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

VERIFIED REPLY

ORAL ARGUMENT REQUESTED

Petitioner Reclaim the Records ("RTR") respectfully submits this Verified Reply in further support of its Verified Article 78 Petition. (Dkt. No. 1.)

PRELIMINARY STATEMENT

1. RTR has requested indexes relating to records of death. Inherently, all the individuals at issue are no longer alive. Rather than grapple with the law and facts of this case, Respondent New York State Department of Health ("DOH") instead has attempted to instill fear over a purported threat of identity theft that actually has no applicability to the records requested in this case. DOH carries a heavy burden in withholding production of the requested records pursuant to New York's Freedom of Information Law ("FOIL"), but it failed to meet that burden by not having established that any legitimate privacy concerns are at issue here. It has likewise failed to establish that a statutory exemption exists under FOIL. Therefore, the requested records should be produced.[1]

[1] Filed concurrently and accompanying this Reply is the Affidavit of Alec Ferretti, a professional genealogist and Director of RTR (hereinafter "Ferretti Aff.").

ARGUMENT

I. DISCLOSURE WILL NOT CONSTITUTE AN UNWARRANTED INVASION OF PERSONAL PRIVACY

2. FOIL does not bar disclosure of personal information. Instead, FOIL puts the burden on agencies to establish that the disclosure of records would constitute an *unwarranted* invasion of personal privacy. *See* Pub. Off. Law ("POL") § 87(2)(a). New York courts have recognized that even though "privacy interests [may be] implicated" by information that an agency seeks to withhold or redact on privacy grounds, there is no basis to withhold the information unless the release would be "unwarranted." *Mulgrew v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 87 A.D.3d 506, 507 (1st Dep't 2011). Additionally, an agency's rationale must be specific. For instance, in *Baez v. Brown*, the Second Department held that an agency's redactions and denial of a request on privacy grounds were inadequate "since the respondent failed to proffer more than conclusory assertions to support these claims." 124 A.D.3d 881, 883 (2d Dep't 2015); *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).

3. Here, DOH has not met its burden because it did not adequately establish that the information sought—all of which relates to deceased individuals—would unduly invade anyone's privacy. DOH heavily relies on case law addressing privacy concerns of *living* individuals, but RTR's request does not involve the living. Therefore, DOH's purported support is inapposite. Additionally, DOH asserts concerns about data breaches and fraud, but DOH supplies no example (let alone actual evidence) suggesting that the public disclosure of death indexes, a practice that has long been commonplace in many other departments of health across

the country, has ever resulted in fraudulent activity in any jurisdiction. DOH offers nothing more than mere speculation without any tangible explanation for how basic information about *deceased individuals*, including those who died decades ago, can be (or ever was) used improperly. Next, DOH's allegations that RTR will use the records for solicitation purposes is meritless. The FOIL exception for solicitation applies to the potential use of information sought by a FOIL request to solicit the individuals whose information was the subject of the FOIL request. The individuals in *this* FOIL request are deceased, and it is therefore impossible to solicit them. The exception thus fails to apply. Finally, despite DOH's contrary assertions, compliance with RTR's request will actually serve valuable governmental purposes, such as helping to resolve concerns raised by New York's Inspector General about DOH's antiquated record retention policies, preventing voter and lender fraud, and reducing DOH's immense backlog.

A. DOH Has Not Established that Disclosing the Requested Records Would Constitute an Unwarranted Invasion of Personal Privacy

4. DOH has completely ignored the specific information RTR actually requested and, as a result, has failed to meet its burden to establish that disclosure of the requested records would constitute an unwarranted invasion of personal privacy. First, in DOH's memorandum of law in support of its Answer (Dkt. No. 37, hereinafter, "Opp. Br."), DOH wrongly conflates indexes relating to deaths from more than 50 years ago with those relating to deaths within the last 50 years, and it refuses to produce additional fields of data for deaths over 50 years ago on privacy grounds. But it is meritless to assert *any* privacy claim for indexes relating to deaths that occurred more than 50 years ago because DOH itself makes the underlying death certificates from that period (with *all* the fields of data) fully available to the public. As DOH's website states: "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." (Pet. ¶ 38.) If anyone can receive a copy of the *entire death record*, then DOH has no reasonable basis to assert that disclosure of data extracts compiled from those same records could constitute an unwarranted invasion of personal privacy.

5. As for indexes relating to deaths that occurred within the past 50 years, DOH has likewise failed to meet its burden because the fields of data sought by RTR are already public. RTR explained both in its FOIL letters and Petition how the content of the information requested is already in the public domain and therefore cannot reasonably implicate or create undue privacy risks. Among other things:

- Social Security Numbers of deceased individuals are not private; in fact, they are freely accessible and made public by the U.S. Social Security Administration (the "SSA"). The Social Security Death Master File is publicly available online, with a searchable database of all decedents' Social Security Numbers, dates of birth and dates of death through the year 2014 (and the SSA has disclosed pursuant to a FOIA request a more up-to-date version into the year 2017). (Pet. ¶ 34.)[2]

- The New York Board of Elections publishes "a complete list of names and residence addresses of the registered voters," which includes all living New York voters' dates of birth and their current address information. *See* N.Y. Election Law § 5-602(1); (Pet. ¶ 33 n.5); *see also* N.Y. Election Law § 3-220(1) ("All registration records, certificates, lists, and inventories referred to in, or required by, this chapter shall be public records and open to public inspection . . . .).[3]

- The U.S. Department of Veterans Affairs (the "VA") has released its Beneficiary Identification Records Locator Subsystem, which contains decedents' Social Security Numbers, birth and death dates, and military service information. (Pet. ¶ 33.)

[2] DOH cites one case from which it argues that disclosure of Social Security Numbers (as well as addresses and dates of birth) would constitute an unwarranted invasion of personal privacy. (Opp. Br. at 5 (citing *Beyah v. Goord*, 309 A.D.2d 1049, 1050 (3d Dep't 2003)).) But that case involved *living* individuals, not deceased individuals, and is therefore irrelevant. In *Beyah*, a prison inmate sought records relating to an incident that took place within a correctional facility, including employee accident reports. The court ordered employee accident reports to be produced but directed that each correction officer's home address, phone number, date of birth and Social Security Number be redacted. 309 A.D.2d at 1050. Here, no living individual's Social Security Number (or *any* other category of information) will be disclosed.

[3] On the website of the New York Board of Elections, there is a page dedicated to making FOIL requests, which includes a subsection entitled, "How to Request Voter Registration Data." *See Freedom of Information Requests (FOIL)*, N.Y. Bd. of Elections, https://www.elections.ny.gov/FoilRequests.html (last visited Jan. 12, 2023).

6. If certain data about living individuals is routinely made public (such as voter data), and if federal agencies such as the SSA and the VA routinely release biographical data about deceased Americans, then the release of the same basic data for deceased individuals in New York (who are included in the other data sets) cannot constitute an unwarranted invasion of privacy.

7. Collectively, the fact that this information already is publicly available undermines the notion that disclosure of the requested indexes here—only of deceased individuals—could possibly violate FOIL's privacy exception. FOIL does not permit abstract fears of privacy invasions to override its disclosure mandates. *See Baez*, 124 A.D.3d at 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*, 141 A.D.3d at 661 (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). DOH set forth no concrete basis, as it must, to support its privacy concerns. In fact, DOH's privacy claim is further diminished because it has actually disclosed these very records to other non-governmental organizations. (*See* Pet. ¶¶ 56-57.)[4]

8. DOH heavily relies on *Hepps v. N.Y. State Department of Health*, 183 A.D.3d 283 (3d Dep't 2020) (*see* Opp. Br. at 5-8), but that case involved materially different

[4] *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 v. Dep't of Veterans Affairs*, No. 18 Civ. 8449 (PAE), 2020 WL 1435220, at *6-7 (S.D.N.Y. Mar. 24, 2020) (public domain doctrine warranted disclosure of VA records under FOIA when they had already been previously disclosed).

circumstances from those here. *Hepps* involved FOIL requests seeking indexes to New York marriage records from 1881 through 2017. Given that the request pertained to recent marriages, it thus included, unlike here, personal information on thousands of *living individuals*. The Third Department's opinion heavily focused on the fear of disclosing information on living individuals. For instance, the court explained that DOH had demonstrated that "compelling privacy interests are implicated in the disclosure of personal information related to recent marriages of private persons," further describing the information that is included in "[t]he most recent records." *Hepps*, 183 A.D.3d at 288-89. Ultimately, the court concluded that there was a "potential for harm to thousands of private citizens from the disclosure of the personal information." *Id.* at 293.

9. The facts in this case bear no resemblance to those in *Hepps*. Here, the records requested pertain only to *deceased individuals*. This is critical, as deceased individuals generally have no privacy interests. In fact, in *Jones v. Town of Kent*, the court considered how and to what extent privacy rights extend to those who are deceased, and after compiling and reviewing applicable case law on decedents' privacy rights, the court concluded that it was "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." 46 Misc.3d 1227(A), 2015 N.Y. Slip Op. 50323(U), at *3 (Sup. Ct. Putnam Cty. 2015). Additionally, DOH states that *Hepps* purportedly held in favor of privacy interests "to ward-off identity theft of wrong-doers using the identify [*sic*] of a deceased person." (Opp. Br. at 11.) But such a holding is nowhere to be found in *Hepps*. *Hepps* was about marriage records, not death records, and made no mention of deceased individuals.

10. Further, despite DOH's contentions to the contrary, there is no concern about having to "redact away" records (*see* Opp. Br. at 7), as the indexes sought here convey information on deceased individuals. The decisions DOH cites in support of its argument that it would be burdened in "redact[ing] away" materials are inapposite. For example, DOH cites *Brooklyn Legal Services v. N.Y. City Taxi & Limousine Commission*, 202 A.D.3d 469 (1st Dep't 2022) (Opp. Br. at 7), which involved a FOIL request for "fitness interview decisions" made by the New York City Taxi and Limousine Commission ("TLC"). 202 A.D.3d at 470. The TLC claimed that these records were "so detailed" that redaction would not be effective. *Id.* First, these interview records contained detailed information on living individuals, far different from here. Second, contrary to DOH's argument (*see* Opp. Br. at 7), the First Department instead actually recognized that "not all of the records contain such detail" and that the TLC did not make any argument "that redaction, if feasible, would be unduly burdensome or could not be outsourced." 202 A.D.3d at 470. Therefore, the court remanded the matter for an in camera inspection of records to determine to what extent they could be produced with redactions. *Id.*

11. Next, DOH cites *Rhino Assets, LLC v. N.Y. City Dep't for the Aging (SCRIE Programs)*, 60 A.D.3d 538 (1st Dep't 2009), for the proposition that "redaction is not required if the privacy concerns will still be implicated by the remaining information." (Opp. Br. at 7.) In *Rhino*, the petitioner sought under FOIL information on tenants benefiting from the "SCRIE Program," a program which is "available only to households headed by a tenant at least 62 years old, and in which total household income is less than a prescribed amount—$26,000 per year." 60 A.D.3d at 538. The court explained that redacting financial information would be useless, since *all* individuals involved had income below a certain means; therefore redaction

would not resolve privacy concerns over disclosure of household income. *Id.* Additionally, unlike here, all the individuals at issue were living.

12. DOH next claims that surviving family members will have their privacy rights invaded. (Opp. Br. at 7.) There is no logic to such an assertion. First, DOH cites no support for the proposition that surviving relatives have any privacy interest in basic biographical information concerning a deceased relative. Second, if a surviving family member had a right of privacy in this manner, then, according to DOH's logic, descendants of decedents could block the release of records on their ancestors in perpetuity. Yet, DOH already makes historical death records publicly available. DOH's argument is inconsistent with FOIL, which precludes only an *unwarranted* invasion of privacy. *See* POL § 87(2)(b) (permitting agency to withhold records only if disclosure of records "would constitute an unwarranted invasion of personal privacy").

13. The Court of Appeals previously addressed the privacy exception in a case considering the release of far more sensitive information: records of educators under investigation for Communist ties. There, the Court *permitted* the release of the historical records. It explained: "We do not say that disclosure will be completely harmless to those named in the documents, if they are still alive, or to members of their families who care about their memories. But the diminished claims of privacy must be weighed against the claims of history." *Harbatkin v. N.Y. City Dep't of Recs. & Info. Servs.*, 19 N.Y.3d 373, 380 (2012). Therefore, one cannot simply assert that rights of the deceased pass on to others and continue indefinitely. Consider, for example, the information that DOH already releases to the public for the years 1957 to 1970 on its website: year, certificate number, decedent's full name, age, gender, date of death, and numerical residence code. (*See* Pet. ¶ 17.) DOH fails to explain how this basic biographic information about an individual—information that can also be found in a

newspaper obituary or on the individual's gravestone—could possibly implicate unwarranted invasions of *descendants'* privacy rights.

14. Finally, release of this data would not be unique. In fact, the records sought are similar to those that are made public in countless states throughout the country, including New York's neighboring states—in Connecticut, New Jersey and Massachusetts. For instance, the facts show that, on one commercial website, Ancestry.com, the public has access to New Jersey's death index through 2017, Connecticut's death index through 2012, and Massachusetts' death index through 2003, while more recent years can be searched in person at town and county clerk offices. (Ferretti Aff. ¶ 21.) Countless other states similarly make recent death indexes available online. (*Id.* ¶ 22.) Additionally, in many states, there is wide public access to even the full original death records. For instance, in Massachusetts, any member of the public can request a copy of a death certificate until the present, far surpassing the restrictions on access seen in New York.[5]

B. DOH's Data Breach Concerns Are Irrelevant to this Request

15. DOH's Answer has ignored the types of records that actually have been requested in favor of misplaced fears that have nothing to do with the information sought. DOH claims that there is a risk of identity theft, data breaches and "fraud crimes" from disclosing death indexes, and it discusses at length the history of data breaches. (Opp. Br. at 8.) DOH essentially claims that the release of "data" – full stop – would cause a "data breach." But simply because data exists in the public domain does not mean that it leads to data breaches and invasions of privacy. For instance, if RTR placed on its website an index of the Founding

[5] *See Death Certificates*, Mass.gov, https://www.mass.gov/death-certificates ("Death certificates are public record, so any member of the public can obtain a copy at the city or town clerk's office where the death occurred.") (last visited Jan. 12, 2023).

Fathers, with a list of their birth dates and death dates, according to DOH's logic, this information in the public domain would trigger a "data breach." DOH's assertion is simply illogical, as RTR's request is for basic information on deceased individuals, not living individuals. Such information has no relevance to, for instance, the Equifax data breach cited by DOH. (Opp. Br. at 9.)

16. This request for death indexes does not involve information on living people's addresses, email information, passwords, affiliations, or anything else at all about a living individual. Instead, the request is for a basic tabulation of death dates for deceased individuals. DOH wholly fails to identify any correlation between such information and any data breach, let alone offer any evidence that a data breach has *ever* occurred as a result of the public disclosure of death index data (such as in the myriad states whose data is already available online).

17. In fact, if DOH had such significant fears regarding invasions of privacy, data theft and fraud, one would assume that the agency has policies in place to combat these purported threats. But DOH previously has acknowledged that it actually has *no documents* reflecting instances in which disclosure of vital records resulted in identity theft, fraud or criminal behavior; procedures, rules, guidelines or staff instructions discussing how to identify fraudulent orders for vital records; lists of people identified as having tried to fraudulently order a vital record; or any internal guidance or memos addressing why vital records must be protected from unauthorized usage or disclosure. (Ferretti Aff. ¶ 27.)

18. Further, there is no increase in the levels of identity theft reported in "Open Access States" (that is, states which freely make their death records available to the public) compared to more restrictive states. (*Id.* ¶ 31.) Additionally, the public release of a

death index would actually prevent—not promote—identity theft and data breaches. This is because an agency or lending institution would have the ability to cross-check in a public death index whether an applicant (or voter) is alive or deceased, thus resulting in the ability to catch fraudsters using the information of deceased individuals. (*Id.* ¶¶ 28, 36.) Consequently, the release of this data will only make New York safer.

19. DOH's citation to *Goyer v. N.Y. State Department of Environmental Conservation*, 12 Misc.3d 261 (Sup. Ct. Albany Cty. 2005) is also inapposite. DOH contends that *Goyer* stands for the proposition that "medical conditions and physical attributes" should be withheld in light of identity theft concerns. (Opp. Br. at 10.) "Physical attributes," though, are not even included in a death index. Additionally, the facts in *Goyer* are starkly different than here. In *Goyer*, an individual requested information about individuals in New York who were licensed hunters. The court denied the request and considered the risk of identity theft after taking into account the sheer amount of information contained in this database of 1.1 million individuals and 615,000 licensed hunters: the applicant's full name, gender, height, eye color, date of birth, driver's license number, customer identification number, state residency, notation of blindness, military status, permanent military disability of 40% or more, fulfillment information, preference points, e-mail address, residential address, and telephone number. *See* 12 Misc.3d at 262-63. Given that this database was current, it inherently contained all of these details on living individuals, again making that case materially different than here.

C. RTR's Actions as a Non-Profit Organization Do Not Exempt DOH From Disclosing the Requested Records

20. An unwarranted invasion of personal privacy under FOIL includes the "sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes." POL § 89(2)(b)(iii). DOH wrongly contends that because RTR is a non-

profit organization that solicits donations, it should not be entitled to the records. (Opp. Br. at 11-12.)

21. RTR's intended use of the requested records is *not* for "solicitation and fundraising purposes." RTR has explicitly confirmed as much. (*See* Ferretti Aff. ¶¶ 40-42.) Therefore, this FOIL exception is not at issue.[6]

22. The purpose of the solicitation exception was explained by Robert Freeman, the Executive Director of New York's Committee on Open Government, a body specifically authorized and empowered by statute. *See* POL § 89(1). Specifically, Mr. Freeman explained as follows:

> "Solicitation" is not defined in FOIL. However, in consideration of the guidance offered by the courts and the replacement of the term "commercial" with "solicitation" in §89(2)(b)(iii) of FOIL, I believe that it involves situations in which a list of names and addresses would be used in an effort to sell some sort of a product or service, as in soliciting one's business via direct mail. With respect to fund-raising, if a candidate for political office seeks a list for the purpose of explaining his/her position on issues or merely to seek support, I do not believe that there would be a basis for denying access. If, however, he/she is seeking monetary support for his her [*sic*] candidacy, I believe that would involve fund-raising and, therefore, that a list could be withheld in that circumstance.[7]

23. Here, RTR does not intend to, and indeed could not, solicit anything from the deceased individuals whose information is contained in the requested records. RTR simply intends to publicize the death index to aid researchers, journalists, genealogists, family members, and others in locating information about deceased individuals.

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[6] *See* POL § 89(3)(a) ("An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes.").

[7] N.Y. Comm. on Open Gov't, FOIL-AO-17721 (July 24, 2009), https://docsopengovernment.dos.ny.gov/coog/ftext/f17721.html.

24. The Court of Appeals likewise has interpreted the solicitation exception as contemplating fundraising efforts from the individuals identified in the requested records. For instance, in *Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Department*, the petitioner sought in a FOIL request "names and addresses of rifle and shotgun permittees so that it may mail them circulars describing the organization, its activities, and the services it performs for members." 73 N.Y.2d 92, 96 (1989). In that case, it was "not disputed that a primary reason for conducting this general mail solicitation is to obtain membership dues to support the organization's activities. Simply put, the proposed mailing is to *raise funds.*" *Id.* The Court thus concluded that this conduct was impermissible because of "the rights of individuals to be free from unwanted commercial contacts or nonprofit fund-raising efforts." *Id.* at 97. The Court of Appeals came to a similar conclusion in another matter, where it had been "evident" that a requester's intent in requesting names of teachers was "to expand its membership and, by extension, obtain membership dues. . . . It appears . . . that NYSUT seeks the teachers' names as a convenient mechanism for contacting prospective members." *N.Y. State United Teachers v. Brighter Choice Charter Sch.*, 15 N.Y.3d 560, 564-65 (2010).

25. Here, no such solicitations can possibly take place because the individuals whose information is being shared *are deceased*. There is no basis to argue that RTR would in any manner utilize information on deceased individuals to solicit funds from the estates of those deceased individuals, nor that RTR would seek out the decedents' next of kin for donations.

26. This case instead more closely resembles the facts in *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454 (2007). The requester there was a "national company that provides on-line public land records . . . and maintains a database of nearly two billion documents, providing its customers with immediate electronic access to the information," and it obtained its records

"by requesting them from county clerks, or other public officials who have the responsibility of recording and archiving such documents, throughout the country." *Id.* at 460. First, the Court of Appeals assessed how the court below had "remarked that Data Tree is a commercial enterprise and was seeking the documents for 'data mining' purposes." *Id.* at 463. But the Court disagreed as to the relevance of this fact: "FOIL does not require the party requesting the information to show any particular need or purpose. Data Tree's commercial motive for seeking the records is therefore irrelevant in this case and constitutes an improper basis for denying the FOIL request." *Id.* Next, the Court specifically considered the solicitation exception but rejected that as well: "That particular exemption does not apply in this case however because Data Tree is not seeking a list of names and addresses to solicit any business. Rather, Data Tree is seeking public land records for commercial reproduction on line." *Id.*

27. Similarly, in *Gannett Satellite Information Network, Inc. v. County of Putnam*, a newspaper reporter submitted a FOIL request for the names and addresses of pistol permit holders from the county, but the agency claimed that disclosure "would constitute an unwarranted invasion of privacy because Gannett intends to use the names and addresses of pistol permit holders for solicitation purposes." 142 A.D.3d 1012, 1018 (2d Dep't 2016). The Second Department held that such an argument was "without merit," concluding that "Gannett's status as a commercial enterprise does not demonstrate that Gannett intends to use the names and addresses to solicit business, and it represented that it did not intend to do so." *Id.* Indeed, if a "commercial enterprise" can permissibly carry out such acts, then surely a non-profit organization such as RTR may do so here.[8]

[8] The only case DOH cites is *Hunt v. N.Y. City Department of Correction*, 2008 N.Y. Misc. LEXIS 10547 (Sup. Ct. N.Y. Cty. 2008). (*See* Opp. Br. at 11.) That case emphasized potential *commercial* efforts of the requester based on the wording of the FOIL exemption at the time, but the statute today no longer references "*commercial*" efforts; instead, it references "solicitation," which, for the reasons described above, is not what RTR is doing here. In any

D. RTR's Request Will Serve Valuable Governmental Purposes

28. New York law does not require requesters to provide any reason for submitting a FOIL request. *See Data Tree*, 9 N.Y.3d at 463. Nevertheless, in support of its privacy claims, DOH questions whether RTR's request will serve any governmental purpose. (*See*, *e.g.*, Opp. Br. at 6, 11-12.) Contrary to DOH's assertions, the production of the indexes will actually serve many governmental interests.

29. *First*, the New York Inspector General has raised grave concerns about the status of document retention and copying of records by DOH. Its report concluded that DOH's systems 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 records." (Ferretti Aff. ¶ 33.) RTR's request will therefore aid the agency by creating a publicly available backup copy, consisting of at least a subset of the basic extracted text of the records, thus better preserving these records and assuring that the *only copies* will never get inadvertently destroyed (or weathered with time). (*Id.* ¶¶ 33-35.)

30. *Second*, production of the indexes will also serve valuable governmental purposes by *reducing* (not increasing) incidents of fraud. The public availability of a death index is valuable in combatting concerns of individuals "voting from the grave"—*i.e.*, when deceased individuals still appear on voter rolls and fraudsters use their information to illegally impact elections. (*Id.* ¶ 36.) If a death index is public and can be cross-referenced against voter rolls, then the release of this data would secure the integrity of our electoral system. Likewise, it would benefit lending institutions who are often concerned about making loans based on

event, to the extent that case is at odds with the aforementioned cases, it should not be considered because the Court of Appeals cases are binding.

fraudulent claims (including identity theft), as the lenders would then be able to cross-reference death indexes to help determine whether a deceased individual's information is being used. Additionally, a public death index could help combat instances of organizations (such as insurance companies, workers compensation funds, or unions) unknowingly continuing to pay out benefits after a person has died.[9]

31. *Third*, DOH currently has a massive backlog in vital records requests and often takes *several years* to reply to individuals. For example, as of December 2020, DOH had only processed about 700 out of the over 3,000 genealogical record requests the agency had received from *the prior year* (not even considering the requests it had received in that current year that still remained unfulfilled). (Ferretti Aff. ¶ 37.) This backlog is partly due to the fact that when DOH receives a request for a vital record with imprecise details, DOH employees first often have to search indexes in order to find the correct information about an individual whose documents were requested. (*Id.* ¶ 38.) Consequently, if death index data is available to the public, then individuals will be able locate information on their own, so that their requests to DOH can be more specific and accurate, thus saving the agency valuable time to reduce its immense backlog. Additionally, because of the lack of clarity regarding where individuals died, requesters often write open-ended requests to DOH instead of writing to local town clerks who might otherwise retain the same records, because requesters do not know which town retains the applicable records. (*Id.* ¶ 39.) Therefore, with the public accessibility of the death index, DOH would no longer have to spend considerable time searching indexes (since the public will already

[9] It appears DOH recognizes that such disclosure could be beneficial. For instance, as mentioned in the Petition, RTR is aware that DOH shared death index data with the Unemployment Insurance Integrity Center of Excellence, a division of the National Association of State Workforce Agencies. (*See* Pet. ¶ 56.)

be able to do the same), and individuals will be able to turn to local agencies instead of DOH for the records, thus further lightening DOH's burden. (*Id.*)

32. There is likely also a significant public interest in access to death indexes from recent years for other reasons, such as understanding the impact of the COVID-19 pandemic in New York. Even if causes of death were to be withheld for recent years in the death index, professionals could nonetheless compare the number of deaths in New York from prior years to those during the pandemic and consider trends that occurred during these years (without the need to identify personal medical information on any specific individual), such as studying time periods with surges in deaths cross-referenced to specific localities or counties, as well as data on gender and age. The public nature of the death index to the present would thus be greatly beneficial to the public health and scientific communities.

II. NO STATE STATUTE BARS DISCLOSURE

33. DOH does not engage with RTR's statutory analysis other than to simply say that "death records are not subject to disclosure" under FOIL pursuant to Public Health Law ("PHL") § 4174(1)(a). (Opp. Br. at 13.) But DOH ignores the distinction between *records* of death (*i.e.*, death certificates), as opposed to *indexes* of records.

34. Section 4174(1)(a) only restricts public access to a "certified copy or certified transcript of a death record." Those terms are each defined in the Public Health Law, but neither definition includes any reference to *indexes* of the underlying records. *See* PHL §§ 4100-a(1), (2). Records of death are logged in a book, but they are not inherently *certified*. The Public Health Law thus defines what it means to be a "certified copy" of a death record—a "photographic reproduction . . . of the original certificate or electronically produced print of the original certificate" that is "certified by the commissioner, his designated representative, a local

registrar, deputy registrar or sub-registrar as a true copy thereof." PHL § 4100-a(1). Meanwhile, what is contained on the DOH website for the years 1957 through 1970 is merely a tabulation of individuals' names, dates of death, and towns of death; this is information taken from the original registers, none of which are themselves "certified copies." (Pet. ¶ 17.) This database compiling data from death records is not a certified "photographic reproduction" of a record. A basic index or list of names is informational and helpful, but a mere index cannot be used as a legal substitute for a full printed and certified paper copy of a death certificate. The Public Health Law restricts access to *certified copies* of records, not *indexes* summarizing records.

35. DOH nonetheless asserts that it cannot produce indexes because the information in the index *comes from* the death records. According to DOH's logic, this would mean that *any* summary made of private records must itself likewise be confidential. But that is not the law. The state statute exception under FOIL is to be narrowly interpreted, as the Court of Appeals held, explaining that "[a]lthough we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection." *Cap. Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986). There is no such legislative intent here. The Public Health Law only bars access to a "certified copy or certified transcript of a death record," and each of those terms are defined under Section 4100-a; but neither expressly (or impliedly) references anything to do with indexes. Therefore, the state statute exception cannot apply.

36. Meanwhile, DOH's reliance on 10 NYCRR 35.5(c)(3)—which restricts public access to copies of complete death certificates for a period of 50 years following death—in order to withhold *indexes* is meritless because this regulation is not a state statute, and it

therefore does not constitute a valid statutory basis under FOIL to resist disclosure. (*See* Opp. Br. at 13-15.) Under FOIL, only state and federal *statutes* may bar disclosure, not administrative regulations. As the Third Department recently held, 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").[10] Pursuant to FOIL, which requires a "state statute" to bar disclosure, DOH simply cannot rely on 10 NYCRR 35.5(c)(3), an administrative regulation, to withhold the indexes.

37. DOH also cites to HIPAA again as a basis for withholding the requested records (*see* Opp. Br. at 15), but DOH wholly ignores the Petition's outline of the several reasons why HIPAA is not applicable here. DOH has not attempted to rebut any of the explanations provided in the Petition that clarify why HIPAA is irrelevant, including the following:

- HIPPA's 50-year restriction on access is located in the Code of Federal Regulations, *see* 45 C.F.R. 164.502(f), and because this is an administrative regulation (not a statute), it cannot override FOIL. (Pet. ¶ 48.)
- Death indexes are not protected "health information" under HIPAA, since they do not include any of the information specified under 45 C.F.R. 160.103. (Pet. ¶ 49.)
- DOH is not a "covered entity" for purposes of its retention of death indexes because such records are not part of DOH's "covered programs" pursuant to 45 C.F.R. 164.105(a)(1). (Pet. ¶ 50.)

38. Because there is no statute that bars disclosure of death indexes, they should therefore be produced.

[10] *See also 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"); *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.").

III. THE FOIL REQUEST WAS CLEAR AND NOT OVERBROAD

39. DOH claims for the first time that RTR's request was "overbroad" (Opp. Br. at 15-18), but there is no ambiguity or overbreadth here. DOH understands what RTR is seeking: death indexes. DOH asserts, among other things, that it need not "conduct herculean efforts to respond" (*id.* at 16), that if upon a diligent search it cannot locate information it need not produce anything (*id.* at 17), that the only index DOH has is what it already produced (*id.*), and that DOH would need to have a database "custom built" (*id.* at 18). Those assertions are inaccurate.

40. DOH admits in its filings that it has responsive records. Specifically, DOH states that it has "microfiche copies of death records from 1880 through 2005" and "a database from 1959 to present." (*Id.* at 15.) Therefore, it is unclear why DOH claims that it does not have records, or that it cannot easily locate records. Additionally, even if a request is burdensome, that alone supplies no basis to withhold production. *See* POL § 89(3)(a) ("An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy."). Finally, agencies have the obligation under FOIL to extract information from their computer databases, even if it requires programming, which is expressly *not* deemed the creation of new content. *See id.* ("When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. . . . Any programming necessary to retrieve a record maintained in a computer storage system and to

transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.").

41. Further, countless additional sources confirm that DOH retains responsive records. For example, DOH's own inventory catalogue identifies "indexes" for numerous years and even identifies the specific "cabinet" in which certain of these records are held. (Ferretti Aff. ¶ 7.) Likewise, New York's Inspector General reported that DOH would begin a new "indexing phase" for its vital records as of September 2016. (*Id.* ¶ 8.) Meanwhile, Mr. Ferretti further addressed how DOH has contracted a third-party vendor and acknowledged in 2020 which fields had already been indexed and those in need of further indexing. (*Id.* ¶ 9.) Finally, New York Election Law § 5-708 requires an electronic index of deaths. (*Id.* ¶ 10.)

42. Insofar as DOH interpreted RTR's request to be solely for indexes that are typed in a computer file, DOH misunderstands the request. If indexes exist in paper or microfiche format and have never been converted to digital form, RTR's request seeks a copy of such documents, whether digitized or in paper or microfiche form. RTR is amenable to receiving the records in whichever format is most convenient for DOH to produce. Finally, in terms of data already retained in *any* digital format (which, for the reasons described above and upon information and belief, DOH does in fact maintain), given that DOH has the ability to alter which fields it chooses to produce (*see* Ferretti Aff. ¶ 15), DOH may propose to withhold *specific* fields that it believes are over-invasive in the past few years (such as next-of-kin or medical information), but DOH should nonetheless produce all of the other fields of data.

CONCLUSION

For the foregoing reasons, as well as those in the Petition, the Petition should be granted in whole, and the requested records should be produced.

Dated: New York, New York
January 12, 2023

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Reclaim the Records

VERIFICATION

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

ALEXANDER C. CALZARETH, being duly sworn, deposes and says:

I am a Director 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 Reply 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).

ALEXANDER C. CALZARETH
Director, Reclaim the Records

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

On the 12 of January, 2023, before me, the undersigned, personally appeared ALEXANDER C. CALZARETH, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

NOTARY PUBLIC

LAURIE ANN WAGONFELD
Notary Public, State of New York
Reg. No. 01WA6396360
Qualified in Nassau County
My Commission Expires August 19, 2023