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RECLAIM THE RECORDS

Public Comment on New York City's Proposed Rule Changes Restricting Vital Records Access

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Good morning. My name is Brooke Schreier Ganz, and I am the president and founder of Reclaim The Records. Reclaim The Records is a 501(c)(3) non-profit activist group of genealogists, historians, researchers, and journalists advocating for open public access to archival records held by government agencies and libraries. We are the largest archival records activist group in America, measured both by membership and by impact. We have approximately 4,800 subscribers to our newsletter, and of them, about 820 people signed up from an IP address geo-located to within 50 miles of Times Square. That is almost a fifth of our membership in the New York metro area.

In the past three years, Reclaim The Records has successfully sued two different New York City agencies under the New York State Freedom of Information Law, also known as FOIL. We filed against DORIS, the Department of Records and Information Services, in 2015 and we filed against the New York City Clerk's Office in 2016. We won settlements and the records we sought both times, and even won our attorneys fees from the city once. Those millions of records are now online, and free.

In the past six months, Reclaim The Records has expanded beyond the city and successfully used FOIL to fight the New York State Department of Health for seventeen months to win the first-ever public copy of the entire New York State death index from 1880 through 1956. We also recently used New Jersey's open records law OPRA to fight the New Jersey Department of Health to win and publish for the first time ever the entire New Jersey marriage index, from 1901 through 2016. Those millions of records are also now online, and free, too.

And now we're here talking to you, the New York City Department of Health.

And I'm here this morning to talk about why we in the genealogical community and in the open records community *don't like you and don't trust you*.

When researchers and genealogists come to our organization, through e-mail and social media and by phone, and report terrible problems accessing birth certificates and death certificates to which they know they are legally entitled, and they ask us for records access help, or they simply want to vent about their frustrations, one government agency's name comes up the most. You are known in our community as the worst Department of Health to deal with in the entire country, the most unhelpful. The fact that you are right now threatening to restrict records access even more seems like a bad joke.

We don't trust your motivations in putting forward these proposed rule changes because we have witnessed and documented a pattern of behavior by the New York City Department of Health over many years where you have greatly restricted records access in ways that are jaw-dropping, or flatly

breaking the law. We don't believe you when you say these rules are being changed to protect the public. We have too much evidence that shows that you are just protecting yourself.

For example, up until a few months ago, the New York Public Library on 42nd Street held many rolls of microfilm and hundreds of bound books containing the index to New York city births and deaths, from the early twentieth century up through about 1982. This same index data was made available to the public through about 2008 onsite at your Department's offices. Then one day, a few months ago, in a horrendous break of the New York State Freedom of Information Law, your office apparently decided that these public records should not be public anymore. So your Department bullied the New York Public Library, and your people came in the night and took the books off the shelf of the public library, and the microfilm reels too, thereby “retroactively classifying” those public records, which had been available to the public for decades.

When we at Reclaim The Records heard about this situation, we were appalled. We have already held two different phone conferences with the executive director of the New York State Committee on Open Government in Albany to discuss this situation. The Committee has been funded by the New York State Legislature for decades, specifically set up to deal with issues of public records access. They issue numerous Advisory Opinions to requestors and agencies across the state to keep both groups in compliance with the law.

And in our two conferences with them, and with our attorney, the Committee was outraged by the reports of your Department's behavior. It is their view that your attempt at “retroactive classification” of those public documents – bullying the New York Public Library, literally going in and taking books off the shelves in the middle of the night! – is a gross violation of the New York State Freedom of Information Law. And I can guarantee you right now that this data will be the subject of a new Freedom of Information request by Reclaim The Records in the new year, which I am sure will quickly be filed by an Appeal, followed by an Article 78 petition and lawsuit in the Supreme Court of the state of New York. Guaranteed. In this country, and especially in this political climate, we do not want to go down a road where government agencies feel empowered to physically take away crucial records from the public libraries when they disagree with their existence, and yet that is exactly what your Department has done.

In fact, one of the primary reasons our organization transitioned to a 501(c)(3) non-profit structure this past February is to raise the six-figure war-chest that we need to fund the legal case against your Department for the return of this index data to the public. Luckily, I'm sure you're all aware that the New York State Legislature just passed a new law in their last session mandating that all government agencies who are found to have wrongly withheld public records from requestors in FOIL lawsuits will now be required to award attorneys fees and court costs, rather than it being left to the discretion of the judge in the case. And that is one new law that we will be very eager to try out.

But you guys didn't even limit yourselves to interfering with New York's Freedom of

Information Law; your Department went and inserted yourself into other states' laws and their public records fights, too. For example, Reclaim The Records currently has an active Missouri Sunshine Law case pending against the Missouri Department of Health and Senior Services. We are asking them for a copy of their basic post-1910 birth index and post-1965 death index, a very simple public records request to which they first agreed and then later attempted to deny. This was especially egregious because in the course of our lawsuit, we found out that Missouri's Department has been quietly selling this same data, making money off public records which they then don't want to provide to the public.

Missouri's bad behavior in this case won them a 2017 annual "Foilies Award" from the EFF, ranking them alongside other such open records luminaries as Trump and Sheriff Clarke. A few months later, the Investigative Reporters and Editors group (IRE) also awarded the case, by naming the Missouri Department of Health one of five finalists for their annual "Golden Padlock Award," for government agencies that didn't merely deny records requests but who were especially "devious" in how they tried to avoid public scrutiny. This same Missouri case was also profiled by NPR. I am bringing all this up not to brag, but to emphasize to you how shocking Missouri's behavior was, and how widely reviled by the press, as one of the worst examples of government records denial in the country in the past year.

Well, funny story. In the course of our Sunshine Law suit, Reclaim The Records won copies of the Missouri Department of Health's internal e-mails and meeting notices in discovery, and guess whose names we found in there? That's right, it was the New York City Department of Health. Specifically, it was your registrar of vital statistics Steven Schwartz and your assistant commissioner Gretchen Van Wye whose e-mails and phone meeting logs showed up in the internal Missouri documents. On behalf of the city of New York and your Department, Schwartz and Van Wye consulted by e-mail and over the phone with Missouri's bureaucrats on strategy about that very case, how to deny public records access to Missouri researchers. And when Missouri later wrongfully denied our public records request, Mr. Schwartz actually e-mailed them back to tell their registrar, quote, "That's good news!"

We've helpfully posted copies of Mr. Schwartz's and Ms. Van Wye's e-mails to our public Twitter feed so that you all can read them for yourself. I hope you do, and I hope the journalists in attendance here today will take the time to ask them about that case on the record.

But there's more. Your Department's proposed rule changes of 75 years and 125 years are taken directly from a suggested template known as the Model Vital Statistics Act and Regulations, specifically the version that was drafted in 2011. You mention that clearly in your proposal, as if it were the most logical and normal thing to conform New York City's outdated policies to this fancy new Act. But what you neglected to mention in your proposal is that this Act's implementation was placed on hold by the Department of Health and Human Services (HHS) in April 2012. The federal government didn't want to implement it. And you also fail to mention that this Act is not in place almost anywhere

else in the United States, thankfully. We say “thankfully” because this model Act was drafted in 2011 with absolutely no input solicited or received by the researcher community, genealogist community, or public records experts. It is a highly restrictive framework that would gut public access to vital records across the country, built in secret by a committee. That's why it hasn't been gaining traction with the states.

But guess whose name shows up as one of the only members of that small working group who drafted this flawed and restrictive Act? Yup, it's Steven Schwartz again, the New York City Registrar. And joining him in that working group, as the only person in the whole country who was meant to be representing the concerns of the law within that working group, was Wilfredo Lopez, the Former General Counsel for who else, the New York City Department of Health.

Taken all together, your Department shows a clear pattern of behavior that is in direct opposition to our right to transparency and the public's right to know about our government. So yeah, we're all very skeptical about your Department's stated motivations for this proposed rule change, which would only further deny records access to the public.

So instead of these unnecessary and overbroad rule changes, Reclaim The Records has put together a simple proposal for the Board, with rules we think would be far more appropriate. These rules balance the public's right to know with protections against actual identity theft. They are:

1. “Informational Only” Records. New York City should follow the lead of other vital records jurisdictions such as California and create what are known as “informational only” non-certified copies of vital records. These informational records would display all the same data as original records in a photocopy image, but would have the addition of large red text printed right on the page stating they are “For Informational Purposes Only – Not To Be Used as Proof Of Identity.” They would also lack the printed or raised seal of the city. If this Department is really as concerned with identity theft as you publicly claim to be, then you should have no problem following the lead of other states in making available these sorts of non-certified documents. It would allow researchers immediate access to the crucial information we seek without having any risk that the information contained in them could be used as false documentation.

2. No Waiting Periods. New York City should make these non-certified informational-only copies of birth certificates and death certificates available to the public without *any* waiting period. None. Zero. This is what is done in California, Massachusetts, and several other states, in some cases dating back to the time when the states were still colonies, without any proven ill effects. This bickering over the propriety of 50 years versus 75 years is ridiculous, because both timeframes are completely non-existent in numerous other states, from North Carolina to Iowa to Minnesota, all states with no waiting period, not even for birth certificates, because these states offer non-certified informational-only copies. Our right to access public records – our records, our families' records – is not up for negotiation by government agencies seeking to shirk their duties to civic transparency and

accountability. We are not going to sit here with you and horse-trade our rights.

3. Open Up the Index Data. New York City should immediately release the city's basic birth index and death index to the public as open data, in actual database format (such as SQL or CSV), with updates on an annual basis. The majority of other vital records jurisdictions in the United States publish this information every year without any fuss whatsoever, and yet New York City seems determined to hide it. These indices are *not* actual certificates of any kind, they are merely the finding aid, basically just a big spreadsheet with basic information such as surname, given name, sex, date of birth or death, borough or other locality of birth or death, and the certificate number. The New York Genealogical and Biographical Society has recommended in their petition to the Department that you should also add a new column of information on burial locations to this index, and we agree with them that this would be very helpful information.

Furthermore, New York City agencies are already required to release their internal data sets to the public under Local Law 11 of 2012, also known as the Open Data Law. The New York City Council voted on and passed this legislation on February 29, 2012, and it was signed into law on March 7, 2012. And a formal request was made to this Department through the city's official Socrata open data portal on May 1, 2013 asking for these indices.

It has now been over five and a half years since that citywide law was put in place, and four and a half years since that data request was filed with your Department, and still the New York City Department of Health still has not released any of that birth and death index information to the public. Instead, your meager open data offerings on the city portal include things like the list of local farmer's markets, and results of the latest youth surveys. Meanwhile, one of your Department's most consistent sources of revenue is the sale of copies of vital records to families and researchers, but you won't even give us the basic index to what you hold.

Finally, to close on a personal note, I am a proud fifth-generation New Yorker, although I presently live in exile in California. All eight of my great-grandparents are New Yorkers; five of them were born in the city and the other three immigrated through Ellis Island and settled here. About 95% of my research is concentrated here in the city, and all the records I need to use in my research are here. And it is thanks to decades of experience with the stubborn intransigence of New York City government agencies like this Department that I even founded Reclaim The Records in 2015 in the first place. Had New York City not been such a thoroughly miserable place for genealogists to deal with, I might never have sued the city multiple times and released over twenty million records.

I hope you will take seriously what is being said to you here today. I assure you that we are all taking it extremely seriously and will be following your actions closely. Thank you for your time.