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. 905532-22

AFFIDAVIT OF ALEC FERRETTI

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ALEC FERRETTI, being duly sworn, deposes and says:

1. I am a member of the Board of Directors of Petitioner Reclaim the Records ("RTR"). I am a professional genealogist and have worked for the Wells Fargo Family and Business History Center. I have dual Masters degrees in Archives and Library Science from New York University and Long Island University. I am a member of the Association of Professional Genealogists, the world's largest association for professional genealogists, representing more than 2,000 members in forty countries around the world, and I also serve on the organization's Board of Directors.

2. I write in support of RTR's Petition and to directly address several of the assertions made in the Affidavit of Stephanie Ostrowski, the Director of the Bureau of Vital Records ("BVR") at the New York State Department of Health ("DOH"). (Dkt. No. 36 (hereinafter, "Aff.").)[1]

[1] DOH also submitted an affidavit from Rosemarie Hewig, DOH's Records Access Officer. (Dkt. No. 28.) Ms. Hewig's affidavit lays out the facts of this case and applicable law. The only paragraph that is unique to that affidavit (as compared to DOH's memorandum of law) is the final paragraph, in which Ms. Hewig asserts that there

I. DOH Maintains Death Index Data for All Requested Years

3. Ms. Ostrowski first asserts that DOH does not have one combined "Death Index" that covers all the requested years, and she therefore states that what RTR is seeking does not exist. (Aff. ¶¶ 12-13.) But Ms. Ostrowski misconstrues RTR's request. We are not seeking death index data only if it exists in the exact form as presented in DOH's online database covering the years 1957-1970; that is not what is stated in the FOIL request. Instead, as our FOIL request makes clear, we are seeking a complete set of DOH's death index files that exist "in textual or database format." (Dkt. No. 4 at 1.) We describe further in that letter the format of such records, explaining that we are seeking "merely the basic text index or database (or 'finding aid') to state deaths that DOH retains." (*Id.*)

4. As Ms. Ostrowski states, DOH is actually *required* to maintain a death index. (*See* Aff. ¶¶ 7, 11.) Specifically, under Public Health Law § 4100(2)(g), DOH is required to "prepare and maintain a complete typewritten, printed, photographic or magnetically stored index of all . . . deaths registered; said index to be arranged, in the case of deaths, by the names of decedents." This is the data that RTR seeks and which DOH is mandated by statute to create and retain.

5. DOH attempts to recast RTR's request as being only for data that is specifically in the same format as its online database, but that is not correct. The online database is called the "Genealogical Research Death Index." RTR meanwhile sought whatever death indexes DOH retains. As to what DOH retains, Ms. Ostrowski answered that question in her affidavit. Specifically, she states: "DOH has prepared death-record compilations throughout the

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are no additional fields of data available to be disclosed for death indexes covering the years 1957-1970. Because Ms. Ostrowski made the same assertion in her affidavit, this assertion is therefore addressed herein.

years," which it has stored in microfilm format for the years 1880 through 2005, and it also retains a separate database covering 1957 to present. (Aff. ¶ 14.) RTR's request includes these types of records. RTR's request was for data in "textual or database format." Included in "textual" format are micro-records (such as microfilm and microfiche). For instance, the National Archives and Records Administration ("NARA") states in connection with its catalogue that micro-records are a form of "textual records."[2] Consequently, RTR's intent was to include records that it knows DOH has. Producing copies of these documents would therefore be in compliance with RTR's request.

6. While RTR requested a copy of the death index data in digital form, this format referred to the manner of *receipt* of the records. This did not signify that RTR was interested in documents only if they are *retained* by DOH in digital form. RTR meant, for instance, that if papers exist, RTR would prefer to receive them as digital scans, rather than as stacks of copied pieces of paper. For instance, Ms. Ostrowski states that certain records are only retained in microfiche format and that DOH would have to "manually pull and data enter variables from scans of the microfiche images." (Aff. ¶ 15.) But that is not necessary. If DOH has microfilm records of what RTR is seeking—which DOH has expressly admitted—then we are simply seeking a digitized copy of what is retained on those microfilms. Since Ms. Ostrowski confirmed that death indexes exist in microfiche format, we request that the microfiche be copied—not transcribed or newly created (as DOH contends).

7. Further, DOH's own inventory catalogue features a category of records that DOH explicitly refers to as an "index," which also specifies where the records are located.

[2] For instance, when viewing an image taken from a microfilm in NARA's catalogue, NARA classifies these microfilm files as "Textual Records." *See*, *e.g.*, *New York: KINGS County, Enumeration District 137, Sheet No. 4B*, U.S. Nat'l Archives, https://catalog.archives.gov/id/91782362 (last visited Jan. 9, 2023).

Pursuant to a prior FOIL request, I am in possession of an inventory of DOH's records in spreadsheet form, which specifies that DOH retains the following in its "Cabinet # 31": "Death Indexes" for the years 1861-1977; and "Death Master Index Rolls" for the years 1959-1982. (*See* Ex. 1) Additionally, in a tab on DOH's spreadsheet entitled "Death," there is another file called "birth and death match index" covering the years 1955-1957. (*Id.*) There is additionally an index for the years 1880-1899, paper "birth and death match indexes" for the years 1951 to 1961 and another index from 1980. (*Id.*) Finally, under the tab entitled "Fetal Deaths," there are also indexes for the years 1968-1976, 1978, 1980-1982 and 2001-2003. (*Id.*)

8. Separately, following a critical investigation into DOH and BVR, New York's Inspector General issued a report in 2016 in which it stated that DOH had contracted a vendor to scan and index its records, including all birth, marriage and death records. In this regard, "DOH advised that the scanning phase of the modernization project is estimated to be completed by September 2016, and the indexing phase will commence thereafter."[3] This implies that DOH should have been indexing records that had not been indexed for at least the past six years.

9. Pursuant to other FOIL requests, I am aware that DOH has carried out these initiatives to newly index their records in digital form with a third-party vendor named eBizDocs. For instance, in 2020, a DOH employee emailed eBizDocs and discussed the availability of electronic indexes for all types of vital records in connection with the cost of the vital records digitization project. The primary distinction for pricing was between records with an existing electronic index that could be quickly linked to digital images and records for which

[3] Catherine Leahy Scott, N.Y. Inspector General, *Investigation of the New York State Department of Health Bureau of Vital Records* 9 (June 2016), https://ig.ny.gov/sites/g/files/oee571/files/2016-11/DOHVitalRecordsReport6-21-16.pdf (hereinafter, the "IG Report").

no electronic index existed, which would require more work to create a new index record. In response, the DOH employee wrote that only death records pre-dating 1956 were in need of "full key indexing," signifying that DOH *already has* electronic death indexes for all years starting in 1957. (*See* Ex. 2.)

10. New York State election laws also confirms that the state maintains (or at least should maintain) an electronic index of deaths. Specifically, Section 5-708 of the Election Law, which was enacted in 2002, states:

> It shall be the duty of the state health department and the department of health of the city of New York to deliver to the state board of elections, at least monthly, records, in a format as mutually determined by both agencies, of the names of all persons of voting age for whom death certificates were issued. Such records shall be arranged by county of residence and shall include the name, residence address and birth date of each such person.

The legislative jacket for this law, Chapter 476 of 2002, makes clear that this data exchange is of electronic files, not paper printouts. (*See* Ex. 3.)

11. Finally, Ms. Ostrowski states that DOH's indexes "are used exclusively for the purpose of fulfilling BVR's administrative obligations." (Aff. ¶ 11.) But that is also not true. This case has repeatedly discussed DOH's online database, which DOH itself calls the "Genealogical Research Death Index." On DOH's website, it describes this publicly available dataset 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.[4]

[4] *Genealogical Research Death Index: Beginning 1957*, N.Y. Dep't of Health, https://health.data.ny.gov/Health/Genealogical-Research-Death-Index-Beginning-1957/vafa-pf2s/data (last visited Jan. 9, 2023).

12. DOH's public release of this data on its website to "assist[] individuals" in research and "allow the public to search for individuals" is clearly different from Ms. Ostrowski's assertion that these indexes are used solely for "fulfilling BVR's administrative obligations." (Aff. ¶ 11.) Instead, DOH appears to have made death index data available for the same motive as RTR seeks to do here: aid the public.

13. Because Ms. Ostrowski has expressly admitted that DOH retains the requested records (albeit in various formats), DOH should therefore be able to readily comply with the request. And while RTR sought copies in digital format, if that format is too burdensome for DOH to produce, then RTR is willing to accept production of the records in another format that is more convenient for DOH.

II. DOH Retains Additional Fields of Accessible Data for the Years 1957-1970

14. RTR sought additional fields of data from DOH for death indexes from the years 1957-1970. Ms. Ostrowski claims that "the remainder of the data for the fields that Petitioner is seeking for the years 1957-1970 are not maintained in a readily producible format" (Aff. ¶ 20), and that producing additional fields would require DOH to create "custom built" data (Aff. ¶ 21). But that does not appear to be correct.

15. Pursuant to a separate FOIL request, I previously received from DOH generally the *same* death index in spreadsheet form for the years 1957-1970 as is shown by DOH online. But in the FOIL request, there was a critical difference: on appeal, DOH produced two *additional* fields of data, which are not in the online dataset: location of death (the "gazetteer code") and a code that assists with searching for a surname (the "soundex code"). (*See* Ex. 4.) Consequently, DOH's own production in response to another FOIL request evidences that DOH

does in fact retain additional fields of data, since DOH produced them. Meanwhile, the data was *missing* the gender field, meaning DOH can alter the fields it chooses to produce. (*Id.*)

16. Further, in another FOIL response, DOH released a spreadsheet containing various columns of a DOH database called "DEATHS." This database contains all of the fields in the Genealogical Research Death Index available online, but it also includes several others: the two additional fields received from the separate FOIL request discussed above (gazetteer and soundex codes), but also more—date and place of birth, father's last name, maiden name, county of death, Social Security Number, and various codes. (*See* Ex. 5.) Therefore, it appears that DOH in fact has far more data than Ms. Ostrowski contends in her affidavit.

III. There is No Credible Threat of Identity Theft or Data Breach

17. Ms. Ostrowski talks at length about identity theft, including a subcategory called "synthetic identity theft," as well as data breaches that would collectively result in a purported "unfathomable and unwarranted invasion of the personal privacy of a decedent's immediate survivors and survivors-in-interest." (*See* Aff. ¶¶ 24-34.) Of course, data breach and identity theft concerns are legitimate in general. But these concerns are not relevant to the FOIL request at issue here.

Death indexes are generally public throughout the country.

18. Neither Ms. Ostrowski's affidavit nor the remainder of DOH's filings considers what the norm is regarding the public nature of death indexes. The truth is that, generally, these types of indexes are publicly available and readily accessible online.

19. As discussed herein and in the Petition, New York retains an online "genealogical index" of deaths for the years 1957-1970; but the year 1970 is when New York's public availability ends. After that, DOH contends that the release of more recent years of death

data would gravely contravene tenets of privacy (although it released the data for 1971 in this matter). But these allegations are undermined by the practices of our neighboring states and countless other states throughout the country.

20. In preparing this Affidavit, I have carried out a review from one popular commercial website, Ancestry.com, of which states' death records are readily available *to the public* online on that one website alone, notwithstanding DOH's purported fears. The result is that countless states, including those nearest to us, release to the public records significantly closer to the present than New York.

21. For example, following RTR's own initiatives, New Jersey's death index is now public through the year 2017 (precisely what RTR requested here), which includes the decedent's name, date and place of birth, and date and place of death (and sometimes also the Social Security Number).[5] Connecticut's online death index actually contains far more data through the year 2012, including the individual's name, gender, marital status, birth date and place, full residence address, occupation and industry, spouse name, death date and place, age, father's surname, and record number[6]; and when I filed a freedom of information request in Connecticut in 2019, the state agency produced a death index through that year. Meanwhile, Massachusetts has an online death index on Ancestry.com through the year 2003 (although even more can be searched in person), which contains the individual's name, date of birth and death, and place of death.[7]

[5] *New Jersey, U.S., Death Index, 1848-1878, 1901-2017*, Ancetry.com, https://www.ancestry.com/search/collections/61260/.
[6] *Connecticut Death Index, 1949-2012*, Ancestry.com, https://www.ancestry.com/search/collections/4124/.
[7] *Massachusetts, U.S., Death Index, 1970-2003*, Ancestry.com, https://www.ancestry.com/search/collections/7457/

22. The results of my search also include (but are not limited to) the following states' records, all of which are available online to the public in searchable databases maintained on one website alone:

(a) California: death index through 1997.[8]

(b) Florida: death index through 1998.[9]

(c) Georgia: death index through 1998.[10]

(d) Indiana: complete death certificate images through 2017.[11]

(e) Kentucky: death index through 2000.[12]

(f) Michigan: death index through 1996.[13]

(g) Minnesota: death index through 2017.[14]

(h) Missouri: death index through 2015.[15]

(i) Montana: complete death certificate images through 2018.[16]

(j) North Carolina: death index through 2004.[17]

(k) Ohio: death index through 2018.[18]

(l) Oregon: death index through 2008.[19]

(m) Texas: death index through 2000.[20]

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[8] *California, U.S., Death Index, 1940-1997*, Ancestry.com, https://www.ancestry.com/search/collections/5180/.
[9] *Florida, U.S., Death Index, 1877-1998*, Ancestry.com, https://www.ancestry.com/search/collections/7338/.
[10] *Georgia, U.S., Death Index, 1999-1998*, Ancestry.com, https://www.ancestry.com/search/collections/5426/.
[11] *Indiana, U.S., Death Certificates, 1899-2017*, Ancestry.com, https://www.ancestry.com/search/collections/60716/.
[12] *Kentucky, U.S., Death Index, 1911-2000*, Ancestry.com, https://www.ancestry.com/search/collections/3077/.
[13] *Michigan, U.S., Death Index, 1971-1996*, Ancestry.com, https://www.ancestry.com/search/collections/3171/.
[14] *Minnesota, U.S., Death Index, 1908-2017*, Ancestry.com, https://www.ancestry.com/search/collections/7316/.
[15] *Missouri, U.S., Death Records, 1968-2015*, Ancestry.com, https://www.ancestry.com/search/collections/62145/.
[16] *Montana, U.S., State Deaths, 1907-2018*, Ancestry.com, https://www.ancestry.com/search/collections/5437/.
[17] *North Carolina, U.S., Death Indexes, 1908-2004*, Ancestry.com, https://www.ancestry.com/search/collections/8908/.
[18] *Ohio, U.S., Death Records, 1908-1932, 1938-2018*, Ancestry.com, https://www.ancestry.com/search/collections/5763/.
[19] *Oregon, U.S., Death Index, 1898-2008*, Ancestry.com, https://www.ancestry.com/search/collections/5254/.
[20] *Texas, U.S., Death Index, 1993-2000*, Ancestry.com, https://www.ancestry.com/search/collections/4876/.

(n) Vermont: complete death certificate images through 2008.[21]

(o) Virginia: complete death certificates images through 1995 and death index through 2014.[22]

(p) Washington: death index through 2017.[23]

(q) Wisconsin: death index through 2004.[24]

23. The results of this study are obvious: DOH is acting at odds with a significant number of states in raising privacy concerns. If there were actually such severe privacy risks, then it would be very surprising to find that the majority of the country continues to display its data until the very recent for the public to view online.

DOH's purported fears regarding theft and fraud are unwarranted.

24. Ms. Ostrowski explains that "synthetic identify theft" can "create a new identity" and that this accounts for "half of outstanding auto loans and leases." (Aff. ¶ 27.) That may be true, but there remains a disconnect regarding how such may be relevant to the existence and disclosure of a death index. A death index identifies nothing more than the fact that a person once existed and died on a certain date. Ms. Ostrowski does not explain how *these* records could theoretically aid in fraud, nor does she present any evidence of a single incident anywhere of synthetic identity theft caused by the public release of basic death data; Ms. Ostrowski cites one article on this topic, but that article makes no mention of death indexes or vital records in general. (*See* Aff. ¶ 27 n.4.) Merely because something lists names does not mean it invades anyone's safety, let alone does so egregiously. Countless other sources list peoples' names, such

[21] *Vermont, U.S., Death Records, 1909-2008*, Ancestry.com, https://www.ancestry.com/search/collections/1607/
[22] *Virginia, U.S., Death Records, 1912-2014*, Ancestry.com, https://www.ancestry.com/search/collections/9278/.
[23] *Washington, U.S., Death Index, 1940-2017*, Ancestry.com, https://www.ancestry.com/search/collections/6716/.
[24] *Wisconsin, U.S., Death Records, 1959-2004*, Ancestry.com, https://www.ancestry.com/search/collections/61483/.

as phone books, local land records, and voter records (which also include date of birth and current address). But just because one's name appears in public records does not mean a data breach and fraud have occurred.

25. Next, Ms. Ostrowski claims it would be improper to release death indexes less than 50 years old because of the variety of categories of data included in a death record. (Aff. ¶ 28.) First, absent from Ms. Ostrowski's description is whether *any* of those alleged additional fields of data (such as the identity of one's attending physician or information on hospitalizations) is actually even included in DOH's *indexes* (as opposed to actual death certificates). The highly probable answer is that this information is *not* included in the data that RTR has requested, and therefore it is irrelevant. Ms. Ostrowski further asserts that the information on records less than 50 years old can be misappropriated. Yet she offers no example of misappropriation. Indeed, neither Ms. Ostrowski nor anyone else from DOH cited any actual example of misappropriation of information stored in a public death index.

26. While noting that identity theft is increasing, Ms. Ostrowski fails to tie identity theft to the release of data from vital records indexes. An important reference to consider in this regard is a speech given by Shawna Webster, the Director of the National Association for Public Health Statistics and Information Systems ("NAPHSIS"). NAPHSIS is a nonprofit national association whose members represent state and local vital records, health statistics and information system agencies. Consequently, Ms. Webster speaks on behalf of all the registrars of the nation. In a live panel at the Federation of Genealogical Societies 2019 Conference, Ms. Webster stated:

> Speaking for myself personally, but also I think on behalf of the Board, I don't think anyone would argue this – there's really no data that supports privacy issues and/or fraud is inhibited more in a state that has closed

> records or huge embargo dates than in states that have open records, or in countries that have open records. I haven't seen any data. I'm sure if you saw data, you would have let me know a long time ago.

(*See* Ex. 6.)

27. Further, in 2021, I sought pursuant to a FOIL request from DOH all of its practices relating to identity theft. If DOH had grave concerns of such actions, one would assume that the agency would have taken measures to combat this problem, or at least discuss it. Among other things, I requested any DOH reports and memos addressing instances in which disclosure of vital records resulted in identity theft, fraud or criminal behavior; procedures, rules, guidelines and staff instructions discussing how to identify fraudulent orders for vital records; lists of people identified as having tried to fraudulently order a vital record; and any internal guidance or memos addressing why vital records must be protected from unauthorized usage or disclosure. DOH's Records Access Appeals Officer stated succinctly: "DOH conducted a diligent search and no responsive records were located." (*See* Ex. 7.)

28. Ms. Ostrowski further claims that decedents' identities will be stolen and that "[s]afeguarding the identities of deceased citizens of New York long after they have passed away will contribute to the overall decrease in theft and fraud." (Aff. ¶ 41.) But she has it backwards. The public release of a death index can actually *prevent* – not promote – identity theft because it *proves* someone existed but is no longer living. For instance, a fraudster may attempt to receive a loan from a lending institution using a deceased person's information. In such a case, the lending institution would *benefit* by having death data be searchable. If the lender could run a Social Security Number against a death index, it could quickly see that someone is verifiably deceased, thus triggering a fraud alert. Death indexes therefore *decrease*

identity theft of the deceased, and have an incredibly marginal impact against the living, at best.

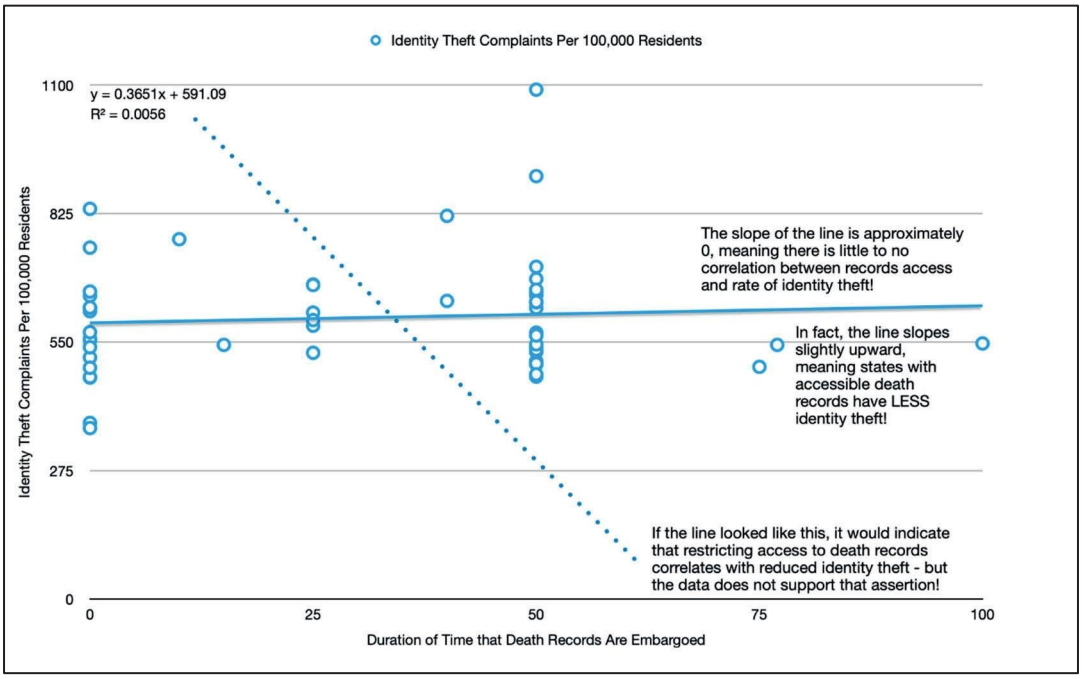
29. Additionally, certain data that Ms. Ostrowski claims is private is not, in fact, private for deceased individuals. This includes Social Security Numbers, which are *public* after an individual has died. For instance, all Social Security Numbers are publicly searchable in online databases like Ancestry.com for individuals who died through the year 2014. This means that one can search a decedent's name, and if the decedent died before 2014, anyone will see the decedent's date of birth and death, Social Security Number, and town or state of residence. Additionally, anyone can order the original application for Social Security Number of any deceased individual, with proof of death, by means of a FOIA request to the U.S. Social Security Administration ("SSA"). I have done this dozens of times. The SSA will then mail a copy of the decedent's original application for a Social Security Number, which will include the decedent's name, date of birth, address, occupation, place of employment, and (depending on how old the record is) the parents' names as well.[25]

30. Further, several reports addressing identity theft make evident that there is no history of vital records of deceased individuals – let alone indexes relating to such records – playing any role. For instance, the Federal Trade Commission publishes an annual detailed report addressing, among other things, fraud, identity theft and other consumer protection topics. In the most recent report, for the year 2021, the 89-page report not once mentions vital records,

[25] *Make A FOIA Request*, U.S. Soc. Sec. Admin., https://www.ssa.gov/foia/request.html (last visited Jan. 9, 2023). Similarly, Robert J. Freeman, Executive Director of New York State's Committee on Open Government, has observed in an Advisory Opinion that burial permits may be released pursuant to FOIL because "there is simply nothing personal or intimate about the fact of a death or the location of a burial." Robert J. Freeman, Executive Director, N.Y. Comm. on Open Gov't, FOIL-AO-14166 (Aug. 5, 2003), https://docs.dos.ny.gov/coog/ftext/f14166.htm.

certificates or indexes of any kind.[26] Likewise, New York's Attorney General published a report on all of the 1,583 data breaches reported to his office in 2017, which collectively exposed the personal records of 9.2 million New Yorkers; but wholly absent was any reference to any alleged historical vital records or death index fraud.[27]

31. Additionally, I have reviewed rates of identity theft against states' policies of public access to death records (that is, the full records, not merely the indexes). The following chart compares across the United States the duration of time that a state's death records are deemed private, tracked against identity theft complaints per 100,000 residents, as reported by the FTC. The chart results in *zero correlation* between a state's reports of identity theft and its policies regarding the publicity of vital records. This means if a state shields from the public its death records for a century or not at all, there has been no proven correlation of identity theft.



[26] *Consumer Sentinel Network: Data Book 2021*, Fed. Trade Comm. (Feb. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CSN%20Annual%20Data%20Book%202021%20Final%20PDF.pdf
[27] *See* Eric T. Schneiderman, N.Y.S. Att'y Gen., *Information Exposed: 2017 Data Breaches in New York State* (2017), https://ag.ny.gov/sites/default/files/data_breach_report_2017.pdf.

IV. Compliance Will Promote Government Purposes

32. While it is not required under FOIL to state one's purpose in seeking records, DOH nonetheless suggests that RTR's request will not serve the underlying purposes of FOIL. (*See*, *e.g.*, DOH Memo. of Law (Dkt. No. 37), at 6.) This is also not true, as our efforts will (a) guarantee the preservation of records that otherwise might be lost, (b) *limit* – not enhance – instances of fraud, and (c) promote the efficiency of DOH, which faces a massive backlog in vital record requests.

33. In 2016, the New York State Office of Inspector General published a critical report of BVR in connection with the unintentional disclosure of private information. Among other things, the Inspector General "uncovered several problems in the systems by which DOH maintains and produces copies of vital records, including using incomplete and complex databases and indices to search for records and keeping an unduplicated and vast original card catalog index."[28] Further and "[m]ost significantly," the Inspector General found that DOH's systems for "indexing, storing, retrieving and reproducing vital records" were "antiquated and not only susceptible to human error, but vulnerable to loss, theft, or destruction, and therefore in critical need of modernization to ensure the integrity of these important documents."[29]

34. The findings in the Inspector General's critical report are further supported by Ms. Ostrowski's affidavit, which actually heightens RTR's concerns. Now, over six years after the IG Report, Ms. Ostrowski is stating that "the earliest death records still exist in microfilm format," and while *some* "have been converted to various other formats, some of the microfiche is not very readable, resulting in the partial in complete [sic] and inaccurate

[28] IG Report, at 1.
[29] *Id.* at 2.

conversion of some records." (Aff. ¶ 15.) If the records are in such disrepair and if these records still exist only in microfilm format (without any backups or duplicates), then RTR's request for a digital set will only *aid* the agency in preserving its records.

35. RTR's efforts therefore will guarantee protection of these crucial records. Without RTR's efforts, based on the Inspector General's report, there could be a risk that the only original copies of these records one day are no longer available.

36. Separately, as described above, DOH has supplied no evidence that death indexes increase instances of fraud. Instead, death indexes (which are proof that someone is deceased) can be valuable in *limiting* fraudulent uses of individuals' data. For instance, there has been a recurring fear about individuals "voting from the grave." If there is a concern about illegal voting by means of fraudsters taking advantage of deceased individuals' data still appearing on voter rolls, then the public availability of a death index—especially for recent years—would *prevent* fraud and promote the safety of our electoral system. Specifically, the death index could be cross-checked against voter rolls to strike off individuals who are now deceased.

37. Finally, releasing death indexes will greatly reduce increasingly untenable burdens that have fallen upon DOH. The agency receives *thousands* of vital record requests per year, but unfortunately, DOH does not have sufficient manpower to process all these requests annually. For instance, in response to a FOIL request in December of 2020, Ms. Hewig stated that in 2018, DOH received over 7,000 genealogy requests for vital records, but nearly 3,000 of those requests still remained unfulfilled at that time, two years later. And as of that time, of the more than 3,000 applications received in 2019, *only 700* had been processed. (*See* Ex. 8.)

Consequently, DOH is faced with a massive backlog of record requests that it is having extreme difficulty processing in a timely manner.

38. There are two specific ways that RTR's request will help DOH reduce its backlog. First, DOH states on its website that the fee for a genealogy copy of a vital record "includes . . . a three-year search of the index."[30] This mean that people submit requests without knowing precise specifics of an individual's date of death, thus requiring DOH to take time to search its indexes each time. If the index is public, then DOH will be able to save considerable time with every request and therefore be able to process more requests annually.

39. Second, DOH states on its website (updated in August 2019) that processing genealogy requests may take eight months or longer, but as described above in connection with Ms. Hewig's response, and also from personal experience, I know that many individuals (including myself) have even waited three years before their requests have been processed by DOH. DOH proposes an alternative on its website: "If the municipality where the event took place is known, submitting your request directly to the local registrar or municipal clerk may save considerable time."[31] The problem is that as of now, most people are unaware of the precise municipality where an event occurred. The public availability of a death index—including the town of death—would therefore permit individuals to pursue this alternative, which will allow DOH to defray time and resources spent on genealogical record requests and further reduce its backlog. In fact, I have used town of death information from death indexes in order to request records for my own family.

[30] *Genealogy Records & Resources*, N.Y. Dep't of Health, https://www.health.ny.gov/vital_records/genealogy.htm (last visited Jan. 9, 2023).
[31] *Id.*

V. RTR Will Not Use the Records for Solicitation Purposes

39. Ms. Ostrowski raises a purported concern about "the intended use of its administrative records" by RTR. (Aff. ¶ 35.) Pursuant to POL § 87(2)(b)(iii), agencies can restrict access to records if the requester will use records for solicitation or fundraising.

40. RTR is a non-profit charitable organization, whose tax-exempt status is premised on the receipt of public contributions. That basis, though, is irrelevant to this request and to the exemption under FOIL because RTR is not seeking this data to solicit the individuals contained in this data. As further described in RTR's Reply, this FOIL exception regards using information *received* in a FOIL request (for instance, addresses or email lists) in order to solicit those same individuals whose information was shared in that request.

41. The individuals contained in this data are all *deceased*. Implicitly, it is impossible for RTR to use this data to solicit the individuals who are listed. To the extent next of kin are listed in any such death index, accompanied by addresses or other identifying information (which I expect would be unlikely), I confirm on behalf of RTR that the sought-after data will not be used to solicit such individuals, add them to our email mailing list, or mail them any documents. There will be no solicitation or fundraising in such a manner relating to these records.

42. For the aforementioned reasons, the Court should grant RTR's petition.

ALEC FERRETTI

Sworn to before me this
January 9, 2023

Notary Public

MICHELLE H MARSHALL
Notary Public - State of New York
NO. 01MA6378546
Qualified in New York County
My Commission Expires Jul 30, 2026