SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

RECLAIM THE RECORDS,

Petitioner,

- against -

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

Index No. _____

VERIFIED ARTICLE 78 PETITION

Petitioner Reclaim the Records ("RTR" or "Petitioner"), by and through its undersigned counsel, brings this Verified Article 78 Petition and alleges the following.

INTRODUCTION

1. The New York State Department of Health ("DOH") retains records of death for those who died anywhere in New York State (the "State") except for New York City, spanning from the 19th century to the present. Over the years, to ease administration, DOH has also compiled indexes to these State death records.

2. Death record indexes such as those retained by DOH are compiled tabulations, often in spreadsheet format with one row per each death record, and summarize the data contained in the underlying documents. Consequently, indexes create the possibility to quickly search for a decedent's death record without having to flip through millions of pages of documents for different individuals.

3. DOH has already placed online, on its own website, a small sample of the death indexes it retains. Specifically, on DOH's website, anyone can freely search a database that DOH created from its index to State deaths covering the years 1957 to 1970.

4. Given that DOH had already placed part of its data online, Petitioner RTR, a non-profit organization that promotes public accessibility of historical and genealogical records, requested from DOH pursuant to New York's Freedom of Information Law ("FOIL") "one complete set, in digital form, of the New York State Death Index, covering all data that is already retained by [DOH] in textual or database format, for all available dates through December 31, 2017, inclusive." (*See* Ex. 1.)

5. Other than producing certain records pre-dating 1957, DOH's Records Access Officer ("RAO") issued a denial (*see* Ex. 2) and, following RTR's appeal (*see* Ex. 3), DOH's Records Access Appeals Officer (the "Appeals Officer") issued another denial (*see* Ex. 4). DOH refused to produce additional fields of data for the period 1957-1970 on the premise that such disclosure would constitute an unwarranted invasion of personal privacy, and DOH produced nothing relating to the past 50 years on the basis of privacy and certain regulations.

6. DOH's position is simply incorrect. There is no basis in this case to restrict access to New York State death indexes. As a New York agency, DOH had the burden of demonstrating with specificity why production was exempted under FOIL, but it failed to meet its burden. Because disclosure would neither cause an unwarranted invasion of personal privacy nor be in violation of any statute, DOH must produce the requested records.

PARTIES

7. Petitioner Reclaim the Records is a 501(c)(3) non-profit organization that supports genealogists, historians, researchers, teachers and journalists. RTR works to identify important genealogical and historical record sets not currently available to the public, and has aided in making freely available to the public millions of previously inaccessible records.

8. Respondent New York State Department of Health is a state agency and is the department of the New York State government responsible for matters of public health.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction to decide this Petition pursuant to Public Officers Law ("POL") § 89(4)(b), as an appeal of a FOIL denial following an administrative appeal denial.

10. Venue is proper pursuant to CPLR 506(b) and 7804(b) because material events took place in this county and the principal office of Respondent is in this county.

FACTUAL BACKGROUND

11. New York State has a two-tiered system for the administration of death records. Records relating to those who died in New York City are governed by the New York City Department of Health and Mental Hygiene, while those for anywhere else in the State are under the ambit of DOH.

12. DOH, like many other vital records agencies in the country, maintains not only death certificates, but also compiled indexes of the underlying records. Indexes (which may be in paper or computerized form) are valuable tools for vital records agencies, as they create the possibility for the agency to quickly locate a specific file and assess information such as trends for ages of death, gender, location of death, and other statistics.

13. Additionally, if an individual makes an inquiry for a specific person's death certificate, an index drastically reduces the time it takes the agency to locate the requested record. Often times, the information from the death index may even be sufficient to satisfy a person's request, without even needing to retrieve a copy of the underlying record.

DOH's Data and the Public Interest

14. Public access to state-created computerized lists of deceased individuals, including those more recently deceased, is common throughout the country. These indexes are useful in a wide variety of circumstances for both individuals and businesses as an important tool that enables factual research and deters fraud without compromising the actual underlying death certificate. Death indexes offer support to, among others, pension funds and insurance companies dealing with unclaimed property or potential benefits fraud; attorneys and genealogists tracing heirs for probate cases or simply looking for the whereabouts of an individual; and journalists, historians, statisticians and educators, who need access to data to accurately check sources and news stories.

15. DOH maintains an "Open Data" web portal, an agency-created website where DOH freely publishes hundreds of its own data sets. DOH has placed in the Open Data Portal a subset of its State death index files. However, the publicly available subset only covers information for the years 1957 to 1970 and includes some but not all of the data fields that are known to be available in the full State index. DOH calls this subset of data its "Genealogical Research Death Index," which DOH describes as follows:

> The Genealogical Research Death Index assists individuals with locating New York State (NYS) death records that fall within defined genealogy years, exclusive of New York City recorded death records. This Index contains information on decedents, date of death, gender, age at death, and NYS file number that will allow the public to search for individuals on a variety of genealogy criteria if on file for at least 50 years.[1]

[1] *Genealogical Research Death Index: Beginning 1957*, N.Y. State Dep't of Health, https://health.data.ny.gov/Health/Genealogical-Research-Death-Index-Beginning-1957/vafa-pf2s (last visited July 21, 2022).

16. DOH states that its online database was created in 2013, was last updated in March 2021, and currently contains more than 1.4 million entries. The database contains the following fields of data: year of death, state file number, decedent name, middle initial, surname, age at death, gender, date of death, and residence code (corresponding to a town). Not only are all of these fields available for viewing online, but DOH also permits anyone to download the entire dataset, which can then be viewed as a spreadsheet.

17. Below is a screenshot from the DOH website showing how death entries appear in this online database, which anyone may freely search:

Table Preview

View Data | Create Visualization

Year of ...	State Fil...	Deceden...	Deceden...	Deceden...	Deceden...	Deceden...	Deceden...	Date of ...	Residen...
1957	1	WILLIAM	T	HAMMES	87	Yrs	M	01/01/1957	101
1957	2	JAMES	W	ODONNELL	76	Yrs	M	01/01/1957	101
1957	3	JOHN	E	QUINLAN	78	Yrs	M	01/01/1957	101
1957	4	MARY	G	GILCHRIST	56	Yrs	F	01/01/1957	101
1957	5	KYRAN		MAHER	53	Yrs	M	01/01/1957	101
1957	6	CATHERIN	A	BOOTH	42	Yrs	F	01/01/1957	153
1957	7	HANNAH		MEEHAN	65	Yrs	F	01/02/1957	101
1957	8	LORETTA	J	RYAN	56	Yrs	F	01/02/1957	101
1957	9	MARY		NUSBAUM	92	Yrs	F	01/02/1957	101
1957	10	DEBRA		LIEBERMAN	9	Mon	F	01/02/1957	101
1957	11	FRANCIS	M	BOOM	69	Yrs	M	01/02/1957	101
1957	12	GRACE	W	SPENSLEY	81	Yrs	F	01/03/1957	101
1957	13	BRIDGET		MORRISSEY	87	Yrs	F	01/03/1957	1001

< Previous Next > Showing Decedents 1 to 13 out of 1,430,759

18. According to search metrics on DOH's website, DOH's "Genealogy Death Index" is identified as the second most-viewed item in its Open Data Portal out of nearly 600 data sets, viewed even more often than data sets regarding State Covid testing, and second only

to data relating to Medicaid providers,[2] attesting to the enormous public interest and need for access to State death record information.

19. While the DOH online portal contains a helpful index for State death records, it is only a small subset of the data retained by DOH. Indeed, the online version of the index currently contains data from only the years 1957 to 1970. However, DOH is actually in possession of a far more complete index, covering nearly 150 years of deaths from the 1800s to the present, with millions more rows of data.[3] Additionally, as DOH made clear in its appeal denial letter, it retains additional fields of data that have *not* been included in the online portal. (*See* Ex. 4, at 1.)

20. The public interest relating to death data has seen a recent uptick because of the COVID-19 pandemic, which led to a variety of FOIL requests against DOH and other agencies relating to access to recent death information. For instance, in *Empire Center for Public Policy v. New York State Department of Health*, the Court recently awarded a non-profit organization counsel fees and litigation costs after the Court found that DOH violated FOIL by subjecting the organization to unreasonable delays and denials of access in connection with its request regarding information on nursing home deaths caused by Covid. *See* 72 Misc.3d 759 (Sup. Ct. Albany Cty. 2021).

[2] *All Data*, N.Y. State Dep't of Health, https://health.data.ny.gov/browse?sortBy=most_accessed&utf8=%E2%9C%93 (last visited July 21, 2022).

[3] The cities of Albany, Buffalo and Yonkers originally maintained their own vital records and did not start reporting deaths to the State until approximately 1915. Consequently, DOH's possession of these towns' records, upon information and belief, covers only the time period beginning around 1915. In any event, DOH retains more than a century of data from those towns, far more than the 13 years DOH currently publishes online.

This Action

21. Petitioner RTR sought the broader set of records retained by DOH in order to assist the public in gaining access to DOH's valuable information. On November 11, 2021, RTR submitted a FOIL request with DOH's Records Access Office, requesting all years and all fields of data of the indexes that DOH had created, through the year 2017. Specifically, RTR sought "one complete set, in digital form, of the New York State Death Index, covering all data that is already retained by [DOH] in textual or database format, for all available dates through December 31, 2017, inclusive." (Ex. 1, at 1.)

22. RTR explained in its FOIL request that it did *not* seek actual copies of death certificates, but instead, merely the basic text index or database containing State deaths already maintained by DOH. (*Id.*) RTR emphasized that DOH could easily produce the requested records because DOH already retains the requested data in text-based formats (compatible with programs such as Microsoft Excel). (*Id.* at 2.) RTR explained that there was no privacy basis to restrict access, providing as an example that the U.S. Social Security Administration ("SSA") has produced similar data. (*Id.* at 2-3.) RTR additionally stated that it was willing to pay for the time and effort needed to make the data available, including all necessary costs. (*Id.* at 3.)

23. On February 15, 2022, the RAO responded by producing a spreadsheet index to State deaths for the year 1971, while for years 1957 to 1970, the RAO directed RTR to DOH's online portal to view the database and the fields contained therein. (*See* Ex. 2.) The RAO did not address any records pre-dating 1957. For years after 1971, the RAO denied the request pursuant to POL § 87(2)(a), as being purportedly exempt from disclosure by certain provisions of state law.

24. In denying RTR's request, the RAO did not assert that there would be any unwarranted invasion of personal privacy in disclosing the records sought.

25. RTR timely appealed the RAO's denial on March 8, 2022. First, RTR objected to the RAO's failure to address pre-1957 records. (*See* Ex. 3, at 2.) Second, for records between 1957 and 1970, RTR objected that merely referring it to the DOH online portal failed to adequately address RTR's FOIL request because RTR sought additional data fields not contained in the DOH online portal. (*Id.* at 2-3.) Third, for 1971 records, RTR stated that there were additional fields of data that should have been produced. (*Id.* at 3.) Finally, for post-1971 records, RTR pointed out that, contrary to the RAO's assertion, there is *no* state statute that bars disclosure of death record indexes, and that DOH has in fact previously disclosed these very records. (*Id.* at 3-5.)

26. RTR's appeal was generally denied by the Appeals Officer on March 22, 2022. First, the Appeals Officer denied disclosing additional fields for the period 1957 to 1970 based on privacy, stating as follows:

> It is my understanding that the additional fields contained in these records to which you refer would include Social Security Numbers, dates of birth and other personal information, the disclosure of which "would constitute an unwarranted invasion of personal privacy" under POL §87(2)(b). Therefore, this portion of your request was properly denied.

(*See* Ex. 4, at 1.) As to the period 1972 to 2017, the Appeals Officer stated that DOH could not release these records because they are specifically exempt from disclosure under (i) Public Health Law ("PHL") § 4174(1)(a), asserting that death records are not subject to FOIL; (ii) 10 NYCRR 35.5(c)(3), asserting that death records may be disclosed only after 50 years; and (iii) a regulation promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Therefore, the Appeals Officer stated that the FOIL exception under POL

§ 87(2)(a) permitted DOH to withhold the requested records. (*See* Ex. 4, at 1-2.) The Appeals Officer also asserted that disclosure of these records would be an invasion of privacy, claiming that disclosure of the requested information would lead to identity theft. (*Id.* at 2.)[4]

27. Having exhausted all administrative avenues, RTR thus brings this action pursuant to FOIL and Article 78 of the CLPR to compel DOH to comply with its obligations to produce the requested records.

ARGUMENT

28. This Court should order DOH to produce the requested records because there is no applicable exemption under FOIL that would prevent disclosure. As relevant here, there is no state or federal statute that bars disclosure, and there would be no unwarranted invasion of personal privacy in disclosing tabulated spreadsheets containing basic information about deceased individuals.

29. Under New York's Freedom of Information Law, each agency must make available for public inspection and copying *all records*, unless a specifically enumerated exception applies. *See* POL § 87(2). The FOIL exemptions "are to be narrowly interpreted so that the public is granted maximum access to the records of government." *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007). Consequently, considering that "FOIL is based on a presumption of access to the records," agencies "carr[y] the burden of demonstrating that the exemption applies to the FOIL request." *Id.* The Court of Appeals has described the significant burden placed on agencies:

[4] The Appeals Officer also stated that there could potentially exist comma separated value (CSV) files from the period pre-dating 1957, so the Appeals Officer remanded the request to the RAO to assess the period pre-dating 1957. (*See* Ex. 4, at 1.) Two days later, the RAO replied by enclosing death index files covering the time period 1880 to 1956. (*See* Ex. 5.)

> [T]he Clerk must meet this burden in more than just a "plausible fashion." In order to deny disclosure, the Clerk must show that the requested information "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." If the Clerk fails to prove that a statutory exemption applies, FOIL "compels disclosure, not concealment."

Id. at 462-63 (citations omitted); *see also* POL § 89(4)(b) ("In the event that access to any record is denied pursuant to the provisions of [POL § 87(2)], the agency involved shall have the burden of proving that such record falls within the provisions of [POL § 87(2)].").

30. Here, DOH's denial letter invoked only one FOIL exemption: that the post-1971 records are "specifically exempted from disclosure by state or federal statute" pursuant to POL § 87(2)(a). No exemption was cited for earlier records. Meanwhile, the appeal denial letter broke out its response depending on if the records were more or less than 50 years old, and it invoked an additional exemption, alleging that if the records were disclosed, such disclosure "would constitute an unwarranted invasion of personal privacy" pursuant to POL § 87(2)(b). For the reasons described below, neither exemption is applicable here. Therefore, all of the requested records should be produced.

I. THERE IS NO REASONABLE BASIS TO RESTRICT ACCESS TO DEATH INDEX DATA FOR RECORDS FROM MORE THAN FIFTY YEARS AGO

31. The Appeals Officer denied the request for additional data fields concerning pre-1972 deaths on the basis that disclosing the additional fields would constitute an unwarranted invasion of personal privacy under POL § 87(2)(b). (*See* Ex. 4, at 1.) That, however, is neither correct nor reasonable. DOH should be required to produce *all fields of data* in its possession for death indexes that are more than 50 years old.

32. The Appeals Officer's privacy exemption was incredibly bare, stating merely that disclosure would be an unwarranted invasion of personal privacy because the

additional requested fields "include Social Security Numbers, dates of birth and other personal information." (*Id.*) While this information is personal in nature, its disclosure would not be *unwarranted* because this information is already public. There are countless examples involving the release of personal information to the public under New York law and otherwise. For example, under the State's Election Law, the Board of Elections is required to publish "a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction." N.Y. Election Law § 5-602(1). Based on data from the Board of Elections' website, its "data file" of voter lists also includes date of birth, among countless other personal identification fields.[5] This statewide voter data file, which includes the birthdates of all registered voters in New York, is freely accessible to anyone who requests it through a FOIL request. If the birthdate of a living New Yorker is publicly available through FOIL, then surely the birthdate of a *deceased* individual should not be withheld.

33. Similarly, the U.S. Department of Veterans Affairs (the "VA") previously released pursuant to the federal Freedom of Information Act ("FOIA"), both to non-profit organizations such as RTR and to for-profit companies, its "Beneficiary Identification Records Locator Subsystem" (the "BIRLS Database"), which contains very similar data. Specifically, the BIRLS Database contains information on U.S. veterans, pursuant to which the VA has released for inclusion in public databases decedents' Social Security Numbers, birth and death dates, and military service information. *See Reclaim the Records v. Dep't of Veterans Affairs*, No. 18 Civ. 8449 (PAE), 2020 WL 1435220, at *1 (S.D.N.Y. Mar. 24, 2020).

[5] *Data File Layout for voter list exports from NYSVOTER Statewide voter database*, N.Y. Bd. of Elections, https://www.elections.ny.gov/NYSBOE/Forms/FOIL_VOTER_LIST_LAYOUT.pdf (last visited July 21, 2022).

34. Both the RAO and Appeals Officer were put on notice by RTR's original FOIL letter and appeal letter that the information sought is already in the public domain. Specifically, RTR explained in its FOIL letter that "everything of personal relevance contained in the [requested] Death Index is already publicly available." RTR thus elaborated:

> [T]he U.S. Social Security Administration ("SSA") has long published a dataset known as the Social Security Death Master File ("SSDMF"), which is also commonly referred to as the Social Security Death Index. The SSDMF contains over 100,000,000 records about anyone who held a Social Security Number since the time that the numbers were first issued in the 1930s, and it includes not only the death date for decedents, but also their exact birth date, and their state or city of last residence. This data is freely available to the public through the year 2014 on the websites of several non-profit organizations, such as FamilySearch.org, as well as through both website and automated API access from commercial websites and data providers.[6]

35. Neither the RAO nor the Appeals Officer addressed RTR's showing that the information sought already was available to the public. And indeed, because the requested data is already part of the public domain, there is no basis to withhold this information. *See*, *e.g.*, *Reclaim the Records*, 2020 WL 1435220, at *6 ("Under the 'public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.'" (citation omitted)).

36. Nor did the Appeals Officer (the only one to raise privacy concerns) even attempt to address how the disclosure of this *already public information* could amount to an unwarranted invasion of personal privacy for *deceased* individuals. The Appeals Officer made no effort to explain how a deceased individual's privacy could be invaded. *See*, *e.g.*, *Jones v. Town of Kent*, 46 Misc.3d 1227(A), 2015 N.Y. Slip Op. 50323(U), at *3 (Sup. Ct. Putnam Cty.

[6] *See* Ex. 1, at 2. RTR also explained that the SSA had disclosed, following a FOIA request, a more up-to-date version of the SSDMF with information up to the year 2017. *See id.* at 2-3.

2015) ("The Court has been unable to locate any authority holding that a right of privacy extends to those person[s] no longer living. In fact, the holdings are to the contrary.").

37. Further, abstract statements that disclosure of records would cause an unwarranted invasion of personal privacy do not suffice under FOIL. New York courts routinely reject refusals to produce records based on mere speculation that privacy may be invaded. *See, e.g.*, *Baez v. Brown*, 124 A.D.3d 881, 883 (2d Dep't 2015) (agency "failed to proffer more than conclusory assertions" to support privacy claim because "[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed" (citation omitted)); *see also Livson v. Town of Greenburgh*, 141 A.D.3d 658, 661 (2d Dep't 2016) (ordering disclosure of records where town "did not articulate any privacy interest that would be at stake in the disclosure of the records" and where additional bases were speculative).

38. Additionally, there is zero logic in denying access to indexes of pre-1972 death records based on privacy when *anyone* can order all of the actual full and unredacted death certificates themselves from the very same agency. Specifically, on DOH's own website, it retains a page entitled "Genealogy Records & Resources." Thereunder, DOH states that "the New York State Department of Health provides uncertified copies of the following types of records for genealogy research purposes: . . . Death certificates – if on file for at least 50 years."[7] The actual death certificates contain additional information that would not appear in the requested indexes, such as the decedent's parents' names, spouse's name, next of kin, and burial information. Thus, considering that DOH permits anyone to order an uncertified copy of a decedent's original record of death from more than 50 years ago, DOH has no legal basis to now

[7] *Genealogy Records & Resources*, N.Y. State Dep't of Health, https://www.health.ny.gov/vital_records/genealogy.htm (last visited July 21, 2022).

claim that disclosing computerized extractions of *less fulsome* information from the same records would raise a privacy concern.

39. Consequently, in addition to the fact that the Appeals Officer provided no realistic example of how data fields from an index of deceased New Yorkers would constitute an unwarranted invasion of personal privacy and did not allege particularized facts, as required by FOIL, the Appeals Officer further failed to rebut the showing that (i) such basic factual information (such as birthdates, dates of death and Social Security Numbers of deceased individuals) are already publicly available in multiple other state and federal databases, such as the SSDMF from the SSA, the BIRLS Database from the VA, and the New York State voter file; and (ii) DOH itself discloses the information (and more) in the form of death certificates that it provides upon request.

40. Therefore, there is no basis for DOH to restrict access to any data field from indexes relating to deaths that occurred more than 50 years ago. DOH should be required to produce *all* data fields that it has compiled for all such years.

II. FOIL DOES NOT PREVENT DISCLOSURE OF DEATH INDEXES FOR THE PAST FIFTY YEARS[8]

41. For indexes relating to deaths that occurred in the years 1972 to 2017, the RAO provided only one basis for denial: a state statute bars disclosure. The Appeals Officer subsequently affirmed the denial of access on the additional grounds of HIPAA and privacy.

[8] RTR does not concede that death indexes for years that are less than 50 years ago should be treated differently than those for earlier years. They are only considered separately here because the RAO and Appeals Officer provided different bases for denial depending on the time period of the requested records. Additionally, while DOH produced an index for the year 1971, this index was limited in fields. Therefore, RTR also seeks all available fields for 1971.

None of these exemptions apply in this case, and therefore, the post-1971 requested records should also be produced in whole.

A. <u>There is No Statute Barring Disclosure of the Indexes</u>

42. Respondent cites three provisions that it purports prevent the Respondent from producing the post-1971 records. The first is PHL § 4174(1)(a), which states that "no certified copy or certified transcript of a death record shall be subject to disclosure under article six of the public officers law." The second is 10 NYCRR 35.5(c)(3), which states that "no information shall be released from a record of death unless the record has been on file for at least 50 years." The third is 45 C.F.R. 164.502(f), which limits under HIPAA the disclosure of health information to fifty years after an individual's death.

<u>Health Code Section 4174(1)(a) is not applicable.</u>

43. PHL § 4174(1)(a) has no applicability here because it references only a "certified copy or certified transcript of a death record." RTR requested neither a "certified copy" nor a "certified transcript" of a death record. Specifically, the Public Health Law defines these terms as follows:

- The term "certified copy" means a photographic reproduction in the form of a photocopy or a microfilm print of the original certificate or electronically produced print of the original certificate, commencing on or after the implementation date under section forty-one hundred forty-eight of this title, and certified by the commissioner, his designated representative, a local registrar, deputy registrar or sub-registrar as a true copy thereof. *See* PHL § 4100-a(1).

- The term "certified transcript" means a computer generated or other reproduction of information abstracted from the original state or local record the elements of which shall be as determined by the commissioner and certified by the commissioner, his designated representative, a local registrar or a deputy registrar as being an accurate abstract of information contained in the original record. *See* PHL § 4100-a(2).

44. RTR did not request certified copies of death certificates, nor uncertified (or "genealogical") copies of death certificates, nor certified transcripts of these records. Instead, RTR merely requested DOH's partial computerized transcriptions and tabulations relating to those records, akin to a department-created "finding aid" for the underlying full records. For this database extract, no certification or verification was or will be requested. Therefore, PHL § 4174 is inapposite here.

Section 35.5(c)(3) of Title 10 of the New York Regulations is not a state statute.

45. The provision of the Department of Health Administrative Rules and Regulations on which Respondent relied in refusing disclosure, 10 NYCRR 35.5(c)(3), does not constitute an exemption to FOIL as a matter of law. This provision addresses the disclosure of "an uncertified copy or abstract" of a death record for genealogical research purposes, which is permitted after 50 years have passed since death. This regulation, however, is not a "state statute" for purposes of FOIL and therefore provides no basis for DOH to withhold records.

46. New York courts repeatedly have explained that administrative regulations cannot prevent disclosure under FOIL, and one court has specifically held that the NYCRR is *not* a state statute for purposes of FOIL. *See Vertucci v. N.Y. State Dep't of Transp.*, 195 A.D.3d 1209, 1211 (3d Dep't 2021) ("a regulation is not a statute and, therefore, does not fall within the ambit of this narrowly construed exemption"); *N.Y. Times Co. v. N.Y. State Dep't of Health*, 173 Misc.2d 310, 319 (Sup. Ct. Albany Cty. 1997) ("It has been held that exemptions from FOIL may only be created by State or Federal statute, not by administrative regulation"); *see also Archdeacon v. Town of Oyster Bay*, 12 Misc.3d 438, 446 (Sup. Ct. Nassau Cty. 2006) ("9 NYCRR part 9978, the rules and regulations enacted to guide the temporary commission, does not constitute a 'statute' sufficient to provide an exemption under FOIL."); N.Y. Comm. on

Open Gov't ("COOG"), FOIL-AO-19712 (Mar. 4, 2019) ("[I]t has been held by several courts, including the Court of Appeals . . . that an agency's regulations or the provisions of a local enactment, such as an administrative code . . . do not constitute a 'statute'").[9] These cases thus leave no doubt that 10 NYCRR 35.5 is not a "state statute" and therefore cannot override FOIL's burden of production.

47. In any event, this regulation – to the extent it even could apply, which it cannot – limits access to death *records*, not *indexes*. The regulation provides that "no information shall be released from a *record of death* unless the record has been on file for at least 50 years." See 10 NYCRR 35.5(c)(3) (emphasis added). Death records and death indexes are not the same. A death record may contain information such as cause of death, certain family members, cemetery information and other fields of data. RTR's request is different – it is simply for the tabulated computerized index of information regarding those who died in New York State. The plain language of the regulation upon which DOH relied demonstrates that it does not prevent disclosure of computerized indexes under FOIL.

HIPAA does not prevent access to indexes for deaths within the past 50 years.

48. DOH cites a regulation under HIPAA which states that "[a] covered entity must comply with the requirements [of HIPAA] with respect to the protected health information of a deceased individual for a period of 50 years following the death of the individual." 45 C.F.R. 164.502(f). This provision of the Code of Federal Regulations, however, cannot be used to deny RTR disclosure under FOIL because this *regulation* is not a Federal *statute*. As

[9] COOG advisory opinions "are not binding authority, but may be considered to be persuasive based on the strength of their reasoning and analysis." *TJS of N.Y., Inc. v. N.Y. Sate Dep't of Taxation & Fin.*, 89 A.D.3d 239, 242 n. (3d Dep't 2011). Among other decisions, COOG cited the Court of Appeals in *Morris v. Martin*, 55 N.Y.2d 1026 (1982), and the Third Department in *Zuckerman v. N.Y. State Bd. of Parole*, 53 A.D.2d 405 (3d Dep't 1976).

described above, only a state or federal *statute* can bar disclosure under FOIL, not a regulation. (*See supra* ¶¶ 45-47); *see N.Y. Times*, 173 Misc.2d at 319 ("It has been held that exemptions from FOIL may only be created by State or Federal statute, not by administrative regulation.").

49. Even if the HIPAA regulations could prevent disclosure – which they cannot – death indexes are not "health information" under HIPAA. "Health information" means information that "[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual." 45 C.F.R. 160.103. The information contained in death indexes is none of those. Death indexes simply document that an individual died and that the individual died on a specific date in a specific location. RTR sought no medical records or information on individuals' health conditions or care.

50. Further, HIPAA does not even apply to this FOIL request because DOH is not a "covered entity" for these purposes. The 50-year rule applies only to "covered entities." *See* 45 C.F.R. § 164.502(f). Certain entities, though, may be *hybrid* entities, which are single entities "[w]hose business activities include both covered and non-covered functions." 45 C.F.R. 164.103. This entity must then "designate[] health care components." *Id.* The privacy rules under HIPAA "*apply only to the health care component(s) of the entity*." 45 C.F.R. 164.105(a)(1) (emphasis added). Upon information and belief, DOH is a hybrid entity.[10]

[10] In 2005, the Association of State and Territorial Health Officials, a national non-profit organization representing the state and territorial public health agencies of the United States, whose members are the chief health officials in each jurisdiction, published a report on HIPAA privacy rule implementation in the public health agencies of each state and territory. This report specifically identified DOH as a hybrid entity. *See* Ass'n of State & Territorial Health Officials, *HIPAA Privacy Rule Implementation in State Public Health Agencies*, 7 (2005), available at https://biotech.law.lsu.edu/cdc/astho/HIPAA5FINAL.pdf. Meanwhile, New York City has uploaded to its website an official statement of the New York City Department of Health and Mental Hygiene in which it declared itself as a hybrid entity. *See Statement of the N.Y. City Dep't of Health & Mental Hygiene Regarding Hybrid Entity Status*

Therefore, only its healthcare components are protected under the HIPAA privacy rules. DOH specifically lists its "covered programs" on its website: the American Indian Health Program, the Child Health Plus Program, the Elderly Pharmaceutical Insurance Coverage Program, the Family Planning Extension Program, the HIV Uninsured Programs, and the New York Medicaid Program.[11] DOH's vital records department is not one of these programs. Consequently, the disclosure of death indexes retained by DOH is *not* covered by HIPAA, as its retention and disclosure has nothing to do with one of DOH's covered programs.

51. Indeed, if HIPAA were to apply – which it does not – then it would invalidate the public disclosure of death indexes by agencies such as the SSA, which freely shares death index information (*see supra* ¶ 34; *infra* ¶ 55), as well as countless non-profit and for-profit websites and government agencies across the country who share death index information for individuals who died less than 50 years ago. This includes states such as New Jersey, for which anyone can freely search New Jersey's death index online for all deaths occurring in that state until the year 2017,[12] or Connecticut, with online data through 2012,[13] or California, which has death data online through 1997.[14] The disclosure by federal (and state) agencies of similar information demonstrates the error in Respondent's position that a federal regulation somehow precludes it from disclosing the information sought by RTR.

Pursuant to HIPAA, N.Y. City Dep't of Health and Mental Hygiene, https://www1.nyc.gov/assets/doh/downloads/pdf/notice/hybrid-entity-declaration.pdf (last accessed July 21, 2022).

[11] *Notices of Privacy Practices for Department of Health HIPAA Covered Programs*, N.Y. Dep't of Health, https://www.health.ny.gov/regulations/hipaa/notices/ (last accessed July 21, 2022).

[12] *The New Jersey Death Index*, Reclaim the Records, https://www.newjerseydeathindex.com/ (last visited July 21, 2022).

[13] *Connecticut Death Index, 1949-2012*, Ancestry.com, https://www.ancestry.com/search/collections/4124/ (last visited July 21, 2022).

[14] *California Death Index, 1940-1997*, FamilySearch, https://www.familysearch.org/search/collection/2015582 (last visited July 21, 2022).

B. Disclosure Would Not be an Unwarranted Invasion of Personal Privacy

52. There is no unwarranted invasion of personal privacy in the disclosure of death indexes relating to those who died less than 50 years ago for the same reasons as described above for records over 50 years old. (*See supra* ¶¶ 31-40.) This includes DOH's lack of particularity in its denial, the lack of any evidence of *unwarranted* invasions of privacy, and the fact that this information (including Social Security Numbers and birthdates) already is publicly available through the SSDMF. Thus, DOH failed again to meet its burden.

53. The Appeals Officer's additional assertion that disclosure from this more recent period would lead to identity theft is similarly baseless. (*See* Ex. 4, at 2.) DOH has it backwards. Death indexes *prove* that someone is not alive. Consequently, a quick search of a death index can *prevent* identity fraud by proving that the individual whose data is being used is actually deceased. In fact, RTR is aware that state and municipal governments, as well as public and private benefits funds, routinely cross-check internal lists of beneficiaries against state death indexes to prevent funds or benefits from being wrongly continued after a death has occurred. Meanwhile, life insurance companies may use a state death index to identify potential deaths among their customers when heirs have not claimed entitled benefits. Similarly, RTR is aware that financial institutions cross-check death information to *prevent* the fraudulent reuse of a deceased person's financial or personal information.

54. The Appeals Officer offered no evidence or explanation as to how there is a meaningful risk from disclosure here. In DOH's denials, the agency did not put forth any example of how death indexes have *ever* been used in an impermissible manner; nor did DOH consider any of the very useful ways in which death indexes help *prevent* fraud. As described

above, "[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed." *Baez*, 124 A.D.3d at 883.

55. Further, while there is often a concern about the disclosure of Social Security Numbers of living individuals, the records here are for deceased individuals, and, contrary to the Appeals Officer's assertions, Social Security Numbers of deceased individuals are *not* private. Indeed, they are open to the public. Anyone can go on the FOIA portal for the SSA and request the original Social Security Application of a deceased individual simply with proof that the individual is deceased.[15] Additionally, the SSDMF is public and contains the Social Security Numbers, birthdates and dates of death of over 100 million deceased individuals. This data is freely accessible online through 2014, and RTR is aware of at least one occasion when the SSA disclosed SSDMF records through 2017 pursuant to a private citizen's FOIA request. (*See* Ex. 1, at 2-3.)

56. As RTR stated in its appeal letter, RTR is also aware of at least two separate and recent occasions when DOH actually shared information from death records post-dating 1971 in files which, upon information and belief, were very similar (if not identical) to the types of full and unrestricted State death indexes being requested here. RTR is aware that DOH shared these datasets with two organizations that are *not* New York agencies and are both non-profit organizations just like RTR: the National Association for Public Health Statistics and Information Systems (NAPHSIS); and the Unemployment Insurance Integrity Center of

[15] *See FOIA Request Methods and Fees*, U.S. Soc. Sec. Admin., https://www.ssa.gov/foia/request.html#:~:text=FOIA%20Request%20Methods%20and%20Fees&text=You%20can%20make%20a%20request,%2Faction%2Fpublic%2Fhome (last visited July 21, 2022).

Excellence, a division of the National Association of State Workforce Agencies (NASWA). (*See* Ex. 3, at 5.)

57. DOH did not deny the agency's disclosure of its own records to these non-governmental organizations. In fact, there may be *additional* non-governmental organizations with which DOH also shared the same or similar data. DOH thus waived its privacy objection by freely sharing such information with other non-governmental organizations.[16] *See McGraw-Edison Co. v. Williams*, 133 Misc.2d 1053, 1055 (Sup. Ct. Albany Cty. 1986) ("[W]aiver of a statutory privilege 'has long been recognized as acceptable practice so long as it is done intelligently and voluntarily.' . . . While the exemptions to FOIL should be narrowly construed, nothing in the statutory scheme would indicate that the Legislature intended to adopt a different standard with respect to a waiver."); *see also Reclaim the Records*, 2020 WL 1435220, at *6-7 (public domain doctrine warranted disclosure of VA records under FOIA when they had already been previously disclosed). Thus, all available data fields from all of the years RTR requested – that is, everything retained by DOH for its death indexes through the year 2017 – should be produced.

FIRST CAUSE OF ACTION

58. Petitioner repeats and realleges the allegations made above as if fully set forth in this paragraph.

59. The New York State Department of Health maintains computerized indexes to New York State death records from the 19th century to the present.

[16] Upon information and belief, DOH even receives income from its data sharing with NAPHSIS, which through partnerships subsequently sells the death data to governments, companies and private individuals.

60. RTR submitted a FOIL request to DOH requesting digital copies of DOH's computerized indexes, and DOH was required to produce the requested records absent a clear exemption under FOIL.

61. DOH had the burden of establishing that an exemption under FOIL applies. However, it failed to meet its burden because no statute bars disclosure of the requested records (nor any such fields of data), and disclosure would not amount to an unwarranted invasion of personal privacy.

62. Therefore, this Court should order DOH to produce the requested records pursuant to FOIL.

NO PRIOR APPLICATION

63. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests that this Court enter an Order:

A. Issuing a judgment pursuant to the New York Freedom of Information Law compelling Respondent to produce to Petitioner the requested records; and

B. Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 21, 2022

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

By: /s/ Michael D. Moritz
Michael D. Moritz

Jeffrey J. Recher
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Attorneys for Petitioner
Reclaim the Records

VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

BROOKE SCHREIER GANZ, being duly sworn, deposes and says:

I am the President and Founder of Petitioner Reclaim the Records, a not-for-profit organization, and I make this verification pursuant to CPLR 3020(d)(3) and 3021. I have read the foregoing Petition and know the contents thereof; the same are true to my knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true. To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of these papers or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1 of the Rules of the Chief Administrator (22 NYCRR).

BROOKE SCHREIER GANZ
President and Founder of Petitioner
Reclaim the Records

NOTARY

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

Subscribed and sworn to (or affirmed) before me on this 21 day of July, 2022, by BROOKE SCHREIER GANZ, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

(Seal)

Signature

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

RECLAIM THE RECORDS,

Petitioner,

- against -

NEW YORK STATE DEPARTMENT OF HEALTH,

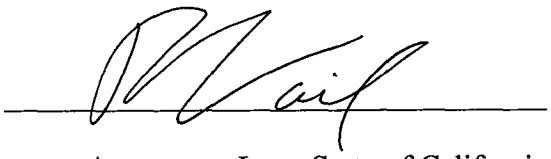
Respondent.

Index No. _____

CERTIFICATE OF CONFORMITY

I, Rosie Vail, an attorney at law admitted to practice in the State of California (SBN 317977), who resides in the State of California and is fully acquainted with the laws of the State of California pertaining to the administration and taking of oaths and affirmations, do hereby certify that I am duly qualified to make this certificate of conformity pursuant to N.Y.R.P.L. § 299-a and hereby certify that the acknowledgment or proof upon the verification of Brooke Schreier Ganz, duly sworn to on the 21st day of July, 2022, was taken by Matt Jones, a Notary Public in the State of California, in the manner prescribed by the laws of the State of California, and conforms to the laws thereof in all respects.

WHEREFORE, I have hereunto set my signature this 21st day of July, 2022.



Attorney at Law, State of California