("the budget") to the FOB pursuant to Racing, Pari-Mutuel Wagering and Breeding Law § 212 (8) (a) (iii) (A), requesting that the cover letter and the budget be exempt from disclosure due to alleged trade secret information contained in the documentation (see Bennett Affirmation at ¶ 6). Thereafter, on December 22, 2008, proposed-intervenor James Odato ("Odato") – a reporter with the Albany Times Union – sought the budget in a FOIL request directed to the Record Access Officer at the DOB. In his request, Odato noted that the budget had been the subject of a review that day by the FOB. Two days later, the DOB informed NYRA of the FOIL request, noting the DOB's chairperson had decided

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[1] This affirmation was submitted in support of NYRA's application for an Order to Show Cause, which, as noted above, was granted along with a temporary restraining order. Also of note, while Racing, Pari-Mutuel Wagering and Breeding Law § 212 sets forth the FOB's authority to oversee NYRA, it does not expressly provide for a staff for the FOB.

to honor the request. According to the petition, NYRA then sought to exercise its statutory right to oppose the FOIL application.

Thereafter, the DOB's FOIL officer informed NYRA that the cover letter would not be withheld from disclosure as a trade secret. Further, she noted: "If you wish to pursue trade secret protection for the budget submission please provide . . . an individual substantive justification for such protection for each and every separate statement within the document for which you seek protection . . . ." (Bennett Letter [dated 1-12-09], Viscusi Affirmation, Exhibit 3). Further, the FOIL officer requested that NYRA explain the "substantial harm that would befall [its] 'competitive position' should each item of information be disclosed" especially with regard to the "long-term nature of NYRA's franchise" (id.).

In response and directing its response to the Records Access Officer at the FOB, NYRA objected to having to justify the application of the trade secret exception to FOIL for every separate statement contained in the budget. Further, NYRA disagreed that its status as a long-term franchise holder altered its reliance on the trade secret exemption, noting it was still in a competitive relationship with "six regional off-track betting corporations, another thoroughbred racetrack, seven harness racetracks, the New York State Lottery and multiple Indian casinos for wagering dollars" in New York as well as out of out-of-state-and-country pari-mutuel sites (Viscusi Letter [dated 1-25-09], id., Exhibit 4). NYRA also objected to partial disclosure of the budget, noting that case law did not support such a contention. In its correspondence, NYRA listed every segment of the budget, noting after each listing that such information was not subject to FOIL disclosure (see id.).

On January 28, 2009, in response to NYRA's letter, the FOIL officer noted that the FOIL request was made to the DOB and not the FOB, explaining: "As NYRA's 2009 operating budget

is possessed by individuals who work at the Division of the budget, it is a record of this agency under [FOIL]" (Bennett Letter at 1 [dated 1-28-09], Bennet Affirmation, Exhibit 7). The FOIL officer also informed NYRA that its request for trade secret protection for the budget and transmittal letter was denied with three exceptions, explaining:

> Without providing any specific legal citations you have asserted a number of times that previous court decisions have 'repeatedly' provided trade secret protection to NYRA's contractual and financial information. However, as a result of the bankruptcy filing and management and legal problems, NYRA is now operating under an increased level of scrutiny pursuant to Chapter 140 of the Laws of 2008, which established the FOB. The franchise agreement entered into by the State of New York and NYRA provides for the payment of $105,000,000 to NYRA, as well as potential additional operating payments and, in turn, requires NYRA to remit a franchise payment to the State of New York. Given the level of State oversight and fiscal involvement, the public has a legitimate interest in NYRA's operations. Moreover, any court decision that were rendered during the period of NYRA's previous franchise would not be relevant, given the new arrangements under which NYRA now operates (id. at 2).

The FOIL officer further noted that NYRA made several general assertions that were either unpersuasive or irrelevant. However, the FOIL officer determined: "it does appear that information related to the amount budgeted for purse in the current year, the television broadcast revenue received from ABC and the amount received from the license fee for the flea market at Aqueduct qualify for trade secret protection" (id.). Finally, the FOIL officer informed NYRA of its right to appeal this determination and noted that, pursuant to Public Officer Law § 89 (5) (b) (3), "a copy of this determination is being transmitted to the individual who requested the record under FOIL, and the Committee on Open Government" (id. at 2-3).

Thereafter, NYRA administratively appealed the above-discussed determination. In that appeal, NYRA preliminarily noted that it did not have a statutory obligation to the DOB with regards to submitting its budget, effectively objecting that the FOIL matter was handled by the DOB instead

of the FOB. Otherwise, NYRA asserted that it had met its burden of justifying its claim that it would suffer substantial harm if the entire budget was disclosed. NYRA argued that the determination was inaccurate in suggesting that a "new" franchise existed and that NYRA is operating under an increased level of scrutiny and, therefore, prior Court decisions regarding other FOIL requests are still binding. Further, NYRA rejected the notion that the State has made a new investment in NYRA since the referenced $105,000,000 promised to NYRA was part of a 2008 settlement agreement wherein NYRA conveyed three of the four racetracks it purchased in 1955 for, among other things, that funding and a 25-year franchise. Moreover, NYRA contends that, as part of 2008 agreements, it did not forgo the trade-secret exemptions under FOIL. NYRA also argued:

> The purpose of the Racing Law sections requiring NYRA to file information with the NYSFOB are to assure the NYSFOB that NYRA is operating its franchise properly and efficiently. It is not the purpose of the statue for NYRA's competitors to be made aware of NYRA's internal confidential and proprietary trade secret business methods. It should also again be noted in this regard that NYRA's contracts (and similar information, such as that at issue herein) have been routinely protected by the courts of the State of New York. If the 2009 NYRA Operating Budget in reference herein were to be disclosed under FOIL, it would have the effect of rendering a multitude of NYRA non-disclosure agreements null and void. It would adversely affect future NYRA contract negotiations if potential contracting parties believed that NYRA would be unable to keep proprietary information confidential (Viscusi Letter at 8 [dated 2-5-09], id., Exhibit 6).

On February 13, 2009, Anglin, acting as the FOIL's appeal officer on behalf of the DOB, upheld the determination to release a redacted version of the budget to FOIL requestor. Anglin explained that NYRA had failed to meet its burden of justifying trade secret protection for the entire budget. Anglin noted that, while three specific areas of the budget qualified for trade secret protection, NYRA had not, with regard to the other areas of the budget, "provided any specific rationale to meet its burden to demonstrate how disclosure of the specific items in the budget would

cause substantial competitive injury" (Anglin Letter [dated 2-13-09], id., Exhibit 7). Anglin also noted that it was disseminating a copy of the determination to the FOIL requestor and to the Committee on Open Government (see id.).

By way of Order to Show Cause dated February 27, 2009, NYRA commenced this proceeding to prohibit the DOB from enforcing its February 13, 2009 determination and to vacate the same. Pending a hearing on the matter, Supreme Court, New York County (Mills, J.) temporarily enjoined respondents from enforcing its February 13, 2009 determination. Upon respondents' motion, the same Court (Emead, J.) ordered that venue be changed to Albany County, and, after transfer, The Hearst Corporation and Jim Odato (collectively, "Hearst") moved to intervene in this matter. The Court heard oral argument on this matter during its December 18, 2009 CPLR article 78 calendar, during which the Court granted the intervention motion and sought further submissions from the parties. This matter is now fully submitted.

DISCUSSION

As a preliminary matter, NYRA contends that the FOIL determination should be vacated since it was issued by the wrong agency. NYRA argues that the FOB has oversight obligations but that the DOB, which issued the determination, had no authority to act in this matter. As NYRA asserts, the DOB does not have statutory oversight capacity of NYRA (see Racing, Pari-Mutuel Wagering and Breeding Law § 212). However, as NYRA seemingly acknowledged in its submissions to the Court and as the record indicates, the DOB was in possession of the record. Accordingly, since the DOB, as a governmental agency, held the budget, it properly addressed the FOIL request directed to it (see Public Officers Law § 86 [4]; Matter of Capital Newspapers v Whalen, 69 NY2d 246 [1987]; see also Matter of Newsday, Inc. v Empire State Dev. Corp., 98

NY2d 359 [2002]; Matter of Encore Coll. Bookstores, Inc. v Auxiliary Serv. Corp. of the State Univ. of NY, 87 NY2d 410, 418 [1995]).

Otherwise, as to the merits, "FOIL was enacted 'to promote open government and public accountability' and 'imposes a broad duty on government to make its records available to the public'" (Matter of Miller v New York State Dept. of Transp., 58 AD3d 981, 982 [3d Dept 2009], lv denied 12 NY3d 712, quoting Matter of Gould v New York City Police Dept., 89 NY2d 267, 274 [1996]; see Matter of Beechwood Restorative Care Ctr. v Signor, 5 NY3d 435, 440 [2005]). Further, as a general rule, settled case law holds that the provisions of FOIL should be liberally construed to fulfill the legislative's goal of access to governmental records (see Matter of Newsday, Inc., 98 NY2d at 362). As a corollary to this legislative policy, the Court of Appeals has held that the exemptions set forth in FOIL should be interpreted narrowly, "imposing the burden upon the public agency [or opposing entity] to demonstrate that 'the material requested falls squarely within the ambit of one of [those] statutory exemptions'" (id., quoting Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]; see Matter of Data Tree, LLC, 9 NY3d at 462-463; Matter of Gould, 89 NY2d at 275). Additionally, records of a public agency are presumptively deemed to be open to public inspection without regard to need or purpose of the applicant (Matter of Gould, 89 NY2d at 274-275).

NYRA contends that the DOB's determination to disclose the budget with only a limited application of the trade secret exemption in FOIL lacks a rational basis. NYRA argues that the DOB "act[ed] in a manner which contravenes NYRA's and the State's best interests" by directing disclosure of confidential information that will impinge on NYRA's ability to compete (NYRA's Memorandum of Law at 7). Further, NYRA argues that this Court must consider the substantial

harm that will come to NYRA from disclosure of these documents to the general public rather than to Odato since he, as a reporter, is bound to disclose the budget to the public. Moreover, NYRA contends that it has submitted sufficient evidence to support its contention that the trade secret exemption applies to it. NYRA maintains that, at either the agency level or here, it has offered specified reasons to support the conclusion that, if the budget is disclosed, NYRA will suffer a competitive injury. NYRA acknowledges that some of the information in the budget may appear generic, cumulative or statistical to DOB and the FOB employees/staff not familiar with the thoroughbred horse racing business but argues that this information would be useful to its competitors.

Contrary to NYRA's argument, the Court's review here is not under the "arbitrary and capricious" standard but, instead, as noted above, the entity claiming an exemption under FOIL bears the burden of proving entitlement to that exemption (see Matter of New York Comm. for Occupational Safety and Health v Bloomberg, 2010 NY Slip Op 80 at * 4 [1st Dept, Jan. 7, 2010], Matter of Bahnken v New York City Fire Dept., 17 AD3d 228, 230 [1st Dept 2005], lv denied 6 NY3d 701; Matter of Capital Newspapers Div. of the Hearst Corp. v Burns, 109 AD2d 92, 94 [3d Dept 1985], affd 67 NY2d 562 [1986]). Here, NYRA claims that the entire 2009 budget should be exempt under Public Officers Law § 87 (2) (d),which provides that an agency may deny access to records that "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." Thus, under this exemption, the question is whether the disclosure of the data would cause substantial injury to the competitive position of the entities submitting the information (Matter of Encore Coll. Bookstores, Inc., 87 NY2d

at 419). Moreover, it "protects the interests of a commercial enterprise in avoiding a significant competitive injury as a result of disclosure of information it provided to an agency" (Matter of Verizon NY, Inc. v Bradbury, 40 AD3d 1113, 115 [2d Dept 2007]; see Matter of Encore Coll. Bookstores, 87 NY2d at 420). "To meet its burden, the party seeking [the trade secret] exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on speculative conclusions that disclosure might potentially cause harm" (Matter of Markowitz v Serio, 11 NY3d 43, 51 [2008]).

First, the Court rejects NYRA's contention that the Court should consider that the budget, if disclosed, could become public given the requestor's status as a newspaper reporter. As settled case law holds, the purpose of the requestor is not at issue in FOIL (see Matter of Gould, 89 NY2d at 274-275). Next, the Court rejects NYRA's argument that it met its burden of establishing that the trade secret exemption should be applied to the entire budget (see Matter of Verizon NY, Inc., 40 AD3d at 1115). Both at the agency level and here, with regard to the portions of the budget not exempted by the DOB, NYRA failed to present either specific or persuasive evidence that it would suffer a competitive injury if disclosure was directed despite the DOB's requests for such specific information (see id.; Matter of Markowitz, 11 NY3d at 51). While NYRA has made some showing that it is in competition with other race tracks and pari-mutuel wagering facilities, it has not shown how disclosure of the budget would cause substantial injury to that competitive position (Matter of Encore College Bookstores, Inc., 87 NY2d at 419). For instance, NYRA asserts that its budget is a "treasure trove" of information for its competitors but offers no specific explanation as to why. Equally unpersuasive is NYRA's suggestion that disclosure could lead to the "cannabaliz[ation]" of its executives (see Viscusi Affirmation at ¶ 8 [affirmed 12-16-09]).

Furthermore, the Court rejects NYRA's assertion that the determination contravenes the State's best interest by directing disclosure of part of the 2009 budget. While article two of the Racing, Pari-Mutuel Wagering and Breeding Law does provide that the FOB should be "guided", in part, by concerns for "maximizing revenue for governments" (see Racing, Pari-Mutuel Wagering and Breeding Law § 212 [8] [a]), the FOB is also to "make recommendations for establishing model governance principles to improve accountability and transparency" (id. (emphasis added)). In addition, the Court is not persuaded by NYRA's claims that individuals lacking in experience of the thoroughbred racing industry rendered the determination at issue. Here, the determination following the administrative appeal was issued by the chairperson of the FOB – the very entity overseeing NYRA. Furthermore, in response to NYRA's petition, the DOB has presented evidence that much of the information which NYRA seeks to shield from disclosure is already of public record (see Matter of Encore Coll. Bookstores, Inc., 87 NY2d at 420). The Court also notes that NYRA's reliance upon several cases from Supreme Court, New York County, is misplaced since, among other reasons, those cases either dealt with documentation different from the budget at issue here or pre-dated the 25-year extension of NYRA's franchise agreement.[2]

In its submissions, Hearst agrees that NYRA failed to meet its burden but also contends that the entire budget should have been disclosed. Hearst argues that NYRA failed to establish that the trade secret exemption applied to (1) the amount budgeted for purse in the current year, (2) the television broadcast revenue received from ABC, and (3) the amount received from the license fee for the flea market at Aqueduct, arguing, in effect, that the Court should set aside that part of the

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[2] The Court also notes that it is not bound to follow these decisions (cf Mountain View Coach Lines, Inc. v Storms, 102 AD2d 663, 664 [2d Dept 1984]; Matter of Patrick BB, 284 AD2d 636, 639 [3d Dept 2001]).

determination. In response, NYRA contends, among other things, that, since Hearst failed to timely commence an article 78 proceeding seeking such relief, it may not as an intervenor seek it in this proceeding. The DOB maintains that no part of the determination should be set aside.

Although intervention may occur at any point in a proceeding, "a party may not avoid a Statute of Limitations bar by moving to intervene in a pending proceeding after the period of limitations has run. Thus, where the proposed intervenor's claim would be barred by the Statute of Limitations, the question arises whether its claim may be properly related back to the filing date of the petition" (Matter of Greater NY Health Care Facilities Assn. v DeBuono, 91 NY2d 716, 720 [1998]). The Court of Appeals has explained that "a successful intervenor becomes a party for all purposes and the intervenor's claim will be deemed to have been interposed as of the filing date of the petition. However, intervention cannot be used as a means to revive stale claims" (id.). That Court further concluded:

> [A] party may be permitted to intervene and to relate its claim back if the proposed intervenor's claim and that of the original petitioner are based on the same transaction or occurrence. Also the proposed intervenor and the original petitioner must be so closely related that the original petitioner's claim would have given the respondent notice of the proposed intervenor's specific claim so that the imposition of the additional claim would not prejudice the respondent (id. at 721).

Here, no dispute exists that Hearst neither sought to independently challenge the determination nor to intervene in this proceeding until long after the four-month statute of limitations had run.[3] Further, no dispute exists that Hearst's claim and that of NYRA are based on the same transaction or occurrence – namely, Odato's FOIL request. However, to the extent that Hearst seeks affirmative relief in this proceeding instead of merely opposing NYRA's petition, such relief must

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[3] The record is also clear that Odato was given notice of the FOIL determination when it was issued.

be denied. Hearst's claim that the portion of the DOB's determination allowing some redaction of the budget based upon the application of the trade secret exemption should set aside is not related to NYRA's claim that the entire budget should be exempt from disclosure; rather, such claims are antithetical (Matter of Nordmann-Moroney v Board of Appeals of Vil. of Westbury, 55 AD3d 738, 739-740 [2d Dept 2008]). Accordingly, Hearst cannot use this proceeding to revive what is a stale claim (see Matter of Greater NY Health Care Facilities Assn., 91 NY2d at 721). In any event, the record shows that NYRA made a sufficient showing to warrant application of the trade secret exemption to these three specific areas of the budget.

For the reasons discussed above, the Court denies the relief requested in the petition and the affirmative relief sought by Hearst. Otherwise, the Court has reviewed the parties' remaining arguments and finds them either lacking in merit or unnecessary to reach given this Court's determination.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for in camera review.

Therefore, it is hereby

ORDERED and ADJUDGED that the relief requested in the petition is denied; and it is further

ORDERED and ADJUDGED that the relief requested by intervenors The Hearst Corporation and Jim Odato is denied; and it is further

ORDERED and ADJUDGED that the petition is dismissed.

This Memorandum constitutes the Decision and Judgment of the Court. This original Decision and Judgement is being returned to the attorney for respondents. The below referenced original papers are being mailed to the Albany County Clerk. **The signing of this Decision and Judgement shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.**

SO ORDERED.
ENTER.

Dated: March 10, 2010
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause filed March 6, 2009;
2. Petition verified February 20, 2009, with Exhibits 1-19 annexed;
3. Affirmation of Pasquale Viscusi, Esq., affirmed February 24, 2009;
4. Answer dated December 10, 2009;
5. Affirmation of Kathy A. Bennett, Esq., affirmed December 10, 2009, with Exhibits 1-15 annexed;
6. Respondents' Memorandum of Law dated December 11, 2009;
7. Notice of Motion dated December 9, 2009;
8. Affidavit of Ravi V. Sitwala, Esq., sworn to December 9, 2009, with Exhibits A-B annexed;
9. Intervenors' Memorandum of Law dated December 9, 2009;
10. Reply Affirmation of Paul J. Campito, Esq., affirmed December 17, 2009;
11. Affirmation of Pasquale Viscusi, Esq., affirmed December 16, 2009;
12. Petitioner's Memorandum of Law dated December 17, 2009;
13. Letter of Douglas J. Goglia, Esq., dated December 22, 2009;
14. Letter of Paul J. Campito, Esq., dated December 28, 2009.