



Devon Galloway
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January 27, 2025

VIA E-MAIL and U.S. MAIL

New York State Gaming Commission
Gaming Commission FOIL Appeals Officer
P.O. Box 7500
Schenectady, NY 12301-7500
FOIL.Requests@gaming.ny.gov

**Re: Constructive Denial of Freedom of Information Law Request
No. R000217-112624**

Dear Gaming Commission FOIL Appeals Officer:

Under Public Officers Law § 89(4)(a), I write to appeal the New York State Gaming Commission's ("Gaming Commission") constructive denial of my straightforward request for a single document: an executed copy of the Belmont Park Renovation Financing & Repayment Agreement by and among the New York Racing Association, Inc., the State of New York, and the New York State Franchise Oversight Board, which was approved by the Franchise Oversight Board on March 28, 2024 ("Repayment Agreement").

I. Background

On November 26, 2024, I submitted a Freedom of Information Law ("FOIL") request for the Repayment Agreement. Exhibit B. The Gaming Commission acknowledged receipt of that request the same day, stating that it will provide a status update on or before December 26, 2024. *Id.* The Gaming Commission then noted that copies of the Repayment Agreement and related materials were publicly available on the New York State Franchise Oversight Board's ("FOB") website.¹ Exhibit A at 4.

¹ Part X, Section 2, subsection (10) of the State of New York's 2024 Budget requires the Gaming Commission to publish the Repayment Agreement "on the public-facing portion of its website."

After reviewing those materials, I noticed that the Repayment Agreement on FOB's website was redacted and neither signed nor dated by any of the parties. I raised these concerns to the Gaming Commission's Records Access Office, and I asked that the Gaming Commission either: (1) provide a copy of the fully-executed (*i.e.*, unredacted, signed and dated) version of the Repayment Agreement; or (2) acknowledge that there is not a fully-executed version of the Repayment Agreement as of November 26, 2024.² Exhibit A at 3. The Gaming Commission never responded to my communication.

On December 30, 2024 — four days after the Gaming Commission's self-imposed deadline to provide a status update on the request — I reiterated my concerns with the Repayment Agreement to the Gaming Commission and again asked it to provide a fully-executed version of the Repayment Agreement or acknowledge that one did not exist as of December 30, 2024. Exhibit A at 2–3. I noted that the matter was urgent and made myself fully available to have a conference call on the issue. *Id.* The Gaming Commission never responded to that communication.

On January 22, 2025, I contacted the Gaming Commission a third time about this issue, and I raised its failure to respond to my request since November. Exhibit A at 1–2. I also asked if the Gaming Commission could provide an answer to the request by the end of the day, and I again made myself fully available to have a conference call on the matter. *Id.* While the Gaming Commission acknowledged receipt of my communication, it has yet to provide an answer to my request. *Id.* at 1.

II. Applicable Law

New York's Freedom of Information Law makes all government records presumptively open for public inspection unless a record is exempt. *Fappiano v. New York City Police Dept.*, 95 N.Y.2d 738, 746 (2001). The decision to withhold records from public inspection is sharply circumscribed and “shall be valid only when” the Gaming Commission shows “a particularized and specific justification for such denial.” Public Officers Law § 87(2).

An agency subject to FOIL must accept records requests submitted through email. Public Officers Law § 89(3)(b). That agency also has five business days to either provide the requested public record, deny the request, or acknowledge receipt of the request along with a statement of when that request will be granted or denied. Public Officers Law § 89(3)(a). If an agency does not conform with FOIL's deadlines, that failure shall be construed as a denial. Public Officers Law § 89(4)(a). *See also Legal Aid Soc. v. N.Y. State Dept. of Corrections*, 105 A.D.3d 1120, 1121 (3d Dep't 2013).

² My request for the fully-executed Repayment Agreement stems from the Gaming Commission's response to a previous FOIL request, stating that the Repayment Agreement “requires the written approval” of the State Comptroller and the State Attorney General to become effective. Exhibit C at 1.

III. Argument

The Gaming Commission has not adhered to FOIL's statutory deadlines. It did not provide a copy of the fully-executed Repayment Agreement by its self-imposed December 26, 2024 deadline, nor did it deny my request by that deadline. The Gaming Commission's silence on my request is thus construed as a denial. Public Officers Law § 89(4)(a).

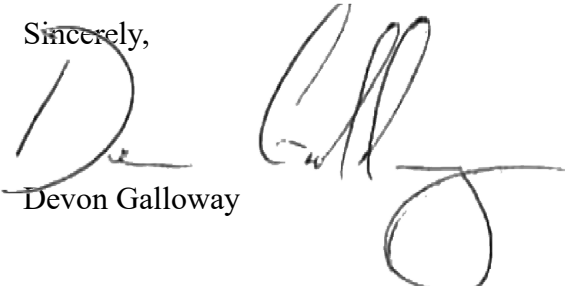
More importantly, I ask for only a single document or an acknowledgement that the document does not exist. My uncomplicated request does not require the Gaming Commission to search through voluminous records or electronic data. Yet the Gaming Commission has failed to provide any response to a simple question: Is there a fully-executed version of the Repayment Agreement, and if so, why can it not provide that agreement to the public?

As alluded to in my communications with the Gaming Commission, a fully-executed Repayment Agreement involves an urgent matter of public concern. According to the Gaming Commission's own representations, the Repayment Agreement must be fully-executed to be effective and to allow the New York Racing Association to receive funding promised under that agreement. *See* Exhibit C at 1. That funding will be used to finance the renovations at Belmont Park in Elmont, New York. Moreover, the Repayment Agreement is required to be shown to the public under the State's 2024 Budget. *See supra* n.1. The Gaming Commission is thus in the best position to answer the crystal-clear question of whether a signed Repayment Agreement exists and, if so, to produce that agreement.

For these reasons, I request that the Gaming Commission either: (1) provide a copy of the fully-executed (*i.e.*, unredacted, signed, and dated) version of the Repayment Agreement; or (2) acknowledge that there is not a fully-executed version of the Repayment Agreement as of the date of any response to this appeal. Should I not hear from the Gaming Commission within ten business days, I will consider seeking relief under Article 78 of New York Civil Practice Law and Rules, along with reasonable attorneys' fees and litigation costs. *See* Public Officers Law § 89(4)(b)-(c); *Legal Aid Soc.*, 105 A.D.3d at 1121.

I am available to discuss this matter at a mutually-convenient time. Thank you for your attention to this matter.

Sincerely,



Devon Galloway

EXHIBIT A

From: McFee, Robin (GAMING) <Robin.McFee@gaming.ny.gov>
Sent: Wednesday, January 22, 2025 3:49 PM
To: Galloway, Devon
Cc: Hasbun, Marcos E.; Chen, Jer-Wei; Thomson, Bryan D.
Subject: RE: [Records Center] FOIL Records Request :: R000217-112624

EXTERNAL

Hello Mr. Galloway. Your email has been received. We will get back to you as soon as possible.

Thank you.

Robin McFee

Assistant Public Information Officer

NYS Gaming Commission

354 Broadway, Schenectady, NY 12035

Robin.McFee@gaming.ny.gov
gaming.ny.gov

From: Galloway, Devon <DGalloway@zuckerman.com>
Sent: Wednesday, January 22, 2025 1:41 PM
To: McFee, Robin (GAMING) <Robin.McFee@gaming.ny.gov>
Cc: Hasbun, Marcos E. <mhasbun@zuckerman.com>; Chen, Jer-Wei <jchen@zuckerman.com>; Thomson, Bryan D. <BThomson@zuckerman.com>
Subject: FW: [Records Center] FOIL Records Request :: R000217-112624

You don't often get email from dgalloway@zuckerman.com. [Learn why this is important](#)

ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.

Hi Robin,

Thanks for our call today. Below is the email thread between me and Mr. Lee Park regarding the Belmont Park Renovation Financing & Repayment Agreement. As I noted on the call, we requested that the Gaming Commission provide a signed copy of the Repayment Agreement by and among the New York Racing Association, Inc., and the State of New York, and the New York State Franchise Oversight Board, which was approved by the Franchise Oversight Board on March 28, 2024.

As you can see from Mr. Park's November 26 email, he sent us a link to the Repayment Agreement, but that agreement is neither signed nor dated by the parties. Thus, I followed up with Mr. Park to see if there is a fully-executed copy of the Repayment Agreement, or - if the Repayment Agreement has yet to be signed and dated by the parties - confirmation that there is no fully-executed version of the Repayment Agreement as of today.

Do you mind providing an answer to the below request by today? I have tried reaching out to Mr. Park a couple of times about this, but I have not received a response. I am happy to have another call today to discuss as well.

Also, do you mind confirming receipt of this email? I want to make sure I heard your email correctly on our call. Thanks for taking the time to help us with this.

Take care,
Devon Galloway



Devon Galloway
Zuckerman Spaeder LLP
DGalloway@zuckerman.com

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From: Galloway, Devon
Sent: Monday, December 30, 2024 12:53 PM
To: NYS Gaming Commission Records Access Office <gamingny@govqa.us>
Cc: Hasbun, Marcos E. <mhasbun@zuckerman.com>; Thomson, Bryan D. <BThomson@zuckerman.com>; Chen, Jer-Wei <jchen@zuckerman.com>
Subject: RE: [Records Center] FOIL Records Request :: R000217-112624

Mr. Park,

I hope you had a great holiday. I am following up on the below public records request for a fully-executed (signed and dated) copy of the Belmont Park Renovation Financing & Repayment Agreement, by and among the New York Racing Association, Inc., and the State of New York, and the New York State Franchise Oversight Board, which was approved by the Franchise Oversight Board on March 28, 2024. As noted below, the Repayment Agreement on the Franchise Oversight Board's website is neither signed nor dated by any of the parties, and thus, we request a fully-executed copy of that document.

Please let me know as to when the Gaming Commission can provide a fully-executed copy of the Repayment Agreement, or in the event that the Repayment Agreement has yet to be signed and dated by the parties, confirmation from the Gaming Commission that there is no fully-executed version of the Repayment Agreement as of today. Given the urgency of this matter, I am happy to discuss this request on a call if necessary.

Take care,
Devon



Devon Galloway
Zuckerman Spaeder LLP
DGalloway@zuckerman.com

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From: Galloway, Devon
Sent: Tuesday, November 26, 2024 5:39 PM
To: NYS Gaming Commission Records Access Office <gamingny@govqa.us>
Subject: RE: [Records Center] FOIL Records Request :: R000217-112624

Mr. Park,

Good afternoon and thanks for your response. The Repayment Agreement in the link you provided is not dated, nor has it been signed by any of the parties. Thus, I request that: 1) the Gaming Commission provide the fully-executed (signed and dated) version of the Repayment Agreement; or 2) in the event that the Repayment Agreement has yet to be signed and dated, confirmation from the Gaming Commission that there is no fully-executed version of the Repayment Agreement as of today. I am happy to discuss this issue more on a call. Thanks for your time.

Take care,
Devon Galloway



Devon Galloway
Zuckerman Spaeder LLP
DGalloway@zuckerman.com

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From: NYS Gaming Commission Records Access Office <gamingny@govqa.us>
Sent: Tuesday, November 26, 2024 3:55 PM
To: Galloway, Devon <DGalloway@zuckerman.com>
Subject: [Records Center] FOIL Records Request :: R000217-112624

EXTERNAL

--- Please respond above this line ---



**Gaming
Commission**

One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500
www.gaming.ny.gov

Dear Devon Galloway,

Per your Freedom of Information request for "The Belmont Park Renovation Financing & Repayment Agreement by and among the New York Racing Association, Inc., and the State of New York, and the New York State Franchise Oversight Board (the "Board") approved by the Board on March 28, 2024."

Please note that the [agreement](#) and related materials are publicly available via the New York State Franchise Oversight Board's website: <https://franchiseoversightboard.ny.gov/belmont-park-renovation>.

Thank you for contacting the Gaming Commission.

Regards,

Lee Park

Records Access Officer

New York State Gaming Commission

To monitor the progress or update this request please log into the [FOIL Records Center](#)



EXHIBIT B

From: NYS Gaming Commission Records Access Office <gamingny@govqa.us>
Sent: Tuesday, November 26, 2024 2:59 PM
To: Galloway, Devon
Subject: FOIL Records Request :: R000217-112624

EXTERNAL



Dear Devon Galloway:

This message acknowledges receipt of your request. Your request was received in this office on 11/26/2024 and given the reference number R000217-112624 for tracking purposes.

Records Requested: The Belmont Park Renovation Financing & Repayment Agreement by and among the New York Racing Association, Inc., and the State of New York, and the New York State Franchise Oversight Board (the "Board") approved by the Board on March 28, 2024.

We will provide you with a status update on or before 12/26/2024.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed.

NYS Gaming Commission

To monitor the progress or update this request please log into the [FOIL Records Center](#)



EXHIBIT C



Gaming Commission

354 Broadway, P.O. Box 7500
Schenectady, New York 12301-7500

www.gaming.ny.gov

May 20, 2024

via electronic mail only: DGalloway@zuckerman.com

Devon Galloway, Esq.
Zuckerman Spaeder LLP
485 Madison Avenue, 10th Floor
New York, New York 10022

Dear Mr. Galloway:

This correspondence serves as the determination of your administrative appeal related to your request for certain records pursuant to the N.Y. Public Officers Law ("POL"), Article 6, Freedom of Information Law ("FOIL") received by the N.Y.S. Gaming Commission ("Commission") on May 6, 2024.

As a preliminary point, for the Belmont Park Renovation Financing & Repayment Agreement by and among the New York Racing Association, Inc., and the State of New York, and the New York State Franchise Oversight Board to become effective requires the written approval of both the Office of the State Comptroller and, as to form, the Office of the Attorney General. As of the date of this correspondence, neither of these two approvals have been secured. Accordingly, no amount of money has been advanced to NYRA for the first 90 days of renovating the Belmont Park facility, even if an amount has been estimated and redacted.

Background

On April 1, 2024, you requested the following:

"The Belmont Park Renovation Financing & Repayment Agreement by and among the New York Racing Association, Inc., and the State of New York, and the New York State Franchise Oversight Board (the "Board") approved by the Board on March 28, 2024."¹

¹ See Attachment 1, FOIL request of Devon Galloway, April 1, 2024.

On April 1, 2024, an acknowledgement of your request was directed to your electronic mail.²

On April 9, 2024, Commission Assistant Public Information Officer Siobhan Buskey provided records responsive to your request and noted that "[t]he responsive records have been redacted where disclosure would impair present or imminent contract awards, or collective bargaining negotiations, per Public Officers Law § 87(2)(c)."³

The Commission received your administrative appeal related to your request on May 6, 2024.⁴

Appeal

In your appeal, you note the following redactions of the responsive records provided:

- "1) the amount of money advanced to NYRA for the first 90 days of renovating the Belmont Park facility — referenced on page three of the Belmont Park Financing and Repayment Agreement ("Financing and Repayment Agreement");
- 2) the amount of principal and interest NYRA must repay per year to the State of New York — referenced on Exhibit B, titled "Belmont Redevelopment — STIP Loan Repayment" to the Financing and Repayment Agreement;
- 3) the maximum cost for a construction monitor — referenced on page seven of the Financing and Repayment Agreement; and
- 4) the cost estimates for work, including but not limited to "Demo of existing Clubhouse/Grandstand," "Work at abandoned basement gridlines," etc. — referenced in the document titled "Belmont Park Concept Estimate — Executive Summary" to the Financing and Repayment Agreement."

You claim that the Commission failed to justify the redactions or give "any particularized reason that reasonably shows how or why substantial harm would arise from disclosure of the redacted information." Additionally, you claim that "the full unredacted Financing and Repayment Agreement should be publicly available on the Gaming Commission's Website" pursuant to "Part X, Section 2, subsection (10) of the State's 2024 Budget."

² See Attachment 2, Electronic mail from the Commission to Devon Galloway, April 1, 2024.

³ See Attachment 3, Electronic mail from Commission Assistant Public Information Officer to Devon Galloway, April 9, 2024.

⁴ See Attachment 4, Letter of Devon Galloway to Commission FOIL Appeals Officer, dated May 6, 2024.

Discussion

As a preliminary matter, "Part X, Section 2, subsection (10) of the State's 2024 Budget" states "that the gaming commission shall publish such agreement on the public-facing portion of its website." There is no requirement to publish, as you state in your appeal, "the full unredacted Financing and Repayment Agreement."

The Agreement has been published and can be found here:

[https://gamingny.govqa.us/WEBAPP/rs/\(S\(myrg3thbaa2he5owkg4vbmqq\)\)/RequestArchiveDetails.aspx?rid=435&view=1](https://gamingny.govqa.us/WEBAPP/rs/(S(myrg3thbaa2he5owkg4vbmqq))/RequestArchiveDetails.aspx?rid=435&view=1)

I. Denial of access, pursuant to POL § 87(2)(c), to portions of records that, if disclosed, would impair present or imminent contracts.

Under FOIL, an agency may withhold records "if disclosed would impair present or imminent contract awards." POL § 87(2)(c). The Committee on Open Government ("COOG") has advised that "the key word in that provision...is 'impair', and the question under that provision involves whether or the extent to which disclosure would 'impair' the process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers...consideration of the effects of disclosure is the primary factor in determining the extent to which § 87(2)(c) may justifiably be asserted." N.Y.S. COOG, FOIL-AO-10795 (April 27, 1998).

The FOIL exemption outlined in POL § 87(2)(c) "is intended to ensure that government agencies are not placed at a disadvantage at the bargaining table and to ensure that there is a 'level playing field.'" N.Y.S. COOG, FOIL-AO-18737 (November 18, 2011).

Here, responsive records include the amounts of principal and interest NYRA must repay per year to the State of New York. Releasing these amounts would place the State of New York at a disadvantage during future negotiations with other parties seeking loans, thereby "diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers." *Id.*

Additionally, releasing the amount of money advanced to NYRA for the first 90 days would reveal the cost estimates for work to be completed, as the timeline included in the responsive records reveals that only two tasks are scheduled within the first 90 days. Revealing the cost estimates, and the cost of a construction monitor, would "impair imminent contract awards" by diminishing NYRA's ability reach an optimal agreement with potential bidders for such tasks. Obviously, if the entities are aware of NYRA's estimated cost, they may tailor their bids accordingly.

II. Denial of access, pursuant to POL 87(2)(d), to portions of 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.

Under FOIL, an agency may withhold 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." POL § 87(2)(d). "[I]t must be established that the commercial enterprise is in actual competition with other entities, and that release of the information would likely cause it substantial competitive injury." Matter of City of Schenectady v. O'Keeffe, 50 AD3d 1384, 1386, 856 N.Y.S.2d 281 (3d Dept 2008).

Whether substantial competitive harm exists for purposes of FOIL's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. A commercial enterprise can suffer competitive harm only if the desired material has commercial value to its competitors, and therefore courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. See Encore College Bookstores v. Auxiliary Serv. Corp., 87 N.Y.2d 410, 419 (2006).

The parameters of what constitutes a trade secret were discussed in the U.S. Supreme Court case Kewanee Oil Co. v. Bicron Corp., in which the Court quoted Restatement of Torts, section 757, comment b (1939), which states that: "[a] trade secret may consist of any 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." Kewanee Oil Co. v. Bicron Corp., et al., 416 U.S. 470, 474–75 (1974).

The Court of Appeals in New York determined the extent to which information is a trade secret by (1) the extent it is known outside the entity; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the entity to guard said information; (4) the value of the information to the business and its competitors; (5) the amount of effort, or money, expended by the business in developing the information; and, (6) the ease or difficulty with which the information could be properly acquired. Ashland Mgt. v. Janien, 82 N.Y.2d 395, 407 (1993).

Access to portions of the responsive records are appropriately denied pursuant to POL § 87(2)(d). "[I]t has been advised in narrow circumstances that an agency may withhold its records in accordance with § 87(2)(d) when it functions as a competitor in a commercial marketplace..." N.Y.S. COOG, FOIL-AO-19134 (May 28, 2014). As stated above, responsive records include the amounts of principal and interest NYRA must repay per year to the State. Releasing these amounts would cause

competitive harm to the State of New York by causing a substantial injury to its competitive position during future negotiations with other parties seeking loans.

Additionally, in reviewing the responsive records, I note that the "Belmont Park Concept Estimate – Executive Summary" is marked "Sensitive Material for Privileged & Confidential Use." Portions of the responsive records contain objectively commercially sensitive information, trade secrets, or information which, if disclosed, would cause competitive harm.

NYRA is a not-for-profit corporation, which, pursuant to an agreement with the State of New York, holds a franchise to conduct thoroughbred racing at Aqueduct Racetrack, Belmont Park, and Saratoga Race Course. NYRA operates as a commercial enterprise. NYRA also has complete or partial ownership stakes in subsidiary corporations, one being NYRAbets. NYRA is entitled to request that certain records submitted to the Commission be excepted from disclosure pursuant to POL § 87(2)(d) when disclosure of such information would cause substantial injury to its competitive position. POL § 89(5). The detail provided within these documents would place NYRA at a significant disadvantage during the competitive bidding process, which would significantly harm NYRA's competitive position. Therefore, the process outlined in POL § 89(5)(b) should have been conducted with NYRA.

I uphold the decision to redact portions of the responsive records pursuant to POL § 87(2)(c). Additionally, the Commission asserts POL § 87(2)(d) for the reasons set forth above. I hereby remand this matter back to the Records Access Officer to initiate the process outlined in POL § 89(5)(b) concerning the redactions of the amount of money advanced to NYRA for the first 90 days, cost estimates, and the cost of a construction monitor and provide a response as soon as practicable.

Judicial review of this decision may be obtained pursuant to CPLR Article 78.



Robert Williams
Public Records Access Appeals Officer

Copies to:

Committee on Open Government
Lee Park, Deputy Executive Director, Public Information & Engagement
Siobhan Buskey, Assistant Public Information Officer