SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

TAMMY A. HEPPS, BROOKE SCHREIER GANZ,
RECLAIM THE RECORDS,

Petitioners,

-v-

THE NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION

Index No. 905431-18

Dated: January 11, 2019
New York, New York

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I. INTRODUCTION

The respondent seeks to upend over 100 years of precedent in New York State by attempting to place information about who is married to whom beyond the purview of FOIL. The Attorney General of the State of New York, Thomas Carmody, in 1911 issued an opinion to the City Clerk of Niagara Falls that it must make public the "certificates attached showing the performance of the marriage ceremony…" Affirmation of David B. Rankin in Further Support of the Petition ("Rankin Aff.") at ¶2, Ex. A. Nearly fifty years later in 1960, the Attorney General of the State of New York, Louis J. Lefkowitz, stated that "records of marriage licenses … shall be public records and open to public inspection whenever the same may be necessary or requires for judicial or other proper purpose." Rankin Aff. at ¶3, Ex. B.[1] The New York State Department of Health also is reversing course on its previous reliance on Committee on Open Government ("COG") AO-f10608a, an Advisory Opinion from 1998, discussed *supra*. Rankin Aff. at ¶4, Ex. C - COG AO- f10608a. Respondent also offers the Court an opportunity to create a split in authority between the 3rd and 4th Appellate Departments. They ask this court to abandon the precedent of *Matter of Gannett Co. v. City Clerk's Off.*, 157 Misc. 2d 349, aff'd 197 A.D.2d 919, (4th Dept 1993). The Court should not accept this invitation and should order the production of the indexes of the marriage certificates.

The City of New York released the same kind of marriage index sought in this litigation to Reclaim the Records in 2016. Reclaim the Records published the names of the spouses, the Borough in which the license was issued, the date or year the license was issued, the license id number, and in some instances the date the marriage was recorded. The database can be found at www.nycmarriageindex.com. The respondent has pointed to no harm which has resulted from

[1] It is reasonable to assume the proper purpose referred to is the now codified not for commercial purpose language of Public Officers Law § 89 (2)(b)(iii).

the publication of these records. It would be useful for the Court to review this website to see what the respondent is seeking.

The respondent is arguing that the use of the information which has been publicly available should no longer be publicly available because it will be placed on the internet. Information is either public, or it is not public. The method of distributing public information is not relevant to the inquiry before the court. LoCicero Aff. ¶27. The purpose of a request is wholly irrelevant to the FOIL analysis except for the limited circumstances discussed below. There is no precedent to support the position that information should not be deemed public through FOIL because someone would place that information online. *M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 82 (1984) (The use of information produced through FOIL is not relevant to the inquiry of if an exception applies).

II. PURPOSE OF FOIL

The goals of the FOI law are expansive and key to the free and open functioning of our government. It is useful to remember that:

> [FOIL] proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. Thus, the statute affords the public the means to attain information concerning the day-to-day operations of State government. By permitting access to official information long shielded from public view, the act permits the electorate to have sufficient information in order to make intelligent, informed choices with respect to both the direction and scope of governmental activities (see Public Officers Law, § 84). Moreover, judicious use of the provisions of the law can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short, "to hold the governors accountable to the governed." *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979).

To further these goals, FOIL provides that all records kept by a public agency are

presumptively open to public inspection and copying unless specifically exempted. *New York Civil Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 661 (2004). These exemptions "are to be narrowly interpreted so that the public is granted maximum access to the records government." *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007). The agency resisting disclosure must prove entitlement to one of the exceptions, meaning the agency bears the burden to resist production. *Laureano v. Grimes*, 179 A.D.2d 602, 604 (1st Dep't 1992), *see also, Data Tree, LLC,* at 463.

III. EXHAUSTION AND DUPLICATION

A. The Ganz Request

There are two distinct records requests at issue. The first request was made by Brooke Schreier Ganz on September 12, 2017. Petition Ex. A. This request was only officially denied after an internal appeal was taken. The respondent's response to the FOIL request provided records and no indication that any records were withheld. Petition Ex. I & J.

The email which was sent to Ms. Ganz stated:

> Attached you will find the response letter to your FOIL request. Please be advised that the New York State Department of Health has finished processing your FOIL request. As the size of the response materials are too large to send via email, they have been put in the care of the United States Postal Service. You should be receiving your response materials within a few days.
> Petition Ex. I.

The cover letter to the documents stated:

> This letter responds to your Freedom of Information Law request of September 12, 2017, in which you requested "a copy of the New York State marriage index, from 1881 (or as early as such records are available) through December 31, 2016, inclusive."
>
> I have enclosed documents responsive to your request.

> Should you feel that you have been unlawfully denied access to records, you may appeal such denial in writing within 30 days to the Records Access Appeals Officer, Division of Legal Affairs, Empire State Plaza, 2438. Corning Tower, Albany, New York 12237-0026.
>
> If you require additional information or wish to discuss this matter further, please do not hesitate to contact me at (518) 474-8734.
> Petition Ex. J.

To properly deny access to a public record, an agency must deny the request in writing. Public Officers Law § 89(3)(a). This was not done. The respondent stated the records had been provided. The petitioners had no thought that the records would not be provided in full given the weight of the authority for their production. Once the petitioner realized that documents were withheld and not going to be supplemented, an internal appeal was made promptly. Petition Ex. M.

The response to this internal appeal is symptomatic of the sophistry of the arguments from the respondent. They claimed the internal appeal was late because they really denied the request months earlier. Petition Ex. K. In short, the respondent provided some records by stating that responsive documents were being produced, then mailed those documents to a physical address across the country from where Ms. Ganz and Reclaim the Records is located. The claim this was where Ms. Ganz wanted these records sent is belied by the number of communications made between the parties discussing this and various other matters. It is only after the physical records were located, shipped across the country, and then reviewed did it become apparent that the request had actually been denied in part. The state is not allowed to respond to a request and then put the burden on the requestor to determine if the request had been in part denied. If this were allowed, then a respondent could, in all cases, use a letter like the respondent did in this case and place the burden of guessing what records may exist on the requestor. This is clearly

not the law. Once it became apparent the request had been denied, the internal appeal was issued. The respondent is now using *their* error in how they denied the original request as a shield by saying the internal appeal was late. The Court should find the purported denial letter of February 15, 2018 to be defective, thereby failing to trigger the statutorily described 30-day period to file an internal appeal. Defects in a denial letter remove the ability of a respondent to argue the matter was not properly exhausted. *Barrett v. Morgenthau*, 74 N.Y.2d 907, 909 (1989).

B. The Hepps Request

The second request, the Hepps request from July 11, 2018, eliminates any potential argument of an untimely appeal. The same request was made, denied, and then timely appealed. The respondent does not claim otherwise. However, they attempt to rely on the flawed argument that because the request was made before, it cannot be made again. However, the respondent can point to no case which has held that a second FOIL request from another individual, even seeking the same records, was barred as duplicative. Should the Court not find the February 15, 2018 response letter defective, the matter still must be reviewed as Ms. Hepps' request is appropriately before the Court. Her identifying herself as being associated with Reclaim the Records is of no consequence as she did not represent to be acting on their behalf. The respondent claims,[2] because they must to make their argument cognizable, that Ms. Hepps submitted the request on behalf of Reclaim the Records, but a fair reading of the request shows she did not make it on behalf of Reclaim the Records. She states clearly, "I would like to receive a copy…" Petition Exh. N - Hepps Request. The records request was from a personal email address.

[2] Respondent's memorandum of law at Pg. 9.

The Ganz request was not denied in writing until the administrative appeal, and to hold that the requestor must guess if a document has been withheld impermissibly shifts the burden from the respondent to the petitioner. The failure of the respondent to deny the request in writing should not be allowed to be turned into a shield to permit the respondent from escaping their obligations under FOIL.

IV. *GANNETT CO.* AND COMMITTEE ON OPEN GOVERNMENT OPINIONS

The respondent is correct, petitioners do rely heavily on *Matter of Gannett Co. v City Clerk's Off.*, 157 Misc. 2d 349, aff'd 197 A.D.2d 919 (4th Dept 1993). Petitioners do so because *Gannett Co.* is good law which has been cited favorably in the 2nd and 3rd Judicial Departments. *See*, *Mothers on the Move v. Messer*, 236 A.D.2d 408, 410 (2d Dept 1997) and *Empire Realty Corp. v. NY State Div. of the Lottery*, 230 A.D.2d 270, 274 (3d Dept 1997). *Gannett* states unequivocally that, "the names of marriage license applicants would not, in this court's opinion, ordinarily and reasonably be regarded as intimate, private information." *Gannett*, at 352-1. This is the information which the petitioner requests.

The COG, a subdivision of the Department of State, has issued a substantial number of advisory opinions on the issue before the Court. Robert J. Freeman, the executive director of COG,[3] issued an advisory opinion to Ms. Ganz on August 12, 2015. In this opinion, he states that "Domestic Relations Law, §19, which deals specifically with access to marriage records, does not serve as a valid basis for denying access to the records sought." Rankin Aff. at ¶5, Ex. D - COG AO-19289. On January 4, 2002, Mr. Freeman opines that though the names, and counties of residence should be disclosable, he does not believe that street addresses should be

[3] Mr. Freeman has worked for the COG since its creation in 1974 and was appointed to be its executive director in 1976. He received his law degree from New York University and is a nationally acknowledged expert on the New York State FOI law.

disclosed. Petitioner does not seek street addresses. Rankin Aff. at ¶6, Ex. E - COG AO-13120. On June 25, 2001, COG reaffirmed their confidence in COG AO-10608-A. Rankin Aff. at ¶7, Ex. F - COG AO-12752.

On February 11, 1998, COG issued a comprehensive opinion on FOIL access to marriage records. The COG opines that "[i]n short, the fact of a marriage and its duration should in my view be public, as is the fact of a divorce pursuant to § 235 of the Domestic Relations Law." COG believes that the names, the date, and the location of the marriage should be publicly accessible. The note at the end of this advisory opinion states, "[t]he New York State Department of Health has agreed to use the parameters described in this memorandum as a basis for its consideration of requests for marriage records." Rankin Aff. at ¶4, Ex. C - COG AO-10608-A.

On September 19, 1997, COG issued an advisory opinion stating that "[i]n sum, the restrictive interpretation by certain agencies regarding the disclosure of marriage records reflected in the correspondence is, in my view, inconsistent with the Freedom of Information Law, with § 19 of the Domestic Relations Law, and judicial interpretations." Rankin Aff. at ¶8, Ex. G - COG AO-f10339. The April 22, 1993 advisory opinion is in accord. Rankin Aff. at ¶9, Ex. H - COG AO-7661.

The respondent seeks to reverse the established law in the State of New York.

V. RESPONDENT ACKNOWLEDGES NON-PRODUCTION OF DOCUMENTS

The respondent acknowledges that even under their misguided interpretation of the law, they have not produced all of the records which petitioners have requested. The litigation caused the respondent to review their production. During this review they realized they did not produce records from 1964, which they are apparently currently in the process of producing. LoCicero Aff. ¶ 9.

The respondent tacitly acknowledges they have withheld records which do not fall under even their interpretation of the applicability of 10 NYCRR § 35.5 because they have not checked to determine if both parties to the marriage are deceased. LoCicero Aff. ¶35. The plain text of Public Officers Law §89(3)(a) states:

> 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…

Even with the respondent's misguided reading of the applicability of their regulation, they acknowledge they have withheld documents without a justification. They should be ordered to produce those documents.

VI. THERE IS NO REGULATORY PROHIBITION ON PRODUCTION OF THE INFORMATION

The respondent elevates their internal regulation beyond its place. 10 NYCRR § 35.5 is a regulation promulgated by the Department of Health. The regulation is of no consequence in this case because if a regulation conflicts with FOIL, then FOIL controls. *Sheehan v. City of Syracuse*, 521 N.Y.S.2d 207 (1987); *Zuckerman v. NYS Board of Parole*, 385 N.Y.S.2d 811, 812 (1976); *Morris v. Martin, Chairman of the State Board of Equalization and Assessment*, 440 N.Y.S.2d 365, reversed 55 N.Y. 2d 1026 (1982); *Murtha v. Leonard*, 210 A.D. 2d 411 (2nd Dept 1994); *The Matter of Archdeacon v. Town of Oyster Bay*, 12 Misc. 3d 438 (Nassau Co. Sup. Ct. 2006). This is blackletter law and the respondent's appeals to resist the FOI law based on an internal regulation should be unavailing.

VII. PRIVACY/LIFE AND SAFETY

An agency cannot "merely rest upon a speculative conclusion that disclosure might potentially cause harm." *Markowitz v. Serio*, 11 N.Y.3d 43, 50 (2008). Further, evidentiary support is required if an exception to FOIL is being advanced. *Matter of the New York Times*

Co. v. New York State Exec. Chamber, 57 Misc. 3d 405, 420 (Albany Sup. Ct. 2017). The respondent goes to great lengths to attempt scare the Court into believing that even the production of names should be withheld. There is no support in the FOI law for these bold propositions, nor do they provide any in their papers. What they do provide is evidence that identity theft exists and that some unspecified group of individuals may not want the fact of their marriage to be made public. The fact is, the marriage record is already public. Respondent has provided no link between publicly available marriage records and identity theft. As discussed below, marriage records are freely available across our nation. Not one example of these records being misused is before the Court. Not one affidavit from an individual who would not want their marriage to be public is before the Court. The law requires more than speculation.

The amount of data which is released through FOIL is vast. The Purpose of the NYS FOIL law is itself expansive. The respondent bears the burden of showing that the litany of harms they conjure are significantly impacted by the marginal release of data at issue here. Releasing more data into the public realm is exactly the purpose of FOIL and it is disingenuous to lay at the feet of this request the whole of the harms of identity theft and the associated harm which could come from the lack of anonymity in today's society.

The Public Officers Law §89(3)(a) in its text tells us that names and addresses are or can be subject to disclosure under FOIL. The FOI law §89(3)(a) states in part that:

> 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

It is difficult to reconcile the position being taken by the respondent with the plain text of the FOI law. Further, the controlling caselaw does not support the respondent. Names and email addresses are subject to FOIL. *Laveck v. Village Board of Trustees, Village of Lansing*, 42 N.Y.S. 3d 460, 464 (3rd Dept. 2016); *Livson v. Town of Greenburgh*, 141 A.D.3d 658, 661 (2d Dept 2016).

The speculative nature of the State's argument with respect to health and safety is shown by New York City marriage records database. This database was published by Reclaim the Records in 2016 and can be found at www.nycmarriageindex.com. The affidavit of Brooke Schreier Ganz ("Ganz Aff.") at ¶3. If the cavalcade of ills imagined by the State of New York were likely, then New York City would have been experiencing those ills from the publication of the New York City marriage index. The Respondent does not present this argument, which further shows the speculative nature of their claims.

The Respondent should look to other states and see that those States which release in total an individual's marriage certificate to see if they have a significantly higher rate of identity theft. Ganz Aff. at ¶3 Exh. A, shows that of the 50 States and D.C., 39 of them would allow the production of the same kind of index information requested here. Many of the States allow the marriage licenses themselves to be produced. *Id.* This information shows that releasing an index of a marriage records is hardly unique in the nation. This Court should reaffirm New York's position as a State with a robust FOI law, and continue to allow these records to be publicly available. The respondent seeks to move New York State into the minority of jurisdictions which seek to hide marriage information.

VIII. IMPROPER SWEARING

The respondent novely construes a number of cases which talk about needing to have actual hard figures in contractual disputes before a judgment can be entered to argue that the

form of the petition is defective. Curiously, the respondent relies on the exact same series of letters and issues in their papers. Further, they point to no document in the petition which they believe specifically is not properly attested to. The respondent does not explain the infirmity of a petition verified *via* C.P.L.R. §3020(d)(3), nor do they identify one. Should the Court take issue with the form of our proof, we should be provided the opportunity to cure the defect.

IX. PURPOSE - Public Officers Law § 89 (2)(b)(iii)

The respondent is correct that an inquiry into the purpose of a request which implicates someone's privacy interest is appropriate in some circumstances. Public Officers Law § 89(2)(b)(iii). This inquiry is designed to limit commercial enterprises from mining data and soliciting the individuals whose information is obtained. Reclaim the Records is a not-for-profit organization which does take donations, but they have no interest in contacting the individuals whose information is obtained. Further, the request was also made in the name of Ms. Hepps and Ms. Ganz, neither of them have any commercial interest in these records. The purpose of these requests is to assist with genealogical research. If the Court were to conduct the analysis and find that Reclaim the Records' purpose violates the statute, the same cannot be said for the two individuals before the Court.

The Court of Appeals in *Federation of New York State Rifle & Pistol Clubs, Inc. v. New York City Police Department*, 73 N.Y.2d 92, 94-5 (1989), finds that a not-for-profit's intended solicitation of individuals who they were requesting contact information for violated Public Officers Law § (2)(b)(iii). However, in *Rifle & Pistol Clubs*, the intention was to directly solicit information for fundraising purposes. Here, there will be a donation button at the bottom of the page, but that is far from the intended purpose of the request and no direct contact with the

individuals is contemplated, nor would it be possible. Rankin Aff. at ¶10. The Court can see for itself what is contemplated by its review of the New York City records.

Public Officers Law §89(3)(a) specifically states that if the respondent wished, they could have requested an affidavit about the use of the information. The respondent did not make this request. Further, the respondent did not raise this issue at all in the administrative level. Petition Exh. K. The respondent did not raise the issue of the purpose of the request in their administrative denials, therefore it is an argument which is unavailable to them in this litigation. *Matter of Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 74 (2017) ("[J]udicial review of an administrative determination is limited to the grounds invoked by the agency" and "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.") (citations omitted).

The documents are not sought for the purposes of soliciting donations. Even if the Court does find that Reclaim the Records' purpose is violative of the statute, the same cannot be said for Ms. Ganz and Ms. Hepps. Further, this argument was not raised at the administrative level and cannot be raised here.

X. COUNSEL FEES

Counsel fees should be awarded in this matter for several reasons. The respondent's resistance to producing these records is contrary to the established law as articulated in *Gannett Co.* Should we prevail in this litigation, fees should be awarded due to the expensive and time-consuming nature of litigation. *Matter of Legal Aid Socy. v NY State Dept. of Corr. & Community Supervision*, 105 A.D.3d 1120, 1122 (3d Dept 2013); accord, *Matter of NY Civ. Liberties Union v City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dept 2011)("The counsel fee provision was first added to FOIL in 1982, based upon the Legislature's recognition that persons denied access to documents must engage in costly litigation to obtain them…").

Respondent's failure to deny the FOIL request, as discussed above, within the statutory allotted time gives further support for an award of counsel fees. *Id.* Among the departments, the Third Department has been especially robust finding the award of counsel fees to be proper. *Matter of Competitive Enter. Inst. v. Attorney Gen. of NY*, 161 A.D.3d 1283, 1286 (3d Dept. 2018); *Whitehead v. Warren Cty. Bd. of Supervisors*, 165 A.D.3d 1452, 1453-4 (3d Dept. 2018); *Matter of Cobado v. Benziger*, 163 A.D.3d 1103, 1107 (3d Dept. 2018). Further, the delay in access to the requested records by requiring the petitioners to bring the instant proceeding should result in an award of counsel fees. *Matter of Bottom v. Fischer*, 129 A.D.3d 1604, 1605 (4th Dept. 2015). Should the Court grant the petition, subsequent briefing should be allowed to determine the approximate amount of counsel fees.

XI. CONCLUSION

Respondent's unique and unsupported legal arguments should not be allowed to obscure that respondent is seeking to reverse over 100 years of precedent in our State. The court should take this opportunity to reaffirm that the established law in the State of New York is that at least the indices to marriage records are public documents.

Dated: January 11, 2019
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Respectfully submitted,

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