

<b>Empire Healthchoice Assur., Inc. v Clement</b>
2018 NY Slip Op 30489(U)
March 20, 2018
Supreme Court, New York County
Docket Number: 150148/2017
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
EMPIRE HEALTHCHOICE ASSURANCE, INC.,  
Petitioner,

INDEX NO. 150148/2017

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 1

VICTORIA CLEMENT, AS RECORDS ACCESS  
OFFICER FOR THE METROPOLITAN  
TRANSPORTATION AUTHORITY- MTA  
HEADQUARTERS, THOMAS PRENDERGAST,  
AS RECORDS ACCESS APPEALS OFFICER FOR  
THE METROPOLITAN TRANSPORTATION  
AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY,  
Respondents.

**DECISION AND ORDER**

-----X  
The following e-filed documents, listed by NYSCEF document number 2, 9, 10, 11, 12, 13, 14, 15, 16,  
17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this application \_\_\_\_\_ pursuant to CPLR article 78

HON. BARBARA JAFFE:

Petitioner brings this proceeding pursuant to CPLR article 78 to challenge the  
determination of respondent Metropolitan Transportation Authority (MTA) denying petitioner's  
Freedom of Information Law (FOIL) request for certain records related to its failed bid for an  
insurance contract with MTA. Respondents answer and oppose.

I. BACKGROUND

In the petition, petitioner alleges, as pertinent here, that it proposed a bid in response to a  
Request for Proposal (RFP) issued by MTA that relates to a particular contract for the provision  
of health insurance services and coverage for MTA employees. United HealthCare (UHC) and

Aetna also submitted bids; Aetna was awarded the contract. MTA retained AON Consulting, Inc. to assist it in analyzing the RFP. (NYSCEF 1).

When petitioner attempted to protest the award, it was informed that it had 30 days to do so from the date the contract was awarded. Petitioner thus sought relevant records from MTA pursuant to FOIL. (*Id.*).

#### A. First FOIL request

On September 30, 2016, petitioner submitted its first FOIL request, seeking “any and all relevant records” related to the selection of Aetna for the contract. On October 4, 2016, MTA responded by providing petitioner with an “MTA Staff Summary,” which contains the following explanation of the decision awarding the contract to Aetna:

After thorough review and analysis of all RFP documentation, including a member disruption analysis, oral presentations and pricing, Aetna received the highest total score for all plans. Technical proposals from all three vendors were comparable. The selection committee vote was split and recommended to replace Empire with Aetna on the PPO plan, retain UHC for the EPO and POS (which must be awarded to and managed by one supplier), and retain Aetna for Medicare advantage. These selections recommended awarding Aetna with two thirds of the plans based on member population and project annualized cost avoidance of \$20,200,000 per year, taking into consideration plan cost growth assumptions, compared with remaining with the current carriers.

(*Id.*). Petitioner took no further action on this request.

#### B. Second FOIL request

On October 4, 2016, petitioner submitted a second request, seeking: (1) scoring sheets/analysis and supporting documentation related to such scores associated with the RFP for all proposers; and (2) the cost avoidance analysis (analysis) used in the review process. (NYSCEF 12). The request was denied on October 10, 2016; petitioner appealed. Receiving no response to its appeal within the statutory deadline, petitioner commenced an article 78 proceeding in this court under Index No. 101851/16 (first proceeding). (NYSCEF 1).

Oral argument in the first proceeding was held on January 31, 2017. By then, petitioner had commenced the instant action. The justice presiding over the first proceeding stated at oral argument that she was only considering petitioner's requests for "scoring sheets, supporting documentation, excluding what's already the subject of another proceeding for judicial review, and the Cost Avoidance Analysis." (Transcript of oral argument, dated Jan. 31, 2017).

A new justice was assigned to hear the matter, and by interim decision and order dated January 17, 2018, she determined, as pertinent here, that certain records sought by petitioner were to be examined *in camera* to determine whether they were exempt from disclosure. In a footnote, she wrote that in view of the proceeding pending before me, she would not address petitioner's requests for the evaluative tools, methodology, and data used in the cost avoidance analysis or Aetna's RFP response.

#### C. Third FOIL request

Fearing that MTA would limiting its second FOIL request, on October 12, 2016, petitioner submitted a third request in which it specified the documents sought:

- (1) claims re-pricing performed by Aetna;
- (2) the evaluative tools used by AON in analyzing Uniform Data Submission date;
- (3) any evaluative tools and methodology used by AON in preparing its cost avoidance analysis;
- (4) the underlying data used by AON in preparing its cost avoidance analysis; and
- (5) Aetna's response to the RFP.

(*Id.*).

As pertinent here, MTA responded to the third request by denying disclosure of requests two, three, four, and five on the ground that they seek "records prepared for an agency by a consultant, which are retained by the agency," and that such records "should be considered as if

they were prepared by agency staff [as] ‘intra-agency materials.’” Relying on Public Officers Law § 87(2)(g), MTA maintained that records relating to the evaluation process are internal documents consisting of opinions and recommendations, and thus are non-final intra-agency records exempt from disclosure. (*Id.*).

After petitioner appealed the decision, by letter dated November 22, 2016, MTA Records Access Appeals Officer determined that all of the records sought were exempt from disclosure, as follows:

- (1) records related to re-pricing constitute non-final intra-agency records reflecting opinions, evaluations, and recommendations, and while they contain scoring matrices, “these constitute opinions and evaluations expressed in numerical form”;
- (2) the cost avoidance analysis was prepared by a consultant retained by the MTA at its request, and thus constitutes an intra-agency record compiled as part of its deliberative process, which reflects the decision-making procedure related to the award, and “its release would impair the negotiation and award. Thus, evaluative tools and methodology used to compile the Analysis” are exempt pursuant to Public Officers Law §§ (2)(c) and (g); and
- (3) as an agency may withhold records that are trade secrets pursuant to section 87(2)(d), AON’s evaluative tools and methodology are exempt.

(*Id.*). It also denied the request for Aetna’s RFP on the ground that the contract with Aetna had not yet then been executed, a concern that no longer exists.

According to petitioner, the records sought from AON might explain “a recommendation in the MTA Staff Summary that, presently, appears baseless and unsupported by market realities in the metropolitan New York insurance marketplace,” and all of the requested records in its third FOIL request “will help Empire and the public at large educate the MTA in order to help it avoid what may be a costly mistake in how it awarded a \$4 billion services contract.” (*Id.*).

## II. APPLICABLE LAW

FOIL imposes a broad duty of disclosure on government agencies. (Public Officers Law

§ 84; *Matter of Fink v Lefkowitz*, 47 NY2d 567 [1979]). Its purpose is to permit access to governmental operations, and “judicious use of the provisions of [FOIL] can be a remarkably effective device in exposing waste, negligence and abuses on the part of government.” (*Id.* at 571).

Notwithstanding the general policy favoring disclosure, specific exemptions are set forth in Public Officers Law § 87(2). The exemptions are narrowly construed, with the burden resting on the agency to demonstrate that the requested material qualifies for exemption. (Public Officers Law § 89[4][b]; *Mulgrew v Bd. of Educ. of City School Dist. of City of New York*, 87 AD3d 506 [1<sup>st</sup> Dept 2011], *lv denied* 18 NY3d 806 [2012]).

To sustain that burden, the agency must “articulate particularized and specific justification [for the exemption] and, if necessary, submit the requested materials to the court for an *in camera* inspection.” (*Matter of Fink*, 47 NY2d at 571). Thus, as “blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government,” the court should conduct an *in camera* inspection if it is unable to determine whether withheld materials are entirely exempt. (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267 [1996]).

As pertinent here, Public Officers Law § 87(2)(g) exempts from disclosure inter- or intra-agency materials that are not: (i) statistical or factual tabulations or data; or (iii) final agency policy or determinations. Factual data is objective information, as opposed to “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (*Matter of Gould*, 89 NY2d 26 at 277).

The exemption for trade secrets, Public Officers Law § 87(2)(d), provides as relevant here, that records or portions thereof need not be disclosed if they contain:

... 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 . . .

This purpose of the exemption is to “protects businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State’s economic development efforts and attract business to New York.” (*Matter of Encore College Bookstores, Inc. v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 420 [1995]). The court must consider whether the information sought is valuable to the competing business, as well as the resulting damage to the submitting business if information is released, and if the disclosure is the only means for the competitor to gain the requested information, “the inquiry ends here.” (*Id.* at 420).

### III. ANALYSIS

The sole requests at issue here are 1) the evaluative tools, methodology, and data used in the cost avoidance analysis, and 2) Aetna’s RFP response.

#### A. Exemption for trade secrets

##### 1. AON’s evaluative tools, methodology, and data

###### a. Contentions

Petitioner asserts that to establish that the records sought constitute or include trade secrets, respondents must show that AON’s evaluative tools and methodology in preparing the cost avoidance analysis “constitute a formula, pattern, device, or compilation of information used in AON’s business, and which gives AON an opportunity to obtain an advantage over competitors who do not know or use it,” and that the information is truly secretive. It denies that MTA demonstrates that the trade secret exemption applies, absent evidence that AON’s tools and methodology are trade secrets rather than standard industry practice or that it maintained the

secrecy of the information, or that AON is in actual competition with other entities such that the release of the information would likely cause it substantial competitive injury. Petitioner observes that it, as an insurance carrier, is not in competition with AON, a consulting service. (NYSCEF 1).

Respondents argue that AON's evaluative tools and methodology are exempt as disclosure would harm its competitive position, and that AON received from third-party providers data that encompassing proprietary and commercially sensitive pricing information. It relies on an affidavit from the director of the Professional Services Category Management in the MTA's Procurement Department, who states therein that she managed the RFP and procurement process at issue for MTA, that MTA retained AON to perform the cost avoidance analysis, and that MTA's files related to the RFP are voluminous and include: (1) proposals from petitioner, UHC, and Aetna and their follow-up responses; (2) communications and documents regarding "geoaccess," or network access by location; (3) pricing and re-pricing results and analysis; (4) reports and presentations by Segal Company, Inc., regarding a "disruption" analysis of the potential impact of a change in the service provider for New York City Transit (NYCT) employees, retirees, and their dependents; (5) AON's reports and presentations; (6) a confidentiality agreement between MTA and AON; (7) presentations and notes for committee meetings and briefings to the MTA board and the NYCT president; and (8) scoring sheets and documentation. She represents that the documents also include MTA's evaluations, commentaries, and analyses related to the RFP and award, and reflect confidential, proprietary, and commercially sensitive information of the proposers and "the evaluations and opinions of those who participated in and were consulted about the procurement process." (NYSCEF 22).



By affidavit dated January 20, 2017, an AON senior vice president states, as pertinent here, that

As part of the services AON provided to MTA, AON prepared a report entitled "Financial Analysis and Methodology and Descriptions" for the MTA to assist MTA personnel in their RFP deliberations in selecting a vendor. Exhibits contained in this report presented a cost comparison to the MTA of awarding the RFP to each of the proposers. The difference in cost between the incumbents and each proposer was defined as the "Cost Avoidance Analysis." The Cost Avoidance Analysis was generated using responses provided by the proposers through the RFP process as well as Aon Hewitt's proprietary tools, methodologies, algorithms, and analytical models. One of these models, Aon Hewitt's Discount Database, is a tool that all of the proposers have already been participating with outside of the RFP process.

...

AON has numerous competitors in the healthcare consulting industry, and the information on which it relied in preparing the Cost Avoidance Analysis is precisely the sort of information which would be interesting to AON's competitors. If AON's proprietary tools, methodologies, and models were subject to disclosure to third parties, there would be a significant likelihood of substantial harm to AON's competitive position in the industry.

He also observes that it and MTA are parties to a confidentiality agreement, and that it has confidentiality agreements with each RFP proposer. (NYSCEF 23).

Respondents reject as irrelevant petitioner's contention that it and AON are not themselves in competition, as the correct standard is whether AON is in actual competition with other entities such that disclosure of information would likely result in substantial competitive injury. (NYSCEF 9).

b. Analysis

Based on the foregoing, respondents establish, through specific, detailed, and non-conclusory allegations, that AON's evaluative tools and the methodology it used in conducting the cost avoidance analysis constitute trade secrets, as does some of the underlying data on which it relied in completing its analysis. (*See Matter of New York Telephone Co. v Public Serv.*

*Commission of State of New York*, 56 NY2d 213, n 3 [1982] [defining “trade secret” as “formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it”]; *Matter of Catapult Learning, LLC v New York City Dept. of Educ.*, 109 AD3d 731, 732 [1<sup>st</sup> Dept 2013] [granting redaction of information about pricing, budget, and insurance from petitioner’s contract proposal as it constituted “essential information about its previously successful approach to bidding for educational services contracts” and its disclosure would likely result in substantial competitive injury]; *see also Matter of Verizon New York Inc. v New York State Public Serv. Commission*, 46 Misc 3d 858 [Sup Ct, Albany County 2014], *affd* 137 AD3d 66 [3d Dept 2016] [information related to company’s costs, pricing, budget, and business strategy may constitute trade secret]).

However, a determination as to whether and to what extent the underlying data is exempt must be made after an *in camera* inspection of the documents at issue.

## 2. Aetna’s RFP response

### a. Contentions

In addition to the contentions above, respondents maintain that the trade secrets exemption applies to materials submitted by RFP participants as well as by administrative agencies and third-party vendors, and that disclosure of information related to Aetna’s claims re-pricing, its RFP submission, and any “underlying data” used by AON, would likely result in substantial competitive injury to both Aetna and UHC, as it would reflect confidential, proprietary, and commercially sensitive information, including financial, pricing, and rating information. (NYSCEF 9).

Respondents offer a letter from Aetna to MTA dated December 7, 2016, in which Aetna objects to the disclosure of financial, pricing, discount, and guarantee information, claiming that such materials constitute trade secrets which, if disclosed, would cause it substantial harm by diminishing or erasing its competitive advantages, and by enabling its competitors to analyze and determine its proprietary pricing models and methodologies. Aetna characterizes such materials as the “cornerstones of the business,” the disclosure of which would be “devastating” and that the disclosure of its business strategy would be damaging as competitors would then be able to determine rate strategies and selectively underprice it. Thus, disclosure would eliminate the “level playing field among carriers.” It identifies information within in its RFP as exempt, including proprietary network information, information related to its references, its negotiated average network discounts, return on investment information, claim target guarantees, and risk share documents. (NYSCEF 20).

Respondents also observe that petitioner claims an exemption from disclosing its own RFP and related pricing, in an email response dated December 7, 2016, to MTA’s request in an unrelated proceeding that petitioner review its response to an RFP and any information provided related thereto and pricing information, and identify proprietary information to be redacted.

Petitioner indicated as follows:

Given the highly competitive nature of proposals for administrative services to self-insured providers of health benefits, the likelihood that the same parties will be competing for other similar contracts at some point in the future, and the simple fact that proposers all operate in the same competitive industry, the tests of actual competition and potential for substantial competitive injury can be easily met.

[Petitioner’s] Price Schedule identifies the ASO fees [it] was initially willing to accept, along with the services that would be provided in exchange for those fees . . . Prices are, of course, carefully guarded in this industry. Disclosure of [petitioner’s] ASO fee schedule could place [it] at a serious competitive disadvantage with respect to other

insurance carriers bidding for the same contracts. This information is not available to [petitioner's] competitors. For these reasons, the Price Schedule is exempt from disclosure pursuant to § 87(2)(d).

[As to claims re-pricing information contained in third-party reports], the reports should not be disclosed because they contain confidential information regarding [petitioner's] historic allowed charge amounts and discounts. Knowledge of the discounts and allowed charge amounts [petitioner] would have achieved for a specified time period in respect of a known set of claims would provide a competitor a substantial advantage over [petitioner] inasmuch as discount percentages do not dramatically increase on a year-to-year basis. Thus, disclosure of the reports would cause [petitioner] a substantial competitive injury.

(*Id.*). In the same email, petitioner asserted that information about the scope of its work deviations, organizational staff turnover, membership, client base, audit rights, references, performance guarantees, scope of provider network, sample group agreements for Medicare Advantage plans, and information contained in its best and final offer is exempt from disclosure.

Petitioner explains the discrepancy in its positions as arising from a distinction it draws between a successful proposal and an unsuccessful proposal, claiming that a successful proposal “loses its competitive sensitivity because its terms form the basis of an award and a public contract.” Petitioner thus maintains that its position with respect to disclosure of its proposal is not inconsistent with its own request for records. (*Id.*).

#### b. Analysis

Having failed to identify the trade secrets exemption in their decision denying petitioner's appeal as to Aetna's RFP, respondents may not raise it in response to the petition. (*See Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67 [2017] [in opposing petition, respondent could not rely on exemption it did not invoke in denying FOIL request; “to allow it do so now would be contrary to our precedent, as well as to the spirit and purpose of FOIL”]). However, to

the extent that AON relied on data contained within Aetna's RFP response in conducting its analysis, that information may nevertheless be exempt.

Absent any authority cited for the proposition that an award of a contract removes any protection from disclosure of trade secrets, petitioner's argument is disregarded.

Therefore, respondents are directed to submit *in camera*, along with all of the records used by AON in its analysis that reflect facts and/or data rather than tools or methodology, a copy of Aetna's RFP response, with a detailed itemization of the information contained in the response which is part of AON's analysis.

## B. Exemption for intra-agency records

### 1. Contentions

Petitioner denies that the claims repricing prepared by Aetna is inter- or intra-agency material, and argues that even Aon's records or analyses are exempt, statistical or factual tabulations or data contained therein, including estimates of future expenditures, are not, nor is the data which AON analyzed and relied on to make its recommendation. (NYSCEF 1).

Petitioner relies on an advisory opinion rendered by the State of New York Department of State, Committee on Open Government, dated February 13, 2015, indicating that intra-agency records, including consultant reports, are subject to disclosure under FOIL as are records consisting of statistical or factual tabulations or data, even if intertwined with opinion or analysis. (*Id.*).

Respondents contend that petitioner seeks evaluative tools and methodology, which by definition reflect or include exempt opinions, evaluations, recommendations, and deliberations. They deny that petitioner's requests encompass statistical or factual tabulations or data, and argue that even if the methodology and tools use data and facts, they are not themselves data or facts, even if they consist of mathematical or computer modeling. (NYSCEF 9).

In reply, petitioner asserts that the tools and methodology used by respondents must have been based on data or facts, which are disclosable, and that at the very least, the court must review the documents *in camera* to see whether they were properly withheld. (NYSCEF 24).

Respondents demonstrate that the tools and methodology themselves are exempt intra-agency documents consisting of opinions, deliberations, and recommendations. However, the underlying facts or data are not exempt unless they constitute protected as trade secrets, which has not yet been determined. (See *Matter of Professional Standards Review Council of Am. Inc. v New York State Dept of Health*, 193 AD2d 937, 940 [3d Dept 1993] [where petitioner sought information about its competitor's successful award pursuant to RFP, including competitor's RFP response and documents relating to decision to award contract to competitor, backup factual and statistical data not exempt but subjective comments, opinions, and recommendations not subject to disclosure; *in camera* review needed]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is held in abeyance pending respondents' submission, in camera and within 30 days of the date of this order, of all the documents it withheld or redacted, in unredacted form, along with a specific and particularized explanation for any exemptions or privileges claimed for each document at issue.

3/20/2018  
DATE

  
BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	