SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
RECLAIM THE RECORDS,

Petitioner,

Index No. 905532-22

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S ANSWER

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PRELIMINARY STATEMENT

Petitioner, Reclaim the Records ("RTR"), commenced this Article 78 proceeding against the Respondent, New York State Department of Health ("DOH" or the "Department"), by filing a petition on July 21, 2022. Petitioner seeks an Order directing DOH to produce "one complete set, in digital form, of the New York State Index, covering all data that is already retained by DOH in textual or database format, for all available dates through December 31, 2017, inclusive (the "Death Index")." See NYSCEF Doc. Nos. 1-4.

DOH respectfully submits this memorandum of law in support of its answer and in opposition to the petition. As discussed fully herein, the petition should be dismissed, with prejudice, because DOH properly responded to the subject Freedom of Information Law ("FOIL") request. Furthermore, DOH properly invoked applicable exemptions, and provided Petitioner with all the responsive records to which they are entitled. The claims asserted by Petitioner are unsupported by proof and have no merit, and therefore, the petition should be denied in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

On November 11, 2021, Michael D. Moritz, on behalf of RTR, submitted a FOIL request for "one complete set, in digital form, of the New York State Death Index, covering all data the is already retained by the DOH in textual or database format, for all available through December 31, 2017, inclusive (the "Death Index"). Hewig Aff. at ¶ 10 & Ex. "A".

The following day, on November 12, 2021, the RAO issued an acknowledgement letter advising the Requester that FOIL #21-11-238 had been received. *Id*. at ¶ 11 & Ex. "B". The RAO estimated that a determination as to whether Petitioner's request would be granted or denied would be reached in approximately 20 business days, or it would notify Petitioner in writing about the

availability of responsive material or if the time needed to complete the request extended beyond the 20 business days. *Id.*

On December 13, 2021, the RAO advised the Requester that it was continuing to work on the FOIL request and estimated completion by February 18, 2022. *Id.* at ¶ 12 & Ex. "C". On February 15, 2022, the RAO responded to FOIL #21-11-238. *Id.* at ¶ 13 & Ex. "D".

DOH provided Requestor with a record reflecting the death index for 1971. *Id.* at ¶ 14. In addition, in its response letter, the RAO provided links to records reflecting the official, published Death Index responsive to the request for the years 1957 through 1970, which is posted on DOH's Health Data NY website. *Id.* The RAO denied the request for indexes for the years 1972 through 2017, as "specifically exempted from disclosure by State or Federal Statute in accordance with New York Public Health Law §4174(1)(a), which states that death records are not subject to disclosure pursuant to article 6 of the Public Officers Law, and §35.5(c)(3) of Title 10 of the New York Codes Rules and Regulations, which states that "no information shall be released from a record of death unless the records has been on file for at least 50 years." Additionally, the response letter set forth the Requestor's appeal rights and advised him that if he should "feel that [he] ha[s] been unlawfully denied access to records, [he] may appeal such denial in writing within 30 days." *Id*. at ¶ 14 & Ex. "D".

On March 8, 2022, DOH received an email from Requester's attorney, with an appeal attached and dated March 8, 2022. *Id.* at ¶ 15 & Ex. "E". by which he appealed, in relevant part, DOH's denial of: 1) the Death Index predating 1957; 2) all available data fields from DOH's "internal files" for the Death Index from 1957-1970; 3) already-stored electronic fields of data not already provided for the 1971 Death Index, including the Social Security Number of the deceased,

and exact date of birth; and 4) an already "tabulated computerized [Death] index" for 1972-2017. *Id.*

On March 22, 2022, David Spellman, the Records Access Appeals Officer issued his appeal determination. *Id.* at ¶ 16 & Ex. "F"**.** Mr. Spellman affirmed that there were no responsive records prior to 1957 because no computerized records were available. He did note however, that comma separated value ("CSV") files from the time period may exist. *Id.* Mr. Spellman remanded the matter back to the RAO to conduct a diligent search for such records. Mr Spellman upheld the denial of records from 1972 to 2017 and provided a detailed analysis explaining how the requested records were protected from disclosure pursuant to POL §§ 87(2)(a)*,* pursuant to New York Public Health Law §4174(1)(a) and its accompanying regulation at 10 NYCRR §35.5(c)(3). Also informative here is a similar restriction under HIPAA, per 45 CFR 164.502(f). *Id.* In addition, Mr. Spellman denied this request for records from 1972-2017, as well as for additional fields from the 1957 to 1970 set, as an unwarranted invasion of personal privacy under POL§87(2)(b). *Id.* at ¶¶ 17-18.

On March 24, 2022, RAO complied with the decision of the Records Access Appeal Officer, by providing a copy of the CSV files from the time period 1856-1956 on remand. Additionally, the letter set forth the Requester's appeal rights and advised him that if he should "feel that [he] ha[s] been unlawfully denied access to records, [he] may appeal such denial in writing within 30 days." *Id.* . at ¶ 19 & Ex. "H"

Thereafter, on July 21, 2022, Petitioners commenced this Article 78 proceeding asking the Court to issue a judgment pursuant to the NYS FOIL Law, compelling the Respondent to produce to the Petitioner the requested records. See Doc No. 1.

STANDARD OF REVIEW

An article 78 court reviews a FOIL decision to determine if the decision was "affected by an error of law." CPLR 7803(3); *Mtr of Barry v O'Neill*, 185 AD3d 503, 505 (1st Dept 2020); *Mtr of Cobado v Searles,* 162 AD3d 1577 (4th Dept 2018); *Mtr of Thomas v Condon,* 128 AD3d 528, 529 (1st Dept 2015). The purpose of FOIL, found in Article 6 of the Public Officers Law, is to shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse." (*Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp*., 87 NY2d 410, 416 [1995]). Where a governmental agency seeks to avoid disclosure, it bears the burden of demonstrating the applicability of a statutory exemption (*see Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 158-159 [1999]). "'While FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL.'" (*Matter of Smith v New York State Off. of the Attorney Gen*., 116 AD3d 1209, 1210-1211 [3d Dept 2014] [some internal quotation marks omitted] [quoting *Matter of Hanig v State of N.Y. Dept. of Motor Vehs*., 79 NY2d 106, 110 (1992)], *lv denied* 24 NY3d 912).

ARGUMENT

POINT I

DOH PROPERLY DENIED THE PETITIONER'S REQUEST BECAUSE THE INFORMATION REQUESTED CONTAINS PRIVATE INFORMATION, THE DISCLOSURE OF WHICH WOULD CONSTITUTE AN UNWARRANTED INVASION OF PERSONAL PRIVACY

A. The Petitioner's Request Should be Denied In Order to Prevent Invasions of Privacy and Identity Theft

POL §87(2)(b) provides that an agency may deny access to records when "if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article." POL §89 (2) sets forth a non-exhaustive list of materials that, if produced in response to a FOIL request, would constitute an unwarranted invasion of personal privacy. When determining whether disclosure would constitute an unwarranted invasion of personal privacy that is not expressly listed in POL §89 (2), the Court is required to balance competing interests of public access and individual privacy. *Empire Realty Corp. v. NYS Div. of Lottery*, 230 A.D.2d 270 (3rd Dept. 1997). Moreover, "[w]hat constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable man of ordinary sensibilities." *Dobranski v. Houper*, 154 A.D.2d 736, 737 (3rd Dept 1989). *See also Beyah v. Goord*, 309 A.D.2d 1049, 1050 (3rd Dept. 2003) (holding disclosure of addresses, Social Security Numbers, and date of births would constitute an unwarranted invasion of personal privacy).

For instance, in *Matter of Hepps v. NYS Dept. of Health*, 183 A.D.3d 283, 290-295 (3rd Dept. 2020), the Petitioner sought disclosure of marriage records from DOH regarding the most recent 50 years of marriage and the information sought included the following personal information: prior maiden names, date and county of marriage, number of prior marriages, date

and place of birth, social security numbers, age and gender. *Id.* at 287. In opposition to the Petition, DOH submitted an affidavit showing that publicizing this information on the Internet, as the requester intended, "would facilitate various types of identity theft, account hacking and the creation of fake identities ..." *Id.* at 290. In its Decision, the Third Department, Appellate Division agreed with DOH and held that the Petitioner's request for the most recent 50 years of marriage records constituted an unwarranted invasion of privacy, despite Petitioner's legitimate public interest in obtaining the records. *Id.* However, the Court also noted that this FOIL request did not serve the underlying purpose of FOIL, to promote transparency in governmental operations and decision-making. *Id.* at 288. Rather, in this instance, the "compelling privacy interests . . . implicated in the disclosure of personal information . . . carry more weight than the public interest that would be served by disclosure" which is "the presumed benefit to a few genealogical enthusiasts." *Id.* at 288 and 293. The Court ultimately held that the Petitioner did not show that the "requested disclosure is required to serve the public interest and, more to the point, [the Department] has persuasively demonstrated that such disclosure 'would be offensive and objectionable to a reasonable person of ordinary sensibilities'." *Id.* at 290. The Court also acknowledged the very legitimate threat of identity theft that the Department raised, which required "a different, more cautious analysis in addressing requests for the wholesale disclosure of personal information about private citizens on this scale." *Id.* at 291. Additionally, as part of its decision, the Court explained that redaction is not always required and records may be properly withheld when there is no measured way to "redact away" privacy concerns, either because of specific details of the event in question would still permit discovery of the identity of the redacted individuals or where the redaction would be so extensive the information remaining in the document would provide no useful disclosure. *Id.* at 291. Most importantly, similar to the case

here, the Court in *Hepps* held that even though individual marriage records are public "there is a material difference between providing access to individual records on a demonstration of need . . and providing 50 years' worth of recent marital indiced to publish on the internet." *Id.* at 292

The situation presented in *Matter of Hepp, supra*, is entirely analogous to the situation currently before this Court, that is, the disclosure of the requested death records would constitute an unwarranted invasion of privacy under POL §87(2)(b); especially since there is no way to "redact away" the significant privacy concerns pertaining to the requested records. On this basis alone, wholesale and mass disclosure of the requested information in this case would constitute an unwarranted invasion of privacy to private citizens, particularly the survivors of the decedents in these records, and would outweigh any interest of public access to a searchable genealogical compilation of the death records, when considering the personal information enclosed within the records. *See, Matter of Hepps, supra; see also, Brooklyn Legal Servs. v. New York City Taxi & Limousine Comm'n, No*. 2022 WL 363937, at *1 (1st Dep't. Feb. 8, 2022) ("TLC plausibly asserts, by way of an affirmation from one of its staffers, that the FIDs are so detailed that there is no way to produce them while still preventing a savvy Internet user from deducing the applicants' identities or without redacting them to the point of uselessness"); *Rhino Assets, LLC v New York City Dept. for Aging*, 60 A.D.3d 538, 538 (1st Dept. 2009) (redaction is not required if the privacy concerns will still be implicated by the remaining information).

First, as set forth in detail in the accompanying Affirmation of Stephanie Ostrowski, Director of Bureau of Vital Records ("BVR"), the release of records containing the above information causes DOH grave concerns about identity theft and data breaches. These concerns are certainly justified because Petitioner requested the records to promote the public availability of such records. *See* NYSCEF Doc. No.1. In particular, Director Ostrowski explains that the death

records requested here, for records from 1972-2017, as well as for additional fields for the already public 1957 to 1970 death index, contain social security numbers, dates of birth, and other personal information. Ostrowski Aff. at ¶¶ 16-17 & 28. Contrary to Petitioner's assertions, the Department has only released these records in the past to authorized recipients under the Public Health Law § 4174(1)(a) in situations where release is mandated or permitted by law, or in a non-identifying statistical format. Petition at ¶ 55-57; Ostrowski Aff. at ¶ 22. Death records that are at least 50 years old have also been released pursuant to Public Health Law § 4174(1)(c) and 10 NYCRR § 35.5(a), upon an authorized request for a particular record genealogical purposes and payment of statutory fees (not permitted for commercial purposes). *Id.* at ¶ 19. However, similar to the rationale in *Hepps*, "there is a material difference between providing access to individual records on a demonstration of need . . and providing 50 years' worth of recent marital indiced to publish on the internet." *Matter of Hepps*, 183 A.D.3d at 292. Further, past release of any such records does not prevent the agency from "increasing its safeguards in the face of a newly-comprehended threat." *Id.* At 291-92.

According to Director Ostrowski, alongside authorized local registrars across the state, BVR has a shared responsibility to help mitigate identity theft and fraud crimes by protecting the data within its Vital Records and on this basis, the release of death indexes less than 50 years old, which contain social security numbers, dates of birth, and other person information would constitute an unwarranted invasion of the personal privacy of a decedent's immediate survivors and survivors-in-interest, and this is especially true given that some of the names included in the indexes at issue belong to minors, the disclosure of which is particularly objectionable as a matter of public policy. *Id.* at ¶¶ 25-28.

While DOH acknowledges that the release of decedents' information less than 50 years old may not always constitute an invasion of privacy when making select records available to authorized recipients pursuant to PHL §§ 4174(1)(a), given the circumstances at hand, it is submitted the potential consequences of such a release outweigh the public's interest in the information. *Id.* at ¶ 29. As it relates to this specific issue, Director Ostrowski explains that Petitioner's request for records less than 50 years old should not be viewed in isolation, but rather through the lens of societal interests and their reflection in statutes, regulations, and the legitimate exercise of the State's administrative discretion; especially since identify theft has increased significantly with recent technological advancements. *Id.* at ¶ 31.

For instance, the Bureau of Justice Statics reports that from 2005 to 2010 the rate of identity theft affecting at least one member of a household increased from 5.5% to 7.0% and a report issued in in 2017 found that while identify theft between 2011 and 2015 had fluctuated, it increased by 16% between 2015 and 2016. *Id*. at ¶ 31. Similarly, a 2018 report found that reports of identity theft in 2017 exceeded 2016 and "with the amount of valid information [fraudsters] have on consumers, their attacks are just getting more complex. *Id.*

DOH has also provided further examples of data breaches that have occurred on various websites and social media platforms, including Facebook, Equifax, Exactis,and MyHeritage, and Director Ostrowski explains how the release of a list of names and other fields of personal information requested by Petitioner in this case could be used in combination with other, parallel data resources to misappropriate the identity of hundreds of thousands of individuals. *Id*. at ¶ 32.

In addition to the foregoing, it is important to note that in response to previous FOIL requests, Petitioners have already received records from DOH regarding the birth and marriage

indexes and when these records are viewed in conjunction with one another, anyone wishing to misappropriate information can create a complex identity using actual names. *Id.* at ¶ 34.

In seeking all the records DOH has through December 31, 2017, Petitioner heavily relies on, *Data Tree, LLC v. Romaine,* 9 N.Y.3d 454, 462 (2007). It is respectfully submitted that Petitioner's reliance upon *Data Tree* is misplaced. *Data Tree* discusses how FOIL exemptions "are to be narrowly interpreted so that the public is granted maximum access to the records of government." *Data Tree*, 9 N.Y.3d at 462. The *Data Tree* court determined that the petitioner in that case was not seeking a list of names and addresses but rather, it was seeking public land records for commercial reproduction. *Id* at 463. The court in *Data Tree* explained that if some of the records contain private information, an agency may be required to prepare a redacted version of the record. *Id*. However, the court remitted the matter to the Supreme Court to determine whether any records contain information exempt from disclosure on the basis of privacy and if so, could they be redacted. *Id*. At 464. Thus, Court of Appeals in Data Tree gave discretion to the Supreme Court to decide whether the records could be redacted. *Id*.

Moreover, as it relates specifically to the issue of disclosure of information that would constitute a privacy concern, in the *Matter of Goyer v. NYS Dept. of Envtl. Conservation*, 12 Misc.3d 261 (Sup. Ct., Albany Co., November 29, 2005) the Court denied the Petitioner's FOIL request regarding the disclosure of personal information such as medical conditions and physical attributes of a person. The Court acknowledged that "Identity theft, without question, is becoming one of the fastest growing criminal offenses in the 21st century" and "Disclosure of information such as a full name and date of birth can lead to such a problem." *Matter of Goyer*, *supra,* at 261.

Based on the foregoing, the disclosure of this information would "constitute an unwarranted invasion of privacy" under POL §87(2)(b). Such an unwarranted invasion of privacy

outweighs any interest of public access when considering the personal information enclosed within the records. *See, Matter of Hepps, supra,* at 290-295 (3rd Dept. 2020) (holding that the privacy interests to ward-off identity theft of wrong-doers using the identify of a deceased person far outweighs any interests in breaching a 50 year ban against the disclosure of information).

b. The Petitioner's Request Should be Denied Due to Concerns That the Requested Records Could be Improperly Used for Solicitation and Fund Raising

In this case, Petitioners are also seeking data from statutorily protected vital records to steer traffic to their organization's website and, in turn, to solicit donations. See NYSCEF Doc. 1. In this context, the release of the requested information would constitute an unwarranted invasion of survivors' personal privacy and the data was, therefore, properly withheld.

Pursuant to POL § 87(2)(b)(iii), an unwarranted invasion of personal privacy includes the sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes. See POL § 87(2)(b)(iii). While FOIL does not require a party requesting information to show any particular need or purpose, an unwarranted invasion of personal privacy occurs if a public records request is utilized for the purpose of solicitation or fund-raising. *See Id.*

On this very issue, five interconnected factors and the outcome of the October 2008 case *Hunt v. New York City Department of Correction*, 2008 NY Misc LEXIS 10547 should be considered simultaneously in determining to withhold the death indexes for years 1972 to 2017 from the Petitioners. *See* Ostrowski Aff. at ¶ 36. In addition to DRL § 20(a), 10 NYCRR § 35.5(c)(3) and the synthetic identity fraud concerns discussed above, the potential demand to align or modify future indexes to accommodate the Petitioners' solicitation interests should be considered. *Id.*

Moreover, for similar reasons previously discussed above, if the indexes from 1972 to 2017 are deemed disclosable to the public, there will be a high probability of invasion of privacy and synthetic identity fraud. *Id.* at 36. Director Ostrowski explains that we should expect that the risk of fraud will increase substantially when a public records recipient utilizes social media websites, such as Facebook and Twitter to solicit the business and steer traffic to their website. For instance, on December 13, 2017, RTR utilized Twitter to tweet the following: "[w]e were awarded an in-kind grant from Google to run $10,000 worth of ads per month on their search results pages, to promote our website and our mission to bring public records back to the public." *Id*. at ¶ 38. Another tweet on RTR's Twitter Account in the month of November 2018 reads "[s]hould we announce that we won most of the New York State marriage index, or should we announce that we filed YET ANOTHER lawsuit against @HealthNYGov?" *Id.*

RTR also offers presentations, slides, videos, and webinars to the public to guide clientele on how to obtain information and offers an easy to access Donation Button on its website, and because of this, the death records, if disclosed, would likely be uploaded to RTR's website. *Id*. at ¶ 39.

Based on the aforementioned exemption and the proof that DOH has submitted in support of said exemption, the Petitioner has been provided with all of the records to which it is entitled to and its request for additional records should be denied in its entirety. *See*, *Matter of Goyer*, *supra*, at 261.

POINT II

DOH PROPERLY DENIED THE FOIL REQUEST BECAUSE IT IS EXEMPTED FROM DISCLOSURE UNDER PUBLIC HEALTH LAW §417(1)(a) and §35.5(c)(3) of TITLE 10 OF THE NEW YORK CODES, RULES, AND REGULATIONS

POL §87(2)(a) provides that an agency may deny access to records if they are "specifically exempted from disclosure by state or federal statute."

Public Health Law ("PHL") § 4100(2) provides, inter alia, that all death records must be kept on file and properly indexed by the state Department of Health. In accordance with PHL, the New York State Department of Health is authorized to provide an applicant with a certified copy or certified transcript of death only in the following circumstances: (1) when a documented medical need has been demonstrated, (2) when a documented need to establish a legal right or claim has been demonstrated, (3) when needed for medical or scientific research approved by the commissioner, (4) when needed for statistical or epidemiological purposes approved by the commissioner, (5) upon specific request by municipal, state or federal agencies for statistical or official purposes, (6) upon specific request of the spouse, children, siblings or parents of the deceased or the lawful representative of such persons, or (7) pursuant to the order of a court of competent jurisdiction on a showing of necessity.

PHL § 4174(1)(a) further states that death records are not subject to disclosure under Article six of the Public Officer's Law, meaning they are not subject to the Freedom of Information Law. See PHL § 4174(1)(a). Additionally, 10 NYCRR § 35.5(c)(3), which is derived from this statutory authority, states that no information shall be publicly released from a record of death unless the record has been on file for at least 50 years. 10 NYCRR § 35.5(c)(3).

Here, Director Ostrowski explains that Indexes of deaths created pursuant to PHL § 4100(2)(g) are created from registered death records and are used exclusively for the purpose of fulfilling BVR's administrative obligations. Ostrowski Aff. at ¶ 11. In responding to FOIL #21-11-238, and cognizant of the requirements of 10 NYCRR §35.5(c)(3), DOH determined that it should not release any information from death records that are not at least 50 years old. *Id.* at ¶¶ 4-6. This determination balances DOH's legal obligations to protect the identity and personal information of deceased individuals, discussed in detail below, with its obligations to provide the

public with access to governmental records. *Id.* at ¶ 4. While there is a growing concern regarding the adequacy of the 50-year policy, state regulations currently restrict only the records for the past 50 years. *Id.*

In conjunction with the foregoing, pursuant to 10 NYCRR § 35.5(c)(3) and PHL § 4174(1)(a), DOH provided Petitioner with the death index from 1971 and DOH's RAO additionally directed Petitioner to the web address for the death index from 1957 through 1970. *Id.* at ¶ 5; Hewig Aff. at ¶ 18. While the RAO denied the request for additional fields of data for the years 1972 through 2017, upon remand the RAO provided Petitioner comma separated value ("CSV") files for years prior to 1957 to the extend they were available. Hewig Aff. at ¶ 16; Ostrowski Aff. at ¶ 6.

For similar reasons previously mentioned above, Petitioner's request for additional fields from the records from 1957-1970 should also be denied. Not only is the Petitioner's request for this information an unwarranted invasion of personal privacy, but the Petitioner also conflates two things-death records with the official and published Death Index. While the Petitioner alleges that the publicly available set of State Death Index files covering years 1957 to 1970 include some, but not all of the data fields that are known to be available in the full State Death Index; contrary to Petitioner's assertions, as discussed in the accompanying Affidavit of Director Ostrowski, the Death Index does not contain all information contained in a complete death record. Ostrowski Aff. at ¶ ¶ 18-19. In order to obtain additional data from 1957-1970, the requestor must be a qualified recipient under PHL § 4174(1)(a), or PHL § 4174(c) and 10 NYCRR § 35.5(a) (which specifies that the full death record information is disclosable pursuant to authorized genealogical requests for a specific record and payment of statutory fees, and is not intended to serve requests for mass disclosure of all death records in the Department's possession).

Moreover, as Director Ostrowski explains it is important to note that that all death records maintained by BVR are not in one format and differ depending on the year of the death record. *Id* at ¶ 14. As DOH has prepared and compiled death records throughout the years, it has stored them as microfiche for the years 1880 through 2005; in a database from 1959 to present, which can run only limited reports. *Id.*

Likewise and informative here, pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") health information about a decedent continues to be protected health information for 50 years following the death of the individual. 45 CFR 164.502(f). The application of HIPAA under POL §87(2)(a) similarly bars the release of these records for 50 years.

Finally, to the extent that Petitioner contends that an index is not a "record of death," Director Ostrowski explains the information in the indexes is compiled from records of death and that upon information and belief 10 NYCRR 35.5(c)(3), which is founded on PHL § 4174(1)(a), restricts the release of indexes less than 50 years old. *Id.* at ¶ 24.

Based on the foregoing, the Petitioner's request was properly denied.

POINT III

DOH PROPERLY DENIED PETITIONER'S FOIL REQUEST SINCE THE REQUEST WAS OVERBROAD

"The requirement of Public Officers Law § 89(3)(a) that requested documents be 'reasonably described' serves to enable an agency to locate and identify the records in question." *In re Pflaum v. Grattan*, 116 A.D.3d 1103, 1104 (3d Dept. 2014) (citations omitted). Public Officers Law § 89(3)(a) "places the initial burden on the person or entity making a FOIL request to provide a reasonable description of the records sought". *In re Jewish Press, Inc., v. New York State Police*, 207 A.D.3d 971, 974 (3d Dept. 2022). "[W]hen an agency denies a FOIL request on

this ground, the agency bears the burden to establish that the descriptions were insufficient for purposes of locating and identifying the documents sought." *In re Reclaim the Records v. New York State Dept. of Health*, 185 A.D.3d 1268, 1269 (3d Dept. 2020) (internal citations and quotations omitted); *In re Jewish Press, Inc.*, 207 A.D.3d at 974.

"[A] valid basis for denying [a] FOIL request has been established—at least with respect to [paper] files—when they are not 'indexed in a manner that would enable the identification and location of documents.'" *In re Pflaum* 116 A.D.3d at 1104. Further, "FOIL does not differentiate between records stored in paper form or those stored in electronic format." *In re Data Tree, LLC v. Romaine*, 9 N.Y.3d 459, 464 (2007). Therefore, the "failure to provide a reasonable description of the records sought may present the same obstacles to an electronic search as it does to a search of paper records, preventing an agency from retrieving a record 'with reasonable effort.'" *In re Reclaim the Records*, 185 A.D.3d 1268, 1273 (3d Dept. 2020).

It is further submitted that the Petitioner's request for "one complete set, in digital form, of the New York State Index, covering all data that is already retained by DOH in textual or database format, for all available dates through December 31,2017, inclusive (the "Death Index")" failed to reasonably describe records with sufficient detail to enable a diligent search, as required by POL §89(3)(a).

Courts have held that when an agency does not have a retrieval system that would allow it to reasonably locate records, the Department is not required to conduct herculean efforts to respond to a FOIL request. *See Reclaim the Recs. v New York State Dep't of Health*, 185 AD3d 1268, 1272 (3d Dept 2020) (agency "established that its indexing system did not permit searching either its paper or electronic records by the name of an entity, and that it had no method of searching its correspondence records, whether on paper or in digital form, for the terms provided in petitioners'

request"); cf. *Shapard v Attea*, No. 08-CV-6146, 2014 WL 4402200, at *3 (WDNY, Sept. 5, 2014) (noting "trend within this Circuit... to deny production of inmate grievances under these circumstances, on the ground that it would be unduly burdensome due to the fact that they are cataloged by inmate and not by DOCCS staff"); *Lionkingzulu v Jayne*, No. 12-CV-00845, 2013 WL 6628234, at *2 (WDNY, Dec. 16, 2013); *Willey v Kirkpatrick*, No. 07-CV-6484CJS, 2011 WL 4368692, at *5 (WDNY, Sept. 19, 2011).

An agency need not provide disclosures if it certifies that upon a diligent search it cannot locate responsive information. Public Officers Law § 89(3)(a); *see also*, *McFadden v. Fonda*, 148 AD3d 1430, 1431 (3d Dept 2017) (certification that requested records could not be located sufficient to satisfy FOIL request); *Rattley v New York City Police Dept.*, 96 NY2d 873, 875 (2001) (certification requirement satisfied by the Department averring that "all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate[.]").

In the case at bar, Petitioner's request specified that he was seeking any "Death Index" predating 1957 and post-1971, as well as the additional data fields from the "Death Index" for 1957-1970 that were not already available online. The Requestor specified that he was not seeking "actual copies of death certificates, but rather, merely the basic text index or database . . . to state deaths that DOH retains, part of which DOH already freely publishes in an online dataset. The Requestor clarified that based on the online index already published for the years 1957-1970, they were asking for "any and all computerized tabulations or files retained by DOH." *See* Affirmation of Rosemarie Hewig, ¶ 10, Ex. A.

Moreover, Director Ostrowski states, the Department maintains one official "Death Index" similar to what Petitioner is looking for, and that is the record from 1957-1970 that is already published online on DOH's Health Data NY website. Ostrowski Aff. at ¶ 16. The

remainder of the death-related records that the Department maintains outside of the Death Index are maintained in a multitude of formats and storage mediums depending on year, as presented above, and not all are digitized, and are not consistent in terms of the formatting or fields presented. *Id.* To the extent Petitioner is seeking any additional records that are already created, formatted, and readily producible in a manner similar to the published Death Index, they simply do not exist. *Id.* However, even if deemed legally releasable, this record would have to be custom built using data from the database and an entirely new Death Index containing this additional data must be created. The Department would require assistance from a technological team to accomplish this and it would take significant time to complete. *Id.* at 21.

DOH simply does not currently possess a mechanism for the practical retrieval of all DOH death records Petitioner is requesting. Accordingly, DOH's determination that it could not respond to the Petitioner's general request for "one complete set-in digital form" was well-supported and not affected by any error of law. Thus, the denial of the FOIL request is proper.

POINT IV

PETITIONER IS NOT ENTITLED TO ATTORNEY'S FEES OR OTHER COSTS

Public Officers Law § 89 provides that the Court "shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (Public Officers Law § 89 [4] [c] [ii]). The petitioner has the burden of establishing that the statutory prerequisites have been met (*see Matter of Grace v. Chenango County*, 256 AD2d 890, 891 [3d Dept 1998]).

Here, for the reasons set forth above, Respondent's response was appropriate and thus, any request by the Petitioner for attorney's fees and other costs should be denied (*see Matter of Niagara Envtl. Action v Niagara Falls*, 63 NY2d 651, 652 [1984]).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the petition be dismissed, with prejudice, or denied in its entirety on the merits, together with such other and further relief as the Court deems just and proper.

Dated: Albany, New York
December 5, 2022

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STATEMENT PURSUANT TO 22 NYCRR 202.8-b

I, Amanda Kuryluk, affirm under penalty of perjury pursuant to CPLR 2106, that the total number of words in the foregoing Memorandum of law is 4,545 and under 20 pages. In determining the number of words in the Memorandum of Law, I relied upon the word count of the word-processing system used to prepare the document.

s/ Amanda Kuryluk
Amanda Kuryluk