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*Bahnken v. New York City Fire
Department*

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“The people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.”¹ It is difficult to dispute that an open government can prevent secrecy and corruption among federal and state governmental agencies.² However, while public access to government records ensures governmental accountability and promotes public participation in the democratic process, it may also leave private entities vulnerable to disclosure of confidential financial information when the government has merely received private records pursuant to reporting obligations.³ How does the law balance the interests of the public with the interests of a private enterprise? Moreover, should an open government include free access to those documents that reveal confidential financial information of a private enterprise?

The New York Legislature enacted the Freedom of Information Law (“FOIL”) in 1974.⁴ By doing so, it sought to give the general public greater insight into governmental decision-making.⁵ In part, FOIL declares:

[T]he [New York] legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.⁶

FOIL allows the public to request government records and documents from any New York State agency.⁷ Although a presumption exists in favor of open access to these documents, there are ten exemptions to the FOIL disclosure requirement under New York Public Officers Law section 87(2).⁸ More specifically, when a

1. N.Y. PUB. OFF. LAW § 84 (McKinney 2006).

2. *See Russo v. Nassau County Cmty. Coll.*, 587 N.Y.S.2d 419, 419–20 (2d Dep’t 1992).

3. *See, e.g., Washington Post v. N.Y. State Ins. Dep’t*, 61 N.Y.2d 557, 605 (1984) (holding the minutes of private insurance company meetings given to State Insurance Department for its examination were not exempt from disclosure under Freedom of Information Law); *Verizon N.Y., Inc. v. Bradbury*, 803 N.Y.S.2d 409, 420 (2005) (holding that a private cable television franchise’s draft copy of an agreement was not exempt from disclosure under the Freedom of Information Law).

4. N.Y. PUB. OFF. LAW § 84.

5. *Id.*

6. *Id.*

7. N.Y. PUB. OFF. LAW § 86 (defining “agency” as “any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities.”).

8. N.Y. PUB. OFF. LAW § 87(2) provides:

Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

- (a) Are specifically exempted from disclosure by state or federal statute;
- (b) If disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
- (c) If disclosed would impair present or imminent contract awards or collective bargaining negotiations;

member of the public makes a FOIL request for a document that was submitted to a state agency by a private enterprise, the state agency may deny access under the “trade secret” exemption to FOIL.⁹ The trade secret exemption “provides that documents held by public [state] agencies are available upon request *unless the disclosure would reveal trade secrets causing substantial injury to the competitive position of a private [commercial] enterprise.*”¹⁰

In *Bahnken v. New York City Fire Department*, the New York Appellate Division, First Department, addressed the issue of whether the New York City Fire Department (“FDNY”), a state agency, could claim the trade secret exemption to prevent contracts under its control between private hospitals and ambulance vendors from being disclosed to New York City’s paramedics union.¹¹ Although the FDNY was not a party to these contracts, it manages New York City’s Emergency Medical Service (“EMS”),¹² and thus was in possession of the

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- (d) 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;
 - (e) Are compiled for law enforcement purposes and which, if disclosed, would:
 - i. Interfere with law enforcement investigations or judicial proceedings;
 - ii. Deprive a person of a right to a fair trial or impartial adjudication;
 - iii. Identify a confidential source or disclose confidential information relating to a criminal investigation; or
 - iv. Reveal criminal investigative techniques or procedures, except routine techniques and procedures;
 - (f) If disclosed could endanger the life or safety of any person;
 - (g) Are inter-agency or intra-agency materials which are not:
 - i. Statistical or factual tabulations or data;
 - ii. Instructions to staff that affect the public;
 - iii. Final agency policy or determinations; or
 - iv. External audits, including but not limited to audits performed by the comptroller and the federal government; or
 - (h) Are examination questions or answers which are requested prior to the final administration of such questions;
 - (i) If disclosed, would jeopardize an agency’s capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
 - (j) Are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.
9. The “trade secret” exemption is set forth in N.Y. PUB. OFF. LAW § 87(2)(d).
 10. 2 MELVIN F. JAGER, TRADE SECRETS LAW § 50:21 (2005) (emphasis added). Although the term “private enterprise” is not defined in FOIL, “private” is defined in Black’s Law Dictionary as “relating or belonging to an individual, as opposed to the public or the government,” and “enterprise” is defined as “an organization or venture, esp. for business purposes.” BLACK’S LAW DICTIONARY 1233, 572 (8th ed. 2004).
 11. *Bahnken v. N.Y. City Fire Dep’t*, 794 N.Y.S.2d 312 (1st Dep’t 2005).
 12. See New York City Fire Department, FDNY-EMS History, http://www.nyc.gov/html/fdny/html/history/ems_article3.shtml (last visited Oct. 20, 2006).

contracts for administrative purposes.¹³ Reversing the lower court’s decision, the Appellate Division held that the specific provisions of the contracts relating to compensation, patient billing, and insurance did not fall within the trade secret exemption to FOIL, and therefore required full disclosure of the contracts.¹⁴ The Appellate Division, relying on *Matter of Capital Newspapers Div. of Hearts Corp. v. Burns*,¹⁵ ruled that the FDNY failed to show that the claimed injury would be substantial enough to fall within the statutory trade secret exemption under Public Officers Law section 87(d)(2).¹⁶ More specifically, the court required a showing of a “particularized and specific justification for denying access” instead of considering whether the private enterprise would be harmed by the disclosure of the documents.¹⁷ In making its decision, the Appellate Division failed to consider a more relaxed standard in reviewing trade secret exemptions, as set forth by the New York Court of Appeals in *Matter of Encore, Inc. v. Auxiliary Service Corp. of the State University of New York at Farmingdale et al.*, which held that courts must consider the resultant damage to the private enterprise when determining whether information should be exempt from disclosure under FOIL.¹⁸

This case comment contends that the Appellate Division erred when it applied the strict *Burns* standard in *Bahnken* because the more relaxed *Encore* standard is appropriate in reviewing FOIL requests for documents created in a private capacity, such as those between private hospitals and private ambulance vendors. The Appellate Division held that none of the contracts’ provisions were protected by the trade secret exemption. However, access to those provisions relating to confidential commercial and financial information should have been restricted because that information could substantially injure the bargaining

13. *Bahnken*, 794 N.Y.S.2d at 314 (Friedman, J., dissenting); see also Letter from Alexandra Fisher, Assistant Counsel, to Walter M. Meginniss, Jr., Esq., Gladstein, Reif & Meginniss, LLP (Mar. 17, 2003) [hereinafter Letter from Alexandra Fisher] (on file with author).

14. *Bahnken*, 794 N.Y.S.2d at 313.

15. 64 N.Y.2d 562 (1986) (holding that exemptions to disclosure were to be narrowly construed to provide maximum access to information, and the government agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within one of the FOIL exemptions by articulating a particularized and specific justification for denying access).

16. N.Y. PUB. OFF. LAW § 87(2)(d) states:

Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof 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.

17. *Bahnken*, 794 N.Y.S.2d at 314.

18. 87 N.Y.2d 410, 420 (1995) (holding that “because the submitting [private] business can suffer competitive harm only if desired material has commercial value to its competitors, courts must consider how valuable information will be to the competing business [requesting the documents], as well as resultant damage to the submitting [private] enterprise” in determining whether material was exempt from disclosure under FOIL).

power of the private hospitals in future contract negotiations. The court should have applied the *Encore* standard in reviewing the contracts because the desired material had commercial value to the paramedics union. Furthermore, mandating that private enterprises furnish contracts that do not involve governmental decision-making does not further the legislative intent of FOIL, which supports open access to government agencies, not private enterprises.¹⁹

As manager of New York City's EMS, the FDNY mandates that it receive copies of the contracts between the hospitals and ambulance vendors within the EMS system to ensure that the system is adequately maintained.²⁰ Patrick Bahnken, the president of the Uniformed Emergency Medical Technician and Paramedics, Local 2507 union ("EMT and Paramedics Union"), sent a FOIL request to the FDNY for copies of all contracts entered into on or after January 1, 1997 between the ambulance service companies operating in the EMS system and eight private hospitals and their affiliates.²¹ These contracts were provided to the FDNY by private hospitals which do not operate their own ambulance services and instead subcontract with private vendors for ambulance services. They did this in accordance with the administration and enforcement of their respective agreements with the FDNY and their participation in the EMS system.²² The private hospitals are not subject to FOIL because they are private enterprises; therefore, Bahnken made his request to a state agency (the FDNY), which was in possession of the desired documents. In accordance with FOIL, the FDNY examined the contracts between the private hospitals and the subcontracted ambulance vendors, and determined that the contracts themselves were not exempt from disclosure under FOIL. However, the provisions dealing with compensation, patient billing, and insurance did fall within the trade secret exemption to FOIL.²³ Under its discretion, the FDNY removed those portions of the contracts²⁴ and provided the redacted versions of the contracts to Bahnken.²⁵

19. See N.Y. PUB. OFF. LAW § 84.

20. See *Bahnken*, 794 N.Y.S.2d at 314; see also Letter from Alexandra Fisher, *supra* note 13.

21. See *Bahnken*, 794 N.Y.S.2d at 313. According to a DC 37 Union Press Release, Mr. Bahnken claimed that he requested the contracts because "[it] is part of our ongoing fight against the privatization of EMS jobs," and "the public has a right to know if these contracts meet the appropriate standards." See Public Employee Press, Local 2507 Foils Super-Secrecy by FDNY (June 2005), available at http://www.dc37.net/news/PEP/6_2005/FDNY.html.

22. *Bahnken*, 794 N.Y.S.2d at 314; see also Letter from Alexandra Fisher, *supra* note 13.

23. *Bahnken*, 794 N.Y.S.2d at 314. The FDNY also redacted portions of the contracts dealing with the internal hospital quality programs on the basis that such information was confidential pursuant to N.Y. PUB. HEALTH LAW § 3006.

24. See *Short v. Bd. of Managers of Nassau County Med. Ctr.*, 57 N.Y.2d 399, 404 (1982) (holding New York public agencies may redact exempt information when responding to a FOIL request, but the appropriateness of the redaction will also be subject to Article 78 review).

25. *Bahnken*, 794 N.Y.S.2d at 313.

Bahnken appealed the FDNY's decision to redact the contracts.²⁶ The FOIL Appeals Officer agreed that the FDNY properly withheld the confidential financial information under the trade secret exemption.²⁷ Bahnken subsequently commenced an Article 78 action,²⁸ petitioning the New York Supreme Court to direct the FDNY to furnish unredacted copies of the contracts.²⁹ After conducting an *in camera* inspection³⁰ of the contracts, the New York Supreme Court held that the FDNY had a rational basis for making the redactions to the contracts and were exempted from disclosure pursuant to N.Y. Public Officers Law section 87(2)(d).³¹

The Appellate Division reversed the New York Supreme Court's decision. The court ultimately reasoned that FOIL should be liberally interpreted, and the statutory exemptions should be narrowly construed, in order to meet FOIL's legitimate goal of an open government.³² Relying on *Matter of Capital Newspapers Div. of Hearts Corp. v. Burns*, the court held that the FDNY failed to prove an exemption under N.Y. Public Officers Law section 87(2)(d) because it did not show a "particularized and specific justification for denying access."³³

In *Burns*, a newspaper investigated allegations that certain members of the Albany police force were abusing sick leave privileges.³⁴ The newspaper made a FOIL request for the number of days certain officers were absent from their scheduled employment.³⁵ The Albany Police Department denied the newspaper's requests concerning one particular officer and the newspaper commenced an Article 78 petition.³⁶ In its decision, the New York Court of Appeals held that the disclosure exemptions under FOIL should be narrowly construed to provide max-

26. *Bahnken v. N.Y. City Fire Dep't*, Index No. 113539/03 (N.Y. Sup. Ct. Feb. 9, 2004). See N.Y. PUB. OFF. LAW § 89(4) for an outline of the appeals process of a FOIL request. A requestor must first appeal to the state agency denying access to the documents. If the FOIL Appeals Officer assigned to the dispute again denies access, the requestor, having exhausted all administrative remedies, may petition the court through an Article 78 proceeding. See also Committee on Open Government, Freedom of Information Law FAQ, <http://www.dos.state.ny.us/coog/foil.html> (last visited Sept. 25, 2006).

27. Letter from Elena Ferrara, FOIL Appeals Officer, to Walter M. Meginniss, Jr., Esq., Gladstein, Reif & Meginniss, LLP (May 13, 2003) (on file with author).

28. An Article 78 proceeding involves a legal challenge before the New York State Supreme Court designed to review the final decision of an administrative agency. See N.Y. C.P.L.R. Article 78 (McKinney 2005).

29. *Bahnken v. N.Y. City Fire Dep't*, Index No. 113539/03 (N.Y. Sup. Ct. Feb. 9, 2004).

30. An *in camera* inspection refers to a judicial inspection of evidence performed in the judge's private chambers. See BLACK'S LAW DICTIONARY 775 (8th ed. 2004).

31. *Bahnken v. N.Y. City Fire Dep't*, Index No. 113539/03 (N.Y. Sup. Ct. Feb. 9, 2004).

32. *Bahnken*, 794 N.Y.S.2d at 314.

33. *Id.*

34. *Burns*, 67 N.Y.2d at 564.

35. *Id.*

36. *Id.* at 565.

imum access to information.³⁷ The court further imposed the burden of proof on the agency seeking to prevent disclosure. The agency had to demonstrate that the requested material fell within one of the FOIL exemptions by articulating a “particularized and specific justification for denying access.”³⁸ In holding that the Albany Police Department failed to prove an exemption from FOIL, the court affirmed the Appellate Division’s order granting the full release of the records.³⁹

In *Bahnken*, the FDNY claimed exemption from disclosure by arguing that the private hospitals in question were commercial enterprises actively competing for ambulance services, and that disclosure would negatively affect their ability to contract for future ambulance services.⁴⁰ However, the *Bahnken* court rejected the FDNY’s argument and asserted that the FDNY did not demonstrate any potential injury substantial enough to fall within the trade secret exemption of FOIL.⁴¹

In his dissent, Judge Friedman argued that even in the absence of a detailed evidentiary showing, it was clear that public knowledge of the contracts’ financial and insurance provisions would likely injure the hospitals’ competitive positions.⁴² Specifically, future ambulance vendors would know the rate at which the private hospitals compensated previous vendors.⁴³ Judge Friedman further noted that the private hospitals provided copies of their ambulance service contracts to the FDNY with the understanding that the confidentiality of these contracts would be maintained.⁴⁴

The dissent relied heavily on *In the Matter of Encore, Inc. v. Auxiliary Service Corp. of the State University of New York at Farmingdale et al.*,⁴⁵ a precedential case which the *Bahnken* majority failed to consider in its holding. In *Encore*, the New York Court of Appeals held that the release of a textbook list compiled by Barnes and Noble Bookstores would have caused substantial injury because the textbook company requesting the information was its direct competitor.⁴⁶ Encore College Bookstores served the State University of New York (“SUNY”) Farmingdale with a FOIL request seeking disclosure of a booklist compiled by a Barnes and Noble, SUNY’s subcontractor, so that it could sell the same books.⁴⁷ When SUNY Farmingdale denied the request, Encore College

37. *Id.* at 566.

38. *Id.*

39. *Id.* at 570.

40. *Bahnken*, 794 N.Y.S.2d at 314.

41. *Id.* See generally N.Y. PUB. OFF. LAW § 87(2)(d).

42. *Bahnken*, 794 N.Y.S.2d at 315 (Friedman, J., dissenting).

43. *Id.*

44. *Id.* at 314.

45. 87 N.Y.2d 410 (1995).

46. *Id.* at 414, 420–21.

47. *Id.* at 415.

Bookstores filed an Article 78 petition requesting the furnishing of the booklist.⁴⁸ Although the court concluded that FOIL *does* extend to records within a private entity's possession, provided the records are kept or held for a government agency,⁴⁹ it ultimately held that the bookstore was under no obligation to release the records.⁵⁰ The court's decision was based on the fact that the subcontractor could claim the trade secret exemption to withhold the booklists.⁵¹

To determine whether the bookstore was obligated to disclose the booklist under FOIL, the *Encore* court looked at (1) the value of the requested information to competitors, and (2) the injury to the competitive position of the subject enterprise.⁵² This two-prong test constitutes a standard to determine whether a private enterprise will be harmed by the disclosure of requested documents. Under the *Encore* standard, where a private enterprise's future negotiations with vendors could be substantially weakened because of the disclosure of previous contractual terms, the court must evaluate the commercial value of the information to the competitors and the potential injury to the private enterprise.⁵³

The Appellate Division in *Bahnken* erred in applying the *Burns* standard instead of the *Encore* standard because the standard used in *Encore* is specifically intended for application in those instances where a government agency neither produced nor was a party to the records in question. In *Bahnken*, the FDNY managed the documents for New York City's 911 system, but took no part in the generation or negotiation of the contracts. Arguably, when a FOIL request is made for documents produced by a local police department, the New York Department of Corrections, or a state health agency, the court should narrowly interpret the FOIL exemptions and apply the *Burns* standard because the intent of FOIL is access to, and awareness of, governmental decision-making.⁵⁴ The purposes of FOIL are not advanced when a court narrowly construes the exemp-

48. *Id.* at 416.

49. *Id.* at 417.

50. *Id.* at 420–21.

51. *Id.* at 421.

52. *Id.* at 420.

53. *Id.*

54. *See, e.g.*, *Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 278 (1996) (holding that police activity logs contained “information kept [or] held . . . for an agency” and thus were records available under FOIL); *Beyah v. Goord*, 766 N.Y.S.2d 222, 224 (3d Dep't 2003) (holding that prison inmate's request for N.Y. Department of Corrections' employee accident reports, employee interviews, report of complaint progress, index sheets and receipt of complaints, employee training records, and prison directive pertaining to the maintenance of log books were not exempt from disclosure under FOIL); *N.Y. Times Co. v. N.Y. State Dep't of Health*, 674 N.Y.S.2d 826, 828 (3d Dep't 1998) (holding that request for certain physicians' names was not exempt from disclosure under FOIL because they did not uniquely identify the patients). The courts in these cases appropriately applied the *Burns* standard in determining whether there was a “particularized and specific justification for denying access” to the requested documents.

tions for documents created by non-governmental entities such as a contract between two private parties.

The *Bahnken* court should have applied the *Encore* standard in reviewing the contracts because the desired material had commercial value to the EMT and Paramedics Union and therefore disclosure could substantially injure the hospital in future contract negotiations with ambulance subcontractors. Under the majority's ruling in *Bahnken*, the public is given free access to private contracts entered into between private companies.⁵⁵ Although it is well established that records may not be withheld from a FOIL request solely based on the non-governmental status of the subject enterprise,⁵⁶ the confidential nature of the financial information in the contracts between the private hospitals and ambulance vendors should have been more carefully analyzed by the Appellate Division in *Bahnken*. Furthermore, according to the court in *Encore*, the FDNY was not required to establish actual competitive harm, but rather "[a]ctual competition and the likelihood of substantial competitive injury is all that need to be shown."⁵⁷ If the legitimate intent of FOIL is to encourage awareness of governmental actions,⁵⁸ then permitting a FOIL request for confidential commercial and financial information of a private company does not further this goal.⁵⁹ This is especially true in light of the fact that the party requesting the information was the president of the paramedics union.

Unlike the majority in *Bahnken*, the Appellate Division in *Glens Falls Newspapers, Inc. v. Counties of Warren and Washington Industrial Development Agency* did rely on the *Encore* standard in determining whether a newspaper should be allowed access to the terms of a confidential settlement dispute over a contract between a private utility company and a government agency.⁶⁰ In holding that the settlement dispute fell under the trade secret exemption of FOIL, the court took into account that disclosure of the terms of the settlement agreement would be valuable to competitors because it disclosed crucial financial terms.⁶¹ The court found that disclosure of these terms would likely injure the competitive position of the utility company in the future.⁶² Specifically, the court pointed out that public disclosure of the details of the agreement would be an obvious advantage for the utility company's competitors. Such dis-

55. See *Bahnken*, 794 N.Y.S.2d at 314.

56. See *Washington Post Co. v. N.Y. State Ins. Dep't*, 61 N.Y.2d 557, 565 (1984).

57. *Encore*, 87 N.Y.2d at 421 (citing *Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

58. N.Y. PUB. OFF. LAW § 84.

59. *Bahnken*, 794 N.Y.S.2d at 315 (Friedman, J., dissenting).

60. 684 N.Y.S.2d 321, 323 (3d Dep't 1999).

61. *Id.* at 322.

62. *Id.* at 323.

closure would jeopardize the utility company's ability to negotiate effectively in order to obtain the lowest rates for its customers.⁶³

The underlying policy rationale behind the trade secret exemption to FOIL is protecting "businesses from the deleterious consequences of disclosing confidential commercial information, so as to further [New York's] economic development efforts and attract business to New York."⁶⁴ Moreover, the general public that utilizes the hospitals' services will be most injured by the *Bahnken* court's decision. As the Appellate Division alluded to in *Glen Falls*, where an enterprise's negotiation power is weakened by the disclosure of confidential commercial and financial information regarding prior agreements, the subject enterprise will not be able to effectively bargain with future vendors.⁶⁵ Armed with sufficient information obtained from previously executed contracts, the ambulance vendors will have a significant advantage over the hospitals in future contract negotiations. The hospitals' weakened negotiating power may result in more expensive contracts, making its services more costly for the general public.⁶⁶

In *Bahnken*, the court allowed an EMT and Paramedics Union to use FOIL as a means to gain access to private hospitals' otherwise confidential financial information. While it may be argued that public awareness of the decision-making of state agencies, like the FDNY, trumps the private entities' interests, the situation in this case is inapposite. The EMT and Paramedics Union that requested access to the contracts had no interest in the inner workings of the FDNY, but rather used FOIL to gain a competitive edge on future contract negotiations. It is only through the exemptions to FOIL that private entities are protected. When a state agency raises a valid trade secret exemption to a FOIL request on behalf of a private entity, the court should apply the *Encore* standard in determining whether the exemption exists to ensure that the requestor is not abusing the system. The *Encore* court set a standard that appropriately considers the commercial value of the documents to the requestor of the information.

The New York legislature intended the public to benefit from the enactment of FOIL,⁶⁷ its goal being an open government, free of corruption and secrecy.⁶⁸ However, the decision in *Bahnken* does not further the policy goals of FOIL and will ultimately hurt the public by forcing private entities, such as non-for-profit hospitals that serve the public, to compromise their negotiating power for future contracts.

63. *Id.*

64. *Encore*, 87 N.Y.2d at 420.

65. *Glens Falls*, 684 N.Y.S.2d at 323.

66. *See id.*

67. *See* N.Y. PUB. OFF. LAW § 84.

68. *Russo v. Nassau County Cmty. Coll.*, 587 N.Y.S.2d 419, 419–20 (2d Dep't 1992).