At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 11th day of January 2019

PRESENT: HON. PATRICK J. McGRATH
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Petitioners,

JUDGMENT
Index No. 905431-18

-against-

THE NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

APPEARANCES: BELDOCK LEVINE & HOFFMAN, LLP
David B. Rankin, Esq.
Attorneys for the Petitioners

HON. LETITIA JAMES
Attorney General for the State of New York
(Lynn Knapp Blake, of Counsel)
For the Respondent

McGRATH, PATRICK J., J.S.C.

Petitioners brings this proceeding pursuant to CPLR Article 78 and the Freedom of Information Law ("FOIL") seeking an Order directing the Respondent to produce a complete copy of the New York State marriage index from January 1, 1967 through December 17, 2017, and for attorneys fees. Respondent opposes the petition and petitioners have submitted a Reply.

On September 12, 2017, petitioner Ganz (founder and president of Reclaim the Records) sent a FOIL request to respondent Department of Health ("DOH"), requesting a copy of the New York

State marriage index from 1881 (or as early as such records are available) through December 31, 2016, inclusive. Ms. Ganz indicated that the purpose for the request was to assist in genealogical research. The request was filed through MuckRock.com, a non-profit information sharing platform that assists anyone tracking, filing or sharing public records requests. *See* https://muckrock.com/about/how-we-work/. At the end of the letter request, there is a note which indicates that "for mailed responses, please address: MuckRock, DEPT MR 42930, 411A highland Avenue, Somerville, MA 02144-2516."

On September 13, 2017, Ms. Ganz received a letter via email from DOH acknowledging receipt of her request and stating that a "determination as to whether your request is granted or denied will be reached in approximately 20 business days." Ms. Ganz then received a letter dated October 12, 2017, indicating that DOH was unable to respond by the date previously given but would complete its process by April 12, 2018.

On February 15, 2018, DOH Records Access Officer Rosemary Hewig sent an email to Ms. Ganz indicating that DOH had finished processing her request and that she would receive responsive materials via United State Postal Service ("USPS").

Attached to the email was a response letter from Ms. Hewig, indicating that she was "enclos[ing] documents responsive to your request". Ms. Ganz was informed of her right to appeal any denial within 30 days. The February 15, 2018 physical letter and responsive materials were mailed to MuckRock (Brooke Ganz) at the Somerville, Massachusetts address listed in the September 12, 2017 FOIL request.

On March 8, 2018, Muck Rock notified Ms. Ganz that they had received her records, which were sent via USPS on March 9, 2018, which were received the next day. On March 15, 2018, Ms. Ganz realized that DOH failed to provide her with records for the years 1968-2016.

On March 30, 2018, Ms. Ganz spoke to Ms. Hewig, who informed her that the records for 1968-2016 would not be produced.

On April 9, 2018, Ms. Ganz filed a letter of appeal addressed to the Records Access Appeals Officer at the New York State Division of Legal Affairs. By letter dated April 24, 2018, respondent denied petitioner's appeal in its entirety.

On July 11, 2018, petitioner Hepps (treasurer of Reclaim the Records) sent a FOIL request to DOH, seeking an electronic copy of the New York State marriage index from January 1, 1967 though December 31, 2017, inclusive. The request was for "basic index only, which might also be known as a 'marriage log' or a 'finding aid' or a 'database extract' or similar terms." As of August 7, 2018, DOH had failed to respond to Ms. Hepps' request. On that date, Ms. Hepps filed an appeal from the constructive denial to the Appeals Officer at the New York State Division of Legal Affairs. On August 9, 2018, respondent denied Ms. Hepps' request.

Timeliness of the Appeal

Respondent argues that petitioners did not appeal in a timely matter and therefore failed to exhaust their administrative remedies. POL 89 (4)(a) provides in pertinent part that "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity...who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought." POL 89(4)(b) provides that "a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules." Respondent argues that it responded to the request on February 15, 2018, but that Ganz did not appeal until April 9, 2018, more than fifty (50) days after the February 15th response.

Respondent argues that the re-submitted request of July 11, 2018 by Ms. Hepps did not revive the initial request. DOH argues that FOIL does not require DOH to reconsider duplicative requests. *Citing* Vann v. Callahan, 16 AD3d 849 (3d Dept. 2005) ("petitioner's instant FOIL request is essentially identical to his prior requests, the denials of which, except for one in 1994, petitioner failed to seek judicial review. Accordingly, this proceeding constitutes nothing more than a belated attempt to challenge [the] previous responses to petitioner's requests and is, therefore, barred by the statute of limitations.").

Petitioners argue that DOH never provided a written denial to Ms. Ganz's concerning the years 1968-2016, in contravention of POL 89(3), which provides that "[e]ach 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 and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied...." (Emphasis supplied). Petitioners cite Barrett v. Morgenthau, 74 NY2d 907 (1989) for the proposition that defects in a denial letter remove the ability of the respondent to argue that matter was not properly exhausted. Id. ("Inasmuch as District Attorney failed to advise petitioner of the availability of an administrative appeal in the office and failed to demonstrate in this proceeding that procedures for such an appeal had, in fact, even been established, he cannot be heard to complain that petitioner failed to exhaust his administrative remedies."); *see also* Matter of Wagstaffe v David, 26 Misc. 3d 1229(A) (Sup. Ct., New York County, 2010) ("It was the failure of the RAO to meet its statutory obligations [pursuant to POL 89 (4)(a)], and, within 10 days of receipt, to provide [petitioner] with a written explanation of the reason(s) for further denial or to provide access to the requested materials, which entitled [petitioner] to seek relief pursuant to Article 78.").

Further, that Ms. Hepps' request was her own, and that respondent points to no case wherein a FOIL request from a different individual seeking the same records could be denied as duplicative.

The burden at all times rests with the agency to justify any denial of access to requested

records. *See* Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462 (2007). If a FOIL request is denied, the agency "must show that the requested information falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." Id. at 462-463, *quoting* Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 (1986).

First, the Court disagrees with petitioners' contention that respondent delayed their ability to appeal by shipping the responsive documents "to a physical address across the country" because respondent shipped the documents to the exact address in Massachusetts as directed in Ms. Ganz's September 12, 2017 request. Respondent cannot be faulted for complying with petitioners' instructions. However, respondent did not comply with its statutory obligations under POL 89(3) by failing to provide a written denial of the a portion of the requested materials. There is nothing in respondent's February 15, 2018 email or letter to indicate that a portion of the records request had been denied, or if those records simply did not exist. The burden to make a determination of whether an appeal is even necessary cannot be shifted to the petitioner. Respondent's argument that petitioners failed to exhaust administrative remedies is without merit.

FOIL

The legislative declaration section of FOIL announces New York's public policy that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions..." [T]he public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of [FOIL]." POL 84.

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." Matter of Fink v Lefkowitz, 47 NY2d 567, 571 (1979). This Court must bear in mind "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." Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen, 69 NY2d 246, 252 (1987). In keeping with that policy, "FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted." Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 (1986); *see* POL 87 [2]. "Notably, blanket exemptions for particular types of documents are inimical to FOIL's policy of open government, and the agency must articulate a particularized and specific justification for denying access to the requested documents." Matter of Police Benevolent Assn. of N.Y. State, Inc. v State of New York, 145 AD3d 1391, 1392 (3d Dept. 2016) [internal quotation marks, brackets and citations omitted]; *see* Matter of Gould v New York City Police Dept., 89 NY2d 267, 275 (1996).

Respondent first argues that the documents sought by petitioner are exempt from disclosure under Public Officers Law 87(2)(a), which bars access to records "specifically exempted from disclosure by state...statute." Respondent cites 10 NYCRR 35.5(b)(4), which provides that "no information shall be released from a record of marriage unless the record has been on file for at least

50 years and the parties to the marriage are known to the applicants to be deceased." A statute is defined as a "legislative act" being the result of the combined action of both the Legislature and the Governor on a bill. Sheehan v. Syracuse, 137 Misc. 2d 438, 440 (Sup. Ct., Onondaga County, 1987) *citing* 56 NY Jur, Statutes, § 1. Public Officers Law 87(2)(a) does not apply since respondent relies on a regulation barring access to the records and not a statute. *See* Zuckerman v. New York State Bd. of Parole, 53 AD2d 405 (3d Dept. 1976) ("a regulation cannot be inconsistent with a statutory scheme ... and the statute involved here specifically states that exemptions can only be controlled by other statutes, not by regulations which go beyond the scope of specific statutory language."); Murtha v. Leonard, 210 AD2d 411 (2d Dept 1994) (Village regulation permitting the village clerk to limit the hours during which public documents could be inspected to a period of time less than the business hours of the clerk's office was violative of the Freedom of Information Law); Herald Co. v. Feurstein, 3 Misc. 3d 885 (Sup. Ct., New York County, 2004) (exemption for records that are specifically exempted from disclosure by state or federal statute (Public Officers Law § 87 [2] [a]) not applicable to Tribal-state gaming compacts, which are agreements, not legislation.); Matter of Archdeacon v. Town of Oyster Bay, 12 Misc.3d 438 (Sup. Ct., Nassau County, 2006) ("9 NYCRR Part 9978, the rules and regulations enacted to guide the temporary commission, does not constitute a "statute" sufficient to provide an exemption under FOIL.).

Next, respondent argues that the requested records are exempt pursuant to Public Officers Law 87 (2)(b), which permits an agency to deny access to records or portions thereof if disclosure "would constitute an unwarranted invasion of personal privacy." Respondent argues that the marriage index contains a large amount of information, including whether the marriage is the first or subsequent ceremony, whether either spouse was previously known by another name, date of marriage, county of marriage, social security numbers, place of birth for each party, and the sex of each spouse. Respondent expresses concern about identity theft and data breaches should this information be revealed, especially with regard to the release of records closer in time to the present. Additionally, respondent argues that the requested disclosure "could endanger the health and safety" of victims of domestic violence, as well same sex couples and transgender individuals who do not wish to be identified. POL 87(2)(f). The index may also include some individuals who are minors, as New York permitted marriage at age 14 with parental consent up until 2017.

Petitioner relies on Gannett Co. v. City Clerk's Office, 157 Misc.2d 349 (Sup. Ct., Monroe County, 1993) wherein city officials denied a journalistic organization's access to the names of those couples to whom marriage licenses had been issued, arguing that the records were exempted from disclosure under FOIL. The court granted the petition for a judgment and directed the city officials to provide access to the requested information because no statute exempted the records from disclosure and the disclosure of the names would not constitute an unwarranted invasion of privacy. The Court held that "the names of marriage license applicants would not, in this court's opinion, ordinarily and reasonably be regarded as intimate, private information... Additionally, the New York State Committee on Open Government, in its advisory opinion dated July 28, 1988, was of the belief that Domestic Relations Law 19 should be read so as not to exempt the names of marriage applicants from disclosure, regardless of the purpose for which a request is made, and also, that under FOIL, disclosure would not represent an unwarranted invasion of personal privacy." Id. at 352-53 [internal

quotation marks and citation omitted].

Petitioner notes that it obtained New York City's marriage record database in 2016, which can be found online. Petitioner notes that respondent has failed to provide one example of their proposed "cavalcade of ills" which has resulted from that publication. Petitioner also provides evidence that 39 of 50 states allow production of the same kind of index information requested here, including marriage licenses themselves.

The personal privacy exemption incorporates a non-exhaustive list of categories of information that the legislature has determined would constitute unwarranted invasions of personal privacy if disclosed. In the absence of any proof establishing the applicability of any enumerated categories, the determination of whether disclosure of the information sought constitutes an unwarranted privacy invasion requires a "balancing [of] the privacy interests at stake against the public interest in disclosure of the information." Matter of Harbatkin v New York City Dept. of Records & Info. Servs., 19 NY3d 373, 380 (2012) [internal quotation marks and citation omitted].

The personal safety exemption does not require an agency to establish that danger necessarily will result from the disclosure. Instead, it must show that a real possibility of endangerment exists. Bellamy v. The New York City Police Dep't, 87 AD3d 874, 875 (1st Dept. 2011). This exclusion has been applied where, for example, the petitioner requests the identity of undisclosed witnesses who have cooperated in the investigation of a gang-related murder, id., or an attempted murder-by-shooting. The Exoneration Initiative v. The New York City Police Dep't, 114 AD3d 436, 439 (1st Dept. 2014).

As noted above, "the [public] agency must articulate 'particularized and specific justification' for not disclosing requested documents." Matter of Gould v New York City Police Dept., *supra* at 275. Conclusory assertions, unsupported by facts, will not suffice. *See* Church of Scientology of N.Y. v State of New York, 46 NY2d 906, 907-908 (1979); Matter of Rose v Albany County Dist. Attorney's Off., 111 AD3d 1123, 1126 (3d Dept. 2013); Matter of Carnevale v City of Albany, 68 AD3d 1290, 1292 (3d Dept. 2009). An agency must present "specific, persuasive evidence" and "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm." Matter of Markowitz v Serio, 11 NY3d 43, 50-51 (2008). Respondent must meet its burden "in more than just a plausible fashion." Matter of Data Tree, LLC v. Romaine, 9 NY3d 454, 462 (2007).

In view of the foregoing well-established law, it is apparent to this Court that the denial of access to the records requested under the privacy and public safety exemptions is not adequately supported by the respondent. Respondent does not establish a causal connection between disclosure and the asserted dangers. Respondent's concerns are too hypothetical and remote to justify either exemption.

The Court notes respondent's assertion that the marriage index does not exist in a single, uniform format, and that the format can vary from year to year. To the extent that some of requested records contain a date of birth and/or Social Security numbers, respondent should redact this

information upon the ground that disclosure of such information would constitute an unwarranted invasion of personal privacy. Disclosure thereof "'would be offensive and objectionable to a reasonable [person] of ordinary sensibilities.'" Matter of Empire Realty Corp. v New York State Div. of Lottery, 230 AD2d 270, 273 (3d Dept. 1997), *quoting* Matter of Dobranski v Houper, 154 AD2d 736, 737 (3d Dept. 1989); *see* Matter of Pennington v Clark, 16 AD3d 1049, 1051-52 (4th Dept. 2005), lv denied 5 NY3d 712 (2005); POL 87 [2] [b]; 89 [2].

Respondent also relies on POL 87(2)(b)(iii), which includes as an "unwarranted invasion of personal privacy" the "sale and release of names and addresses if such lists would be used for commercial or fund-raising purposes." DOH notes that Reclaim the Records uses social media to solicit business and increase interest in its website, which provides access to a donation button. In Federation of New York State Rifle & Pistol Clubs, Inc. v. New York City Police Dep't, 73 NY2d 92, 97 (1989), the Court of Appeals recognized that POL 87(2)(b)(iii) protects " the rights of individuals to be free from unwanted commercial contacts or nonprofit fund-raising efforts." In this case, the documents are not sought for the purpose of soliciting donations. Petitioners would have no direct contact with the individuals contained in the marriage index. Accordingly, this exemption is not applicable here. Even if it were, respondent failed to raise it at the administrative level, and the issue is therefore waived.

Waiver also applied to respondent's arguments concerning POL 87(2)(i), as this issue was not raised at the administrative level. Even if it had been preserved, this exemption does not justify the denial. The statute permits an agency to deny FOIL requests for materials that "if disclosed, would jeopardize the capacity of an agency ... to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." The Information Technology Security Exemption applies to records that would expose an agency to "risks of electronic attack, including damage to the assets themselves, interference with the performance of agency computers and programs, and the unauthorized access to an agency's electronic data." TJS of New York, Inc. v New York State Dept. of Taxation and Finance, 89 AD3d 239 (3d Dept. 2011). Ms. Hewig, as records access officer at DOH, claims that the disclosure of data within a number of the modern index fields that are designed for internal systemic purposes would jeopardize the capacity of DOH to guarantee the security of its information technology assets. The affiant does not claim to be an information technology expert. Before this court could accept them, these contentions clearly require expert proof of how a security breach could occur if the requested data were released, and none is offered. Under these circumstances, this Court cannot find that the respondent has shown that the information sought by petitioners falls within 87(2)(e)(iv), as claimed. Thus, resort to this exemption is inadequate.

Counsel Fees

The Public Officers Law authorizes an award of attorneys' fees where the petitioner "has substantially prevailed" in the FOIL proceeding and the agency either lacked a reasonable basis for denying access to the requested records or "failed to respond to a request or appeal within the statutory time." PPL89 [4] [c] [I], [ii]. "[E]ven when these statutory prerequisites are met, the

decision to grant or deny counsel fees still lies within the discretion of the court." Matter of Henry Schein, Inc. v Eristoff, 35 AD3d 1124, 1126 (3d Dept. 2006).

Despite this Court's direction that the records be redacted, the petitioner "substantially prevailed" within the meaning of the Public Officers Law. *See* Matter of Madeiros v. New York State Educ. Dept., 30 NY3d 67, 79 (2017) ("petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request—including both disclosure that was volunteered by the agency and disclosure that was compelled by Supreme Court's order.").

There is no allegation that respondent failed to respond to a request or appeal within the statutory time. As noted above, petitioners claims that respondent caused a delay in access to the requested records, however, respondent provided the records to the exact address petitioner provided for mailed materials.

Therefore, the Court must considered whether respondent lacked a reasonable basis for denying access to the records. Petitioner argues that respondent's resistance to producing the records is contrary to established law as set forth in Gannett Co. v. City Clerk's Office, *supra.* However, that case is 26 years old. The issue of identity theft based on electronic records was not raised in that case nor was it a prevalent concern at the time. It was not unreasonable to test whether the holding of a trial court level decision was still good law based on changing times and the new recognition of the threat of identity theft. The Court therefore finds that an award of counsel fees is not justified.

Accordingly, it is hereby,

ORDERED AND ADJUDGED that the Petition is granted, with the redactions as outlined herein. Petitioners shall pay all estimated costs to prepare the redacted copies pursuant to POL 87(1)(c)(i-iv).

This constitutes the Decision, Order and Judgment of the Court. The original Judgment is returned to the counsel for petitioners, who is directed to enter it with notice and to serve respondent with a copy thereof with notice of entry. The Court will transmit a copy of the Decision, Order and Judgment and the supporting papers upon which it is based to the Albany County Clerk. The signing of this Decision, Order and Judgment, and delivery of a copy hereof shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: March 13, 2019
Albany, New York

PATRICK J. McGRATH
Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated August 24, 2018; Verified Petition, dated August 24, 2018, with annexed Exhibits A-P.
2. Verified Answer, dated December 18, 2018; Affidavit, Rosemarie Hewig, dated December 20, 2018, with annexed Exhibits A-M; Affidavit Robert Jake Locicero, dated Decmber 20, 2018, with annexed Exhibit A; Respondent's Memorandum of Law, Lynn Knapp Blake, Esq., dated December 20, 2018.
3. Affidavit in Further Support, Brooke Schreier Ganz, dated January 11, 2019, with annexed Exhibit A; Affirmation in Further Support, David B. Rankin, Esq., dated January 11, 2019, with annexed Exhibits A-H; Memorandum of Law in Further Support of Petition, David B. Rankin, Esq., dated January 11, 2019.