

STATE OF NEW YORK
SUPREME COURT: ALBANY COUNTY

CO

In the Matter of the Application of

RECLAIM THE RECORDS and
BROOKE SCHREIER GANZ,

Petitioners,

-against-

THE NEW YORK STATE DEPARTMENT
OF HEALTH,

Respondent,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

VERIFIED PETITION

ALBANY COUNTY
INDEX # _____

RJI # _____

HON. _____

Petitioners Reclaim the Records and Brooke Schreier Ganz, for their verified petition pursuant to Article 78 of the New York Civil Practice of Law and Rules ("CPLR"), by their attorney Lewis Oliver Jr., Esq., do hereby state the following.

PRELIMINARY STATEMENT

1. Petitioners Reclaim the Records and Brooke Schreier Ganz ("Ms. Ganz") filed a request under Freedom of Information Law, Public Officers Law Article 6 §§ 84 - 90 ("FOIL") to obtain communications between respondent New York State Department of Health ("DOH") and Ancestry.com for the period of time wherein communications regarding the acquisition and copying of the New York State Death Index occurred.

Ms. Ganz filed this FOIL request attempting to obtain documents that would explain why her request for the same Death Index materials was responded to differently than the later request by Ancestry.com, and learn whether Ancestry.com was involved in becoming a vendor for the Department of Health by copying the microfiche into digitized records, possibly delaying petitioners' own access to the same records by over a year.

PARTIES

2. Brooke Schreier Ganz (Ms. Ganz) is the founder and president of Reclaim the Records, a 501(c)(3) nonprofit organization. The principle office of Reclaim the Records is located at Reclaim the Records, 905 Ventura Way, Mill Valley, California 94941.

3. Reclaim the Records is a 501(c)(3) nonprofit organization of genealogists, historians, researchers, and open government advocates which uses Freedom of Information requests to obtain public data sets from government agencies. Reclaim the Records scans or digitizes this data from older formats such as microfilms, and publishes the records online for free public use, without any copyrights or usage restrictions, thereby seeking to improve the public's access to that taxpayer-funded data. Reclaim the Records was founded in January 2015 and incorporated in December 2016. The IRS granted not-for-profit status in February 2017. The principle office of Reclaim the Records is located at Reclaim the Records, 905 Ventura Way, Mill Valley, California 94941.

4. The New York State Department of Health is agency of New York State

under the New York State Public Health Law which administrative public health programs and policies in the State and maintains public health records including the State Death Index. The principle offices of the Department of Health are located at The Corning Tower, Empire State Plaza, Albany, New York 12237.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this petition pursuant to CPLR § 7801, §7803(1), and §7803(3).

6. A proceeding under CPLR Article 78 is the proper mechanism for seeking judicial review of a state agency's determination with respect to a FOIL request pursuant to New York Public Officers Law (POL) §89(4)(b).

7. Petitioners have exhausted respondent DOH's internal appeals process, and the instant petition has been filed within the four-month period thereafter specified in CPLR §217(1).

8. Venue is proper in Albany Court pursuant to CPLR §§ 7804(a), 506(b) because respondent DOH made its determination and has its principle offices in the County of Albany.

9. The petitioners have no adequate remedy in law or equity other than the relief requested herein.

10. No previous application has been made by petitioners for the relief requested herein in this or any other court.

RELIEFSOUGHT

11. Petitioners request the Court to grant a judgment and order containing the following relief:

(a) Directing respondent New York State Department of Health (DOH) to produce all records and documents responsive to petitioners' October 17, 2017 FOIL request #17-10-253; and

(b) Directing respondent to explain the manner in which records are kept that allegedly prevent a search for responsive documents; and

(c) Directing respondent to produce information regarding its employees who conducted the search and their duties; and

(d) Directing respondent to produce information about the subject matter of its records; and

(e) Directing respondent to produce information about the search terms used to look for the records and documents requested; and

(f) Directing respondent to certify that a diligent search was conducted that failed to produce responsive records and documents requested; and

(g) Awarding the petitioners costs and disbursements and legal fees incurred in making the instant petition for relief; and

(h) Granting petitioners such other and further relief as the Court may deem just and proper.

STATEMENT OF FACTS

12. On October 17, 2017, petitioners Ganz and Reclaim the Records submitted a request to the FOIL Records Access Officer at the New York State Department of Health ("DOH") seeking records relating to respondent DOH's communications with Ancestry.com [see E-Mail from Brooke Schreier Ganz to New York State Department of Health FOIL website dated October 17, 2017, attached hereto as Exhibit A], in order to learn why there were apparent inconsistencies between DOH's processing of petitioners' earlier FOIL request for the New York State Death Index and its processing of the FOIL request for the identical materials submitted by Ancestry.com.

13. Ancestry.com is a for-profit company that endeavors to obtain genealogical data on a national and international level, which are derived from public records and government agency data sources, and to privatize and paywall that data within its online, searchable platforms and charges the public a substantial annual fee for access.

14. Ms. Ganz and Ancestry.com both endeavored to obtain marriage and Death Index from respondent DOH through filing Freedom of Information Law requests, and Ancestry.com's FOIL request received quicker and more favorable treatment than Ms. Ganz received. Although the same Records Access Office at DOH handled both FOIL requests, the timeline and procedures followed throughout the process for Ms. Ganz and Reclaim the Records was different than it was for Ancestry.com. Ms. Ganz FOIL request took more than one year for DOH to provide documents, but, in contrast, DOH produced digitized records of the New York State Death Index to Ancestry.com in under three (3) months. The factual

background is as follows:

A. FIRST FOIL REQUEST BY RECLAIM THE RECORDS

15. On January 4, 2016, Ms. Ganz filed a FOIL request with DOH for "a copy of the NY State death index in the basic fiche index only format, from June 1880, or as early as those records are available through December 31, 1956, inclusive." [A copy of an email from Brooke Schreier Ganz to DOH dated January 4, 2016 is attached hereto as Exhibit B.]

16. In response to Ms. Ganz's January 4, 2016 request for the Death Index, DOH issued a letter dated March 18, 2016 extending of their time to respond to April 29, 2016. [A copy of a letter from Danielle L. Rysedorph, Esq., Records Access Office, to Brooke Ganz dated March 16, 2016 regarding FOIL #16-11-037 is attached hereto as Exhibit C.]

17. On March 29, 2016, DOH issued a letter informing Ms. Ganz she would be required to pay approximately \$152,000 for the cost of DOH providing copies of the New York State Death Index. [A copy of a letter from Danielle L. Rysedorph, Esq., Records Access Office, to Brooke Ganz dated March 29, 2016 is attached hereto as Exhibit D.]

18. On April 4, 2016, petitioners requested DOH to provide a breakdown of the fees quoted by DOH, the name of the vendor who would perform the copying, and information regarding whether the vendor was selected by the bidding process. [A copy of a letter from Jane L. Moisan, Esq.,

Associate Attorney, Rankin & Taylor, to Danielle L. Rysedorph, Esq., Records Access Office, dated April 4, 2016 is attached hereto as Exhibit E.]

19. On May 27, 2016, DOH advised petitioners of conditions it would impose if Reclaim the Records wished to arrange an on-site inspection and copying of the Death Index. [A copy of a letter from Danielle L. Rysedorph, Esq., Records Access Office, to Brooke Ganz dated May 27, 2016 is attached hereto as Exhibit F.]

20. On June 3, 2016, Ms. Ganz filed an administrative appeal seeking information to explain the cost estimate of \$152,000 to produce copies of the Death Index, and requesting the name of the vendor to be used. [A copy of a letter from Jane L. Moisan, Esq., Rankin & Taylor to Danielle L. Rysedorph, Esq., Records Access Office, dated June 3, 2016 is attached hereto as Exhibit G.]

21. On June 20, 2016, DOH denied Ms. Ganz appeal in its entirety. [A copy of a letter from David J. Spellman, Esq., DOH Records Appeals Officer, to Jane L. Moisan, Esq., dated June 26, 2016 is attached hereto as Exhibit H.]

B. SECOND FOIL REQUEST BY RECLAIM THE RECORDS

22. After her appeal was denied, on October 14, 2016 Ms. Ganz filed a new FOIL Request #16-10-195 at the suggestion of Danielle L. Rysedorph, Esq., Records Access Office, again for the Death Index. [A copy of the email FOIL request from Brooke Schweier Ganz to the FOIL Unit of DOH dated October 14, 2016 is attached

hereto as Exhibit I.]

23. On November 15, 2016, DOH issued an email extending its time to respond to FOIL Request #16-10-195 until December 28, 2016. [A copy of an email from Danielle L. Rysedorph, Esq. to Brooke Ganz dated November 16, 2016 is attached hereto as Exhibit J.]

24. On December 20, 2016 DOH sent a letter to Ms. Ganz concerning requirements for a scanner and archivist. [A copy of a letter from Rosemarie Hewig, Esq., to Brooke Ganz dated December 20, 2016 is attached hereto as Exhibit K].

25. On December 28, 2016, DOH again extended its time to respond until February 10, 2017. [A copy of an email from Rosemarie Hewig, Esq., Records Access Officer, dated December 28, 2016 is attached hereto as Exhibit L.]

26. On May 15, 2017 DOH issued its first FOIL response to Reclaim the Records. [A copy is attached hereto as Exhibit M].

C. FOIL REQUEST BY ANCESTRY

27. On March 9, 2017, over a year after Ms. Ganz first request, Ancestry.com filed its FOIL Request #17-03-180 with DOH for the identical Death Index materials *verbatim* requesting, "a copy of the NY State death index in the basic fiche index only format, from June 1880, or as early as those records are available through December 31, 1956, inclusive." [A copy of an email FOIL request by Jared Akenhead, Service Manager, Acquisitions, Ancestry.com to the DOH FOIL unit dated March 9, 2017 is attached hereto as Exhibit N].

28. On May 15, 2017, upon information and belief, DOH issued its final FOIL responses to Ancestry.com's request for the Death Index by producing responsive records in a digitized format. [A copy of an email from Jessica Tomkiell, Esq., Senior Attorney, NYSDOH Division of Legal Affairs, Records Access Officer to Mr. Akenhead dated May 15, 2017 is attached hereto as Exhibit O.]

D. THIRD FOIL REQUEST BY RECLAIM THE RECORDS

29. On October 17, 2017 Ms. Ganz filed a FOIL request seeking communications between DOH and Ancestry.com to explain what had transpired, and why DOH had responded differently to her FOIL request than it had to Ancestry.com's request for the identical materials [see Exhibit A].

30. This request seeks electronic copies of all "correspondence, e-mails, proposals, drafts, notes, agreements, contracts, meetings and calendar entries, phone logs, meeting minutes, budget items, receipts, vendorization forms or data, bids, evaluation materials, Freedom of Information Law (FOIL) records requests and their associated correspondence and any appeals, and any other documentation or communications" between respondent DOH and "Ancestry, Ancestry LLC, Ancestry.com LLC, Ancestry.com Holdings, ancestry.com Holdings.com Holdings LLC, or similar terms." The request limited the time frame from between January 1, 2015 to October 17, 2017 [see Exhibit A].

31. On October 18, 2017, Ms. Ganz received an E-Mail from

respondent DOH confirming receipt of her FOIL Request, FOIL #17-10-253. [A copy of an E-Mail from _____ to Brooke Ganz is dated October 18, 2017, attached hereto as Exhibit P.]

32. Ms. Ganz received a letter from DOH dated November 15, 2017 extending DOH's time to respond to her FOIL request until January 23, 2018. [A copy of a letter from Rosemarie Hewig, Esq., to Brooke Scheier Ganz dated November 15, 2017 is attached hereto as Exhibit Q.]

33. Ms. Ganz received a letter from DOH dated January 23, 2018 constituting a partial grant and partial denial of her FOIL Request. [A copy of a letter from Rosemarie Hewig, Esq., to Brooke Schreier Ganz dated January 23, 2018 is attached hereto as Exhibit R.]

34. DOH's January 23, 2018 letter enclosed some responsive documents, including copies of Ancestry.com's Death Index FOIL request #17-03-180 and Marriage Index request #17-06-346 and some communications between DOH and Ancestry.com concerning these requests. [See E-Mails from Jared Akenhead dated March 9, 2017 and June 22, 2017; letters from DOH dated March 10, 2017; April 7, 2017; June 23, 2017; July 24, 2017; and September 26, 2017; and E-Mail from DOH Division of legal Affairs dated May 15, 2017 attached hereto as collectively part of Exhibit R.]

35. Respondent DOH denied the remaining portions of Ms. Ganz's FOIL request, referencing Public Officers Law §89(3) and stating DOH could not produce the records, "as your FOIL request fails to reasonably describe the records you are seeking with sufficient detail to enable this Department to locate them." [See Exhibit R].

36. In its January 23, 2018 letter DOH failed to describe any searches it may have conducted for the requested records, pursuant to its obligations under Public Officers Law § 89(3). [See Exhibit R].

37. Respondent DOH also failed to meet its obligation under Public Officers Law 89(3) that regulate the situation where agency staff cannot locate a record. Specifically, respondent DOH failed to "certify that...such record [could not] be found after diligent search." [See Advisory Opinion dated August 13, 2002, FOIL-AO-2002 State of New York Department of State Committee on Open Government, attached hereto as Exhibit S].

38. On February 20, 2018, Ms. Ganz submitted to DOH an Administrative Appeal which requested that DOH provide responsive materials, or provide information about how these types of records are held in order to better enable her to file a successful subsequent FOIL request. [A copy of a letter from David B. Rankin, Esq., to the Records Access Appeals Officer, Division of Legal Affairs, DOH dated February 20, 2018 is attached hereto as Exhibit T.]

39. Ms. Ganz's appeal provided additional specificity as to the records sought.

40. The appeal specified that the FOIL request sought records of "business and contracts between the Department of Health and Ancestry.com." [See Exhibit T].

41. The appeal additionally specified, "emails sought are likely to belong to employees within the Department of Vital Records." [See Exhibit T].

42. The appeal went on to state that relevant E-Mails may be between "employees or agents of Ancestry.com and DOH employees who are members of the Division of Legal Affairs who work with the Department of Vital Records" as well as "the DOH Division of Legal Affairs who may have worked on a contract or projects with Ancestry.com." [See Exhibit T].

43. Pursuant to Public Officers Law 89(a)(4) respondent DOH was required to make a written determination regarding the appeal within 10 business days of receipt by the agency.

44. Ms. Ganz and Reclaim the Records has never received a response to the February 20, 2018 appeal from the Records Access Appeals Officer of DOH.

45. In the absence of any response from DOH, the appeal by Reclaim the Records and Ms. Ganz was constructively denied at the termination of the 10-day period after February 20, 2015. *See Matter of Molloy v. New York City Police Dept.*, 50 A.D.3d 98, 99-100 (1st Dept. 2008).

FIRST CAUSE OF ACTION

46. Each and every allegation contained in paragraphs numbered 1 to 45 are hereby repeated and realleged as if fully set forth herein.

47. The respondent New York State Department of Health (DOH) violated the Public Officers Law 89 et. seq. by failing to conduct a sufficient search and failing to produce all of the records and documents that were in its control requested in Ms. Ganz FOIL request #17-10-253 dated October 17, 2017 even though she adequately specified

the records and documents requested and DOH had adequate information to identify the documents.

A. THERE IS REASON TO BELIEVE THAT ADDITIONAL RECORDS OF COMMUNICATIONS BETWEEN DOH AND ANCESTRY.COM EXIST

48. There is good reason to believe that additional records and documents containing communications between DOH and Ancestry.com about Ancestry's request for the Death Index exist than what have been produced by DOH in response to petitioner's FOIL request.

49. The same two DOH Records Access Officers, Danielle Rysedorph, Esq., Rosemarie Hewig, are signatory to both Ms. Ganz's and Ancestry.com's requests for the Death Index, and it is logical that similar communications would exist between DOH and Ancestry.com as existed between DOH and Ms. Ganz.

FORMAT DIFFERENCE: RELEASE OF ORIGINAL DEATH RECORDS IN MICROFICHE FORMAT

50. Ms. Ganz request seeks communications relating to any process and procedure DOH followed in response to Ancestry.com's proposal that the fiche of the Death Index be mailed directly to Ancestry.com, who would convert the fiche to digital format and return the fiche as well as provide the digitized records to DOH.

51. DOH's response to Ms. Ganz indicated that the agency would not release the original Death Index data which was stored in microfiche format to a requestor

under FOIL. DOH's March 29, 2016 letter to Ms. Ganz stated that, "the Department maintains the requested Death Records data only to in microfiche format."

52. Ancestry requested in its March 9, 2017 FOIL request that DOH should provide Ancestry with a copy of the fiche of the Death Index in its original format so that Ancestry could convert the fiche into digital format.

53. Ancestry.com stated in its March 9, 2017 FOIL request for the Death Index, "I request that a copy of the fiche be sent to the address below ... at which time we will convert the fiche to digital format. Once this process has been completed we will return the original fiche back to you, along with a copy of the digital product, once it is completed."

54. DOH's May 15, 2017 correspondence to Ancestry.com stated "this email correspondence serves to acknowledge your receipt of the digitized records you requested (NYS Death Index). As such we now consider your FOIL request closed."

55. DOH has not produced any communications between DOH and Ancestry that contain any notification to Ancestry that DOH maintained the Death Index data only in microfiche format.

56. DOH has not produced any communication that contains information advising Ancestry that original records of the agency under its control can not be given to the possession of a FOIL requestor.

57. DOH has not produced any communications that contains information about how or why DOH was able to produce the Death Index in digitized format to Ancestry, when its communications with Ms. Ganz had indicated the data existed only on

microfiche.

58. Based on Public Officers Law it is reasonable to believe DOH notified Ancestry.com that the agency would not release custody and control of original Death Index in microfiche format to a FOIL requestor. These notification documents should be produced.

COPYING FEE

59. In its March 29, 2016 follow up letter to Ms. Ganz, DOH informed Ms. Ganz of the projected \$152,000 fee for producing copies of the microfiche Death Index records, stating "contractors are able to provide a copy of the microfiche data for approximately \$2,000 per calendar year requested. You requested seventy-six years of data which would total approximately \$152,000. Please let us know if you would like this information for this amount."

60. In its March 29, 2016 letter DOH also stated, "[p]lease note that the cost of providing the requested data to you in any alternative format other than microfiche would greatly exceed the quoted cost, as the Department currently does not maintain this data in any other format."

61. DOH also stated in its March 29, 2016 letter to Ms. Ganz that, "[o]nce the copying is complete, we will send you a final fee letter detailing the remaining fee. Upon payment of the final stated fee, the Department will release the records."

62. However, despite that a record of Ancestry.com's receipt of digitized records was included in the materials produced to Ms. Ganz, no communications between DOH and Ancestry.com related to payment of a copying fee by Ancestry was produced.

63. In a letter dated ___ DOH advised Ms. Ganz that after she paid the estimated copying fee of \$152,000 she would receive a final bill for the balance due of the cost of copying.

64. DOH did not produce any materials to Ms. Ganz indicating that Ancestry.com had received a final fee letter, despite that the Death Index records had been released. Public Officers Law provides that the agency may charge a fee to FOIL requestors making copies of public records.

65. Based on the documents provided by the agency DOH required Reclaim the Records to pay for copying the Death Index, but did not bill Ancestry.com for the same records.

66. Based on the Public Officers Law it is reasonable to believe DOH must have sent a billing letter to Ancestry for the Health Index date, but DOH has not produced any bill to Ancestry. These estimates and billing documents should be produced.

INSPECTION AND COPYING OF ORIGINAL DEATH INDEX RECORDS

67. In its May 27, 2016 follow up letter to Ms. Ganz's FOIL for the Death Index, DOH stated a number of requirements and conditions related to any on-site inspection and copying of the original microfiche of the Death Index records, and related to any proposals for vendors to perform on-site copying.

68. With regard to on-site inspection and copying, DOH's letter to Ms. Ganz dated May 27, 2016 stated any on-site inspection and copying of records would require

arrangement with the Records Access Office and satisfaction of six detailed conditions.

These conditions were stated as follows:

- a. You must submit to this office your proposed method of copying the fiche records in advance (i.e. the type of machinery you plan on using and its production capabilities.
- b. Inspection and copying will be done under supervision of at least one Department employee, in order to protect the integrity of the records.
- c. Please note that while generally the time for inspection and copying is from 9-5, proposed times for inspection and copying need to be submitted to the Department at least ten business days in advance to give the Department time to prepare and are subject to the Department's availability and approval.
- d. In addition to yourself, you are allotted to bring no more than one guest with you at the time of inspection to assist with the copying.
- e. Given the amounts of records that need to be copied and limited Department resources to supervise this project, copying would need to occur in batches of no more than a certain number of fiches per session based on review of your machinery's output capabilities and availability of the Department staff.
- f. Location of inspection and copying is at the discretion of the Department and is to be determined, but can only occur on-site."

69. DOH has not produced any records or documents containing communications between the agency and Ancestry.com indicating any similar requirements or conditions were placed on processing Ancestry.com's request for the Death Index data.

70. Based on the Public Officers Law, DOH should have imposed similar requirements for on-site inspection and copying by Ancestry. DOH should produce all records and documents advising Ancestry.com about terms and conditions for Ancestry.com to conduct an on-site inspection and copying the original Death Index fiche records.

VENDORS

71. Ms. Ganz's request includes records and documents containing qualifications of any vendor who Ancestry.com might employ to conduct on-site inspection and copying of the Death Index microfiche, and that the contract with the vendor might be subject to competitive bidding.

72. In its May 27, 2016 letter to Ms. Ganz, with regard to requirements and conditions posed relating to the use of any vendors to copy the Death Index microfiche, DOH stated "you are free to send information to the Department regarding an experienced vendor. The Department could receive such information for review with the understanding that the Department must be compliant with procurement statute rules and regulations. Please note that if the Department determines that there will be competitive bidding in the future the vendor you are sending information to the Department about must go through the same process and procedures as all other vendors as required."

73. DOH has not produced any records or documents notifying Ancestry.com of the agency's requirements to receive information about vendors to copy the original Death Index fiche records into digital format, or that the vendor

might have to go through the competitive bidding process.

74. Based on Public Officers Law it is reasonable to believe DOH must have notified Ancestry.com that the agency had requirements for vendors that would copy original Death Index records from fiche to digital format, and that the vendor(s) might have to go through the competitive bidding process. The documents notifying Ancestry.com should be produced to petitioners.

VENDOR CONTRACTS FOR PRODUCTION OF DIGITIZED RECORDS

75. Ms. Ganz's request encompasses records and documents containing communications relating to any process DOH may have followed pursuant to vendor procurement statutes, rules and regulations.

76. Ms. Ganz requests includes records and documents containing communication between DOH and Ancestry.com concerning DOH engaging in a contract with Ancestry.com, and/or a vendor engaged by Ancestroy.com, and/or a vendor unconnected to Ancestry, regarding digitizing the Death Index.

77. Ms. Ganz's request also includes communications between DOH and Ancestry.com that indicate whether DOH had upheld its obligations pursuant to Public Officers Law 87(5)(b), prohibiting an agency from entering into or renewing "a contract for the creation or maintenance of records if such contract impairs the right of the public to inspect or copy the agency's records." The contract procurement process apparently resulted in DOH delaying Ms. Ganz access to those records for nearly a year

and a half after filing her FOIL request.

78. Assuming that DOH's representation to Ms. Ganz that the Death Index records existed only in microfiche format was correct, it is logical to conclude that the agency contracted with some vendor to convert the original records in microfiche format to a digital format because DOH provided the Death Index to both Reclaim the Records and Ancestry.com in digital format.

79. DOH has not produced any contract for a vendor to copy the original Death Index data in fiche format into a digitized format.

80. DOH should produce any records and documents advising Ancestry.com about qualifications for vendors who would copy the microfiche Death Index and put them in digitized format.

81. DOH should produce any contracts with Ancestry.com and/or a vendor engaged by Ancestry.com, and/or a vendor unconnected to Ancestry.com who the agency contracted with to convert the Death Index records from microfiche to digital format.

ESTIMATED PRODUCTION DATE

82. DOH had stated in its March 29, 2016 letter to Ms. Ganz that upon confirmation of payment, "the Department will also provide you with an estimate on when you can expect to receive the requested records."

83. While the produced materials include a confirmation of Ancestry.com's receipt of the digitized Death Index materials, nothing was produced to show a similar

communication had occurred between DOH and Ancestry.com as had been made between DOH and Ms. Ganz regarding an estimated timeframe for providing the records to Ancestry.com.

84. Assuming DOH treated Ms. Ganz and Ancestry.com's identical FOIL requests similarly, DOH documents notifying Ancestry.com when the agency would provide the records to Ancestry.com should be provided.

85. DOH therefore (1) failed to conduct a search or produce records of communications between the agency and Ancestry that contained information about the format, copying fees, site inspection, copying, delivery and/or vendor related communications with Ancestry.com, and/or (2) failed to explain why this search could not be conducted based upon its manner of file management, and/or (3) failed to certify that such a search had been conducted.

B. MS. GANZ'S FOIL REQUEST CONTAINED SUFFICIENT INFORMATION TO IDENTIFY THE RECORDS REQUESTED

86. Respondent DOH had sufficient information to allow it to conduct a search for the records and documents requested by Ms. Ganz containing communications between the agency itself and Ancestry.com for the microfiche of the Death Index.

87. The FOIL request and appeal provided numerous search terms, including numerous terms for the form of requested materials, such as "calendar entries," "budget items," "receipts," "bids," and "vendorization forms," "business," and "contracts."

88. The FOIL request also provided several search terms for Ancestry.com, including "Ancestry, Ancestry LLC, Ancestry.com LLC, Ancestry.com Holdings,

ancestry.com Holdings.com Holdings LLC, or similar terms."

89. Further, the FOIL request and appeal provided specificity as to what division the records may be located, including the Department of Vital Affairs and the Division of Legal Affairs.

90. Upon information and belief, during DOH's own process for reviewing the documents that were produced to Ms. Ganz, DOH would have discovered additional sources for records and documents responsive to Reclaim the Records request for documents pertaining to Ancestry.com's request for the Death Index records.

91. Information that was or should have been obtained in reviewing documents produced to Ms. Ganz includes the identity of specific DOH employees who communicated with Ancestry.com.

92. Rosemarie Hewig, Esq., signing as the Records Access Officer, appears in communications with Jared Akenhead of Ancestry.com dated March 10, 2017; April 7; 2017; June 23, 2017; July 23, 2017; and September 26, 2017.

93. Jessica Tomkiell, Esq., Senior Attorney of DOH Division of Legal Affairs, appears as the signatory on a May 15, 2017 E-Mail to Mr. Akenhead, confirming Mr. Akenhead's receipt of DOH's response to his FOIL request, specifically, confirming receipt of the NYS Death Indices in digitized format.

94. The produced documents, including Ancestry.com's June 22, 2017 FOIL request, contained the E-Mail address of "JAKENHEAD@ANCESTRY.COM" as a potential search term.

95. Respondent DOH (1) failed to conduct a search for communications

between Ms. Hewig and/or Ms. Tomkiell and Ancestry.com and/or for department E-Mails containing the email address "jakenhead@ancestry.com", and/or (2) failed to certify that this search had been conducted; and/or (3) failed to explain why this search could not be conducted based upon its manner of file management.

96. In addition to information that DOH obtained or should have obtained via its review of produced materials, DOH was in a position to know which of its employees would likely have responded to FOIL requests and vendor bids, in particular.

97. DOH would also have been aware of the language of these requirements as constituting useful search terms for locating materials related to whether DOH communicated with Ancestry.com regarding vendors or record copying.

82. Public Officer Law 87(3)(b) requires that each agency maintain, "a record setting forth the name, public office address, title and salary of every officer or employee of the agency."

83. However, without having provided information regarding DOH employees, DOH's January 23, 2018 partial denial requested of Ms. Ganz that she provide respondent with "a list of specific employees whose communications you are seeking[...]" *Id.*

84. Ms. Ganz would have been better able to provide additional specificity if DOH provided information about employees at DOH and their titles.

85. In addition, respondent DOH failed to provide information regarding its record keeping systems, pursuant to its obligations under *Konigsberg v. Coughlin*, 68 NYS2d 245, 250 (1986), which would demonstrate that the requested search could not

have reasonably been conducted.

86. Ms. Ganz may have been better able to provide additional specificity had DOH provided information related to the subject matter of its own records pursuant to Public Officers Law § 87(3)(c), which provides that an agency shall be required to keep, "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

87. Ms. Ganz provided sufficient information in her FOIL request and her appeal to enable DOH to locate responsive records with reasonable effort. Further, DOH was aware of its own previously stated requirements and processes for seeking and evaluating vendors, and was aware of specific departments, employees and email addresses involved in communications with Ancestry.com.

NO CERTIFICATION

88. Respondent DOH did not certify that a diligent search for records and documents of communication between the agency and Ancestry had been conducted and that the additional records requested by Reclaim the Records could not be found, nor did it explain why its manner of record keeping precluded such a search.

89. Ms. Ganz seeks records and documents capable of shedding light on why and how DOH was able to respond to Ancestry.com's request for the Death Index microfiche, with the production of digitized copies in under four months. Ms. Ganz seeks materials to answer questions as to whether Ancestry.com was involved in copying the microfiche into digitized records, possibly delaying her own access to the Death Index materials by over a year.

LEGAL FEES AND COSTS

Public Officers Law 89(4)(c) provides that in an Article 78 proceeding (a) the court may assess reasonable attorneys fees and other litigation costs reasonably incurred by the petitioner against from an agency when the petitioner has substantially prevailed and the agency had no reasonable basis for denying access, or the agency failed to respond to a request or appeal within the statutory time, and further, (b) the court shall assess such reasonable attorneys fees and other litigation costs reasonably incurred when the petitioner has substantially prevailed and the court finds the agency had no reasonable basis for denying access.

In this case, petitioner should substantially prevail because records and documents concerning Ancestry's FOIL request should be provided as a result of this petition, because the agency failed to respond to the applicant's request or appeal within ten (10) days of February 23, 2018, and the agency had no reasonable basis for denying petitioner access to these records and documents.

WHEREFORE, the undersigned petitioners respectfully request this Court to enter a judgment and order containing the following relief:

- (a) Directing respondent New York State Department of Health (DOH) to produce all records and documents responsive to petitioners' October 17, 2017 FOIL request #17-10-253; and
- (b) Directing respondent to explain the manner in which records are kept that allegedly prevent a search for responsive documents; and

- (c) Directing respondent to produce information regarding its employees who conducted the search and their duties; and
- (d) Directing respondent to produce information about the subject matter of its records; and
- (e) Directing respondent to produce information about the search terms used to look for the records and documents requested; and
- (f) Directing respondent to certify that a diligent search was conducted that failed to produce responsive records and documents requested; and
- (g) Awarding the petitioners costs and disbursements and legal fees incurred in making the instant petition for relief; and
- (h) Granting petitioners such other and further relief as the Court may deem just and proper.

Dated: June 20, 2018
Albany, New York

Respectfully submitted,

By: Lewis B. Oliver, Jr.

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