

Foil Redux

I have previously written about my efforts to fill some of the gaps in the annual report of the NY superintendent of financial services to the legislature and the governor through the use of Freedom of Information Law (FOIL) requests. As I reported, the result was a mixed bag – some success and some not so much.



Peter H. Bickford

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One of my successful FOIL requests was obtaining a schedule of excess and surplus lines business written in New York during calendar year 2011. This was one of those schedules regularly appearing in the old form of insurance department annual report but removed from the new department of financial services report. This schedule shows an increase in 2011 excess lines written premiums of \$450 million over 2010 for a total of \$2.47 billion. This total represented 6.84% of all property casualty insurance premiums written in New York during 2011, up from 5.77% in 2010. The schedule also includes a breakdown by line of business.

In the same FOIL request, I sought similar information about special risk – or “free zone” — insurance writings. Under Article 63 of the NY Insurance Law domestic insurers can purchase a “special risk license” that allows them to write three classes of risks free of rate and form filing requirements: large risks meeting a minimum premium threshold; hard to place risks listed by regulation (Regulation 86); and a new class created last year of large commercial insureds as defined in the Non-Admitted and Reinsurance Reform Act (NRRRA), a part of the 2010 Federal Dodd-Frank legislation. In short, the spe-

cial risk license allows domestic insurers to write certain types of business traditionally written through the non-admitted excess and surplus lines market on the same basis, i.e., free of rate and form filing requirements.

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“free zone” writings, including the use of the new “large commercial insured” category, should be as important to the regulators as the excess and surplus lines business. For instance, the legislative and regulatory implementation of the new large commercial risk class was criticized for its restrictive, redundant and unnecessary filing requirements that seemed to undermine and detract from its intent and purpose. The data on the writings in this new class, therefore, would seem to have value in assessing the importance of the new class from both a business and regulatory perspective. *Curiously, however, unlike my request for the E&S details that was honored, my FOIL request for the same information regarding free zone business was denied!*

The main reason stated by the DFS in denying my request was that the information sought was available through the DFS website by accessing each special risk insurer’s electronically filed free zone schedules. In other words, all I had to do is look up the schedules filed by each of the over 200 special risk insurers and manually compile my own summary schedule. I assume that the counsel writing this position on behalf of the DFS was not intentionally trying to be condescending or

disingenuous. Intentional or not, however, it is a very troubling posture from a public access perspective.

The DFS requires each special risk licensee to file a detailed annual report on its writings in each class, including a detailed spreadsheet providing for written premium information by line within each of the three classes. Furthermore, the circular letter incorporating these filing requirements states that “[t]he data compiled from insurer responses will be used to produce the Department’s Annual Free Trade Zone Update.” However, I have not been able to find any such Annual Free Trade Zone Update on the DFS website or elsewhere, nor was such an update offered in response to my FOIL request.

Another reason given by the DFS for denying my FOIL request was that “FOIL does not require an agency to create a record that does not exist (i.e., a summary table).” Aside from ignoring the law (see Public Officer Law §86(a)(3), which states that “[w]hen an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so.”) the DFS position seems to be in conflict with its own statement that it will use the filings to produce an “Annual Free Trade Zone Update.”

If the DFS prepared an update of the special risk business based on the information filed by special risk licensees as it said it would, why didn’t it provide that information in response to a proper FOIL request? If it did not prepare such summary as promised, why not?

The insurance law and regulations are replete with requirements for insurers and others regulated entities to compile and report data to the department. It is a waste of everyone’s resources if that data is not cumulated, analyzed and the results appropriately and openly shared with all interested parties including industry participants, investors, service providers, consumers and legislators. For the most part, such information was regularly made available voluntarily as part of the insur-

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[INSIGHT]

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COOG was copied on the correspondence between the DFS and me regarding my denied FOIL request.

ance department's annual report to the Legislature and the Governor, but as we know, much of this information has been eliminated from the DFS version of an annual report. Regulatory oversight is not just about "enforcement," but is also about proper monitoring the health of insurance entities and availability of product at reasonable and sustainable costs. To this end, the DFS should be expanding not contracting — sharing not suppressing — its compilation, review, analysis and dissemination of the information required be filed with it. And if the DFS chooses not to use the filed information, then the requirement for filing that information should be removed. Mandating filings that are not being used by regulators for a proper regulatory purpose are merely an unnecessary drag on our business and should be eliminated.

By the way, the oversight of the Freedom of Information Law for all state agencies purportedly lies with an entity called the Committee on Open Government (COOG). By its own words COOG "oversees and advises the government, public, and news media on Freedom of Information, Open Meetings, and Personal Privacy Protection Laws." (see <http://www.dos.ny.gov/coog/>)

COOG was copied on the correspondence between the DFS and me regarding my denied FOIL request. Its silence in view of the clear statutory language and the electronic availability of the requested data is deafening. It would be refreshing if open government meant open government. [A]

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