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Via Overnight Mail

August 7, 2018

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

Dear Access Appeals Officer:

I am writing to appeal The New York State Department of Health's ("DOH") constructive denial of Ms. Tammy A. Hepps FOIL request, made pursuant to the New York Freedom of Information Law ("FOIL") and New York Public Officers Law §§ 84-89.

I. Statement of Facts

On July 11, 2018, Tammy A. Hepps ("Ms. Hepps or Petitioner") sent a Freedom of Information Law request ("Request") to the DOH. Petitioner requested "a copy of the New York State marriage index, from January 1, 1967 through December 31, 2017, inclusive." *See* Exhibit 1, FOIL Request, July 11, 2018.

To date the DOH has failed to respond to Petitioner's Request. As such, Petitioner's Request has been constructively denied. The Public Officers Law § 89(3)(a), states in relevant part that:

Each entity subject to the provisions of this article, within **five business days** of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request . . .

Under Public Officers Law § 89(4)(a), a failure to “conform to the provisions of subdivision three of this section shall constitute a denial.” On information more than five business days have passed since the Request was sent to the DOH. By failing to respond to Ms. Hepp’s Request within the statutorily mandated five days, the DOH has constructively denied the request.

This appeal is timely, because it is brought “within thirty days . . . [of] such denial.” Public Officers Law § 89(4)(a).

Ms. Hepps has never been informed the basis for withholding the January 1, 1967, through December 31, 2017, marriage index. Without being advised verbally or in writing of the basis for the denial, an appeal is necessarily based upon some guesswork. However, as support for the right of public access to information, the FOIL Request itself referenced the Court’s decision in *Gannett Co. v. City Clerk’s Office*, 596 N.Y.S.2d 968 (N.Y. Sup. Ct. 1993) (finding “the names of marriage license applicants would not . . . ordinarily and reasonably be regarded as intimate, private information.”) (internal citation omitted) *aff’d*, 197 A.D.2d 919, 604 N.Y.S.2d 848 (1993). While the underlying marriage license or certificate may have increased privacy protections, the marriage “log” or index is open to the public. *Id.*

The Request specified, “this request is for the basic index only, which might also be known as a ‘marriage log’ or a ‘finding aid’ or a database extract’ or similar terms.” Exhibit 1. Ms. Hepps clarified that she was “not requesting any actual marriage certificates or marriage licenses.” *Id.*

II. Law

It is beyond dispute that “government is the public’s business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.” Public Officers Law § 84; *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) (“We have held . . . that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.”).

The term “record” is defined to mean any information kept, held, filed, produced or reproduced by, with or for any agency . . . in any physical form whatsoever including . . . paper [and] computer tapes or discs.” Public Officers Law § 86(4). While FOIL does not “require any entity to prepare a record not possessed or maintained by such entity,” *See Matter of Locator Servs. Group, Ltd., v. Suffolk County Comptroller*, 40 AD3d 760, 761 (2007), “[a]ny 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.” *See* Public Officers Law § 89(3)(a).

“[T]he burden of proof rests solely with the [agency] to justify the denial of access to the requested records.” See *Matter of Data Tree, LLC v. Romaine*, 9 NY3d 454, 463 (2007); *Matter of Markowitz v. Serio*, 11 NY3d 43, 50-51 (2008). This burden must be met “in more than just a plausible fashion.” See *Data Tree v. Romaine*, 9 NY3d at 462; *Matter of West Harlem Bus. Group v. Empire State Dev. Corp.*, 13 NY3d 882, 885 (2009); *Matter of Konigsberg v. Coughlin*, 68 NY2d 245, 249 (1986).

III. Conclusion and Further Request for Production

Ms. Hepps specifically excluded marriage certificates or licenses themselves from the scope of her Request, and instead requested an index of marriage records from the database maintained by DOH. DOH has acknowledged it maintains in a digital database in the regular course of its duties. We believe these records can be retrieved or extracted with reasonable effort.

Accordingly, DOH should be directed to provide the requested marriage index for the dates of January 1, 1967 through December 31, 2017, inclusive. As required by FOIL, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of receipt of an appeal. If any responsive records are denied upon appeal, please fully explain the reasons for the denial in writing, as required by law.

Thank you in advance for your consideration of this matter.

Best regards,



David B. Rankin, Esq.

DBR/ars
Enclosures

From: **Tammy Hepps** <hepps@post.harvard.edu>
Date: Wed, Jul 11, 2018 at 4:21 PM
Subject: NEW FOIL REQUEST FOR 1967-2017 NEW YORK STATE MARRIAGE INDEX
To: foil@health.ny.gov

To Whom It May Concern:

Pursuant to the New York State Freedom of Information Law (1977 N.Y. Laws ch. 933), I hereby request the following records:

I would like to receive a copy of the New York State marriage index, from January 1, 1967 through December 31, 2017, inclusive. This request is for the basic index only, which might also be known as a "marriage log" or a "finding aid" or a "database extract" or similar terms. Please note that I am not requesting any actual marriage certificates or marriage licenses.

According to the attorneys at the New York State Committee on Open Government (COOG), this basic statewide marriage index is legally available to the public under FOIL, based on the outcome of the 1993 lawsuit "Gannett Co., Inc. v. City Clerk's Office, City of Rochester" [596 NYS2d 968 (1993)]. A copy of that decision may be found online at this URL:

<https://www.leagle.com/decision/1993506157misc2d3491455.xml>

Please go read that decision. Note the part where the fifty-year privacy restriction does NOT apply to the basic marriage index, just to the actual marriage certificates or licenses.

Furthermore, this finding was upheld in two recent successful "Article 78" lawsuits in the Supreme Court of New York, both filed against the New York City Department of Health. They are "Reclaim the Records, et al, v. The City of New York", No. 100397/2016 [Sup Ct, NY Cnty], and "Reclaim the Records, et al, v. The City of New York", No. 150250/2018 [Sup Ct, NY Cnty]. In both cases, the index to marriage records that were less than fifty years old were turned over to Reclaim The Records in settlements, and in both cases the city was forced to pay Reclaim The Records' attorneys fees, too.

I would prefer to receive these records in raw text database format, preferably in SQL or CSV format, on a USB hard drive, if possible. If a text database is unavailable, then I would accept the information as images or PDF's. I am willing to pay the costs associated with the records production, along with the costs of the USB hard drive and any insured shipping costs, if needed. Please inform me of any potential charges in advance of fulfilling my request.

This request is not being made for commercial purposes. The requested records will be scanned and uploaded to the Internet, and will be made freely available to the general public. It is anticipated that some non-profit genealogical groups may choose to transcribe the information in the marriage index, to turn it into a new text-searchable database. I would be happy to share any such database

with the Department of Health.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 5 business days, as the statute requires.

For the record, if your office chooses to deny this FOIL request, this is absolutely going to turn into a lawsuit.

Sincerely,

Tammy A. Hepps
Treasurer of Reclaim The Records
<https://www.reclaimtherecords.org/>