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VIA FIRST CLASS MAIL ONLY

June 2, 2016

Records Access Appeals Officer
Division of Legal Affairs
Empire State Plaza
2438 Corning Tower
Albany, NY 12237-0026

RE: Appeal of FOIL #16-01-037 (New York State death index, 1880 through 1956)

Dear Records Access Appeals Officer:

I am writing to appeal FOIL request #16-01-037 dated January 4, 2016, requesting copies of the New York State death index from 1880 through 1956. This is an appeal from a constructive denial and, more specifically, the failure on the part of the New York State Department of Health to provide adequate information as to fees and payment to enable the requesting party, *Reclaim the Records*, to obtain copies of these records.

Reclaim the Records (“*Reclaim*”) submitted their FOIL request on January 4, 2016. *See attached*, “January 4, 2016 Request.” In a letter dated March 29, 2016, the NYS Department of Health (NYS DOH) stated it would produce the requested records. *See attached*, “March 29, 2016 Response Letter.” These records cover seventy-six years and are currently only available to the public in old-fashioned microfiche (note: not microfilm) format. The records are composed of several microfiche sheets per year, with increasing numbers of sheets available for the later years in the record set, as the population in New York increased, and as three major cities (Albany, Buffalo, and Yonkers) finally started including their information in the records set starting around 1914.

However, in multiple communications with *Reclaim the Records* (“*Reclaim*”), NYS DOH has refused to provide either an actual inventory or an estimate of the total

number of microfiche sheets available for this data set. Instead, they have stated without explanation that they would charge *Reclaim* a flat fee of \$2,000 per year for microfiche sheet copies, making the total costs of the record request for all seventy-six years

\$152,000. *See Attached*, "NYS DOH March 29, 2016 Response Letter." By quoting an outrageously high fee, divorced from the actual copying costs of the records, and also failing to provide any further information about the actual number of records available, NYS DOH has neither provided access to the records nor expressly denied access. This request has therefore been constructively denied.

In a phone call with the NYS DOH, *Reclaim* was instructed by the Records Access Officer, Danielle Rysedorph, to inquire about the fee with the Press Office, and this inquiry was made on March 30, 2016. *See attached*, "March 30, Letter to Press Office." The Press Office responded via telephone that they had information regarding the fees. At that point, *Reclaim* requested from NYS DOH a breakdown and explanation of the fee of \$152,000. *See attached*, "April 4, 2015 Letter." In this letter, *Reclaim* specifically inquired whether an outside vendor had been consulted for this estimated \$152,000 fee, and why the DOH estimated costs for this request had been based on a flat fee per year rather than based on the actual number of microfiche sheets, which vary per year.

On May 27, 2016, NYS DOH finally responded to this request by stating that there had been no bidding for the project and the fees quoted were estimates made by staff. No further details were given.

To date, we have not received a response to the following questions, and therefore have insufficient information to move forward with acquiring the requested records:

1. We request a breakdown of the number of microfiche sheets per year;
2. We request that NYS DOH provide an explanation and breakdown of the fees quoted;
3. We request that NYS DOH provide the name of the vendor that will be used;
4. We additionally request information regarding whether the selection of this vendor will be made through a competitive process;
5. We request full details as to how we may provide the payment for these fees, as well as shipping costs, so that we may move forward with receiving these copies.

By way of background, our research would indicate the industry standard for fees for a job of this size – turning existing microfiche sheets into scanned digital images – would be approximately \$3,000, not \$152,000. This would indicate that DOH's requested fees to process this FOIL request are nearly fifty times higher than actual costs.

In arriving at this number, we counted the number of microfiche sheets for this data set at the New York State Archives in Albany at 1,518 sheets. **See attached, "Index to Responsive Microfiche Sheets."** A small number of additional microfiche sheets are missing from the Albany library but are in the DOH's possession and number under 10

sheets. With an approximation therefore of 1,522 sheets for the seventy-six years requested, we looked into finding a sampling of quotes given by commercial vendors to copy both from microfiche to microfiche, and from microfiche to digital, since we stated in our original request our preference was for digital copies. *See attached, "April 29, 2016 Request Letter"* ("If possible, I would prefer the request [be] filled electronically, by e-mail attachment if available or via other media").

With respect to creating digital copies from the microfiche, the format *Reclaim* requested, our research indicates the pricing for the seventy-six years would total about \$3,044. For orders over 250 sheets of microfiche, commercial vendors charge \$2 per sheet. *See e.g., attached, "Advanced Data Solutions: Microfilm and Microfiche Conversions"* captured from <http://www.adsus.net/microfilm-conversion-services.php> on June 6, 2016. Alternately, vendors charging per the digital image instead of by the sheet charge less than seven cents per image. *See e.g., attached, "Digital Film Solutions"* captured from <http://digitalfilmsolutions.com/our-microfilm-scanning-services/microfiche-scanning-conversion> on June 6, 2016.

Other government agencies charge fees that are more expensive than these commercial vendors, but still far more reasonable than the DOH's initial fees estimate. According to the National Archives and Records Administration (NARA), their own in-house fee for microfiche digitization would be \$12 per sheet, which would also include domestic shipping or electronic transfer. At 1,522 sheets, NARA's pricing for the seventy-six years requested would total \$18,264. *See e.g., attached, "NARA Reproduction Fee Schedule as of February 19, 2016"* captured from <http://www.archives.gov/research/order/fees.html> on June 6, 2015.

Chapter 21 of the New York Code of Rules and Regulations ("NYCRR") limits what an agency can charge in fees to actual costs of reproduction and states that the agency may include only the following:

- (i) An amount equal to the hourly salary attributed to the lowest paid employee who has the necessary skill required to prepare a copy of the requested record, but only when more than two hours of the employee's time is necessary to do so;
- (ii) The actual cost of the storage devices or media provided to the person making the request in complying with such request; or
- (iii) The actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, and if such service is used to

prepare the copy.
21 NYCRR Part 1401.8(c)(i)-(iii).

NYS DOH is therefore limited in its fee to the actual cost of the reproduction, including materials and necessary employee time. *See*, Part 1401.8(c). NYS DOH may only elect to employ a vendor to produce the copies if NYS DOH itself lacks both the equipment to generate microfiche copies. *Id.* NYS DOH is required to inform the party requesting records what fees will be charged in making reproductions and if a vendor will be used. Part 1401.(8)(e). Where the quoted fees are unreasonably high for ordinary circumstances, an explanation of fees and circumstances must be provided.

In summary, NYS DOH has exceeded a reasonable timeframe as well as its own stated timeframe for providing access to the records. To review the timeline, *Reclaim* filed the request on January 4, 2016. *See attached*, "January 4, 2016 Request Letter." NYS DOH stated they would provide a response as to fees and vendors by April 29, 2016, well in excess of the 20 days given by statute. *See attached*, "NYS DOH April 19, 2016 Email." On May 4, 2016, NYS DOH had not provided a response and stated the response would be provided on May 9, 2016. *See attached*, "May 4, 2016 NYS DOH Email." On May 13, 2016, NYS DOH stated more time was still necessary and that they would have a response by May 20, 2016. *See attached*, "NYS DOH May 13, 2016 Email." Finally, on May 27, 2016, NYS DOH provided the letter attached, still without any answer whatsoever as to its intended vendor, nor any details regarding the fee quoted of \$152,000, nor an actual inventory or an estimate of the number of microfiche sheets in this records set.

NYS DOH's response came 53 days after *Reclaim* had reiterated its request for information regarding fees, and 143 days after the making its original request. This failure to respond prevents *Reclaim* from acquiring the requested records, and therefore constitutes a constructive denial pursuant to FOIL Section 89(4)(a).

I hereby appeal this denial and request responses to the questions regarding fees and payment, listed above as 1 through 5, be provided to our office.

If for any reason any portion of this appeal is denied, please inform me of the reason for the denial in writing within ten (10) days as required by statute. Please feel free to contact my office if there are any questions about this matter. Thank you for your consideration.

Sincerely,

/s/

Jane L. Moisan
Associate Attorney
Encls.

Reclaim FOIL #16-01-037

June 6, 2016

Page # of #

cc: Danielle Rysedorph (Levine)
via Email Only
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