

A. There is a Difference Between Certified and Uncertified Records in New York

3. Much of Respondents' argument focuses on the limitations of access to death certificates, including a lengthy discussion of the purported legislative rationale for historical amendments to New York statutes. (*See, e.g.*, Opp. at 10-12; *see also* Dkt. Nos. 66-68.) Respondents' discussions, though, ignore and conflate the critical difference between *certified* and *uncertified* copies of vital records. While the citations to law and legislative history referenced by Respondents regard certified copies of records, RTR has requested uncertified copies. This is evident in RTR's FOIL request, which specifically stated that RTR was requesting a set of scans "in uncertified form," and that RTR would stamp or watermark the digital images with language similar to: "UNCERTIFIED COPY – FOR GENEALOGICAL PURPOSES ONLY." (*See* Pet. Ex. 13 at 2.)

4. This difference in certification matters. While *certified* copies, on the one hand, are often required for use as proof of an event for legal and financial purposes—for which an additional level of assurance of authenticity is typically sought (thus prompting additional restrictions on who may request one), *uncertified* copies, on the other hand, are typically marked as being uncertified and for genealogical, informational, and/or research purposes only. This case is only about the latter—the type of certificate that *is not* an official document, and which typically cannot be used as proof of identity in any legal context.

5. While Respondents argue that what RTR is trying to do would override the State (*see, e.g.*, Opp. at 11), in fact, Respondents have it backwards, because RTR is requesting only uncertified copies. And for those, New York State explicitly *permits* disclosure to anyone for informational purposes after 50 years have passed. (*See* Pet. ¶ 66.) For instance, I am able to request an uncertified copy of a death record for someone who died anywhere else in New York

State for the years at issue in this matter. These rules for the rest of the State are laid out in Public Health Law § 4174(3) and 10 NYCRR 35.5, which in summary state the following:

- a. An “uncertified copy” of a death certificate may be disclosed “for authorized genealogical or research purposes”;
- b. Uncertified genealogical copies of death records may be disclosed after the record has been on file for at least 50 years; and
- c. Uncertified copies that are issued for genealogical research purposes are marked with the statement “for genealogical purposes only.”

6. The New York State Department of Health (“NYSDOH”) also makes this difference between certified and uncertified copies evident on its own website. The Department of Health describes that *only* a spouse, parent, child, sibling of the deceased, or others who have a documented lawful right or claim, medical need, or court order may – accompanied by the requisite documentation – request a death certificate.² *However*, NYSDOH then has an entirely separate page on its website for uncertified copies, entitled, “Genealogy Records & Resources,” where NYSDOH states that it “provides uncertified copies of the following types of records for genealogy research purposes: . . . Death certificates – if on file for at least 50 years.”³ As is evident by the State’s practice, what RTR is requesting is not abnormal; rather, it is the norm. If the State will disclose uncertified copies of death certificates over 50 years old to anyone who requests one, RTR is simply requesting that the City not be stricter.

B. This Matter Only Regards the “Privacy” of the Long Deceased

7. Respondents ignore the temporal component of the requested records: RTR’s request is for death records dated between 1949 and 1968. The year 1949 is the first set of New

² See N.Y. State Dep’t of Health, *Death Certificates*, https://www.health.ny.gov/vital_records/death.htm (last visited Mar. 18, 2021).

³ See N.Y. State Dep’t of Health, *Genealogy Records & Resources*, https://www.health.ny.gov/vital_records/genealogy.htm (last visited Mar. 18, 2021).

York City death records not currently available to the public, and at the time of the FOIL request in 2019, 1968 was the most recent year that was over 50 years old. This puts the request in harmony with state policy. These are all records that would be publicly available had the individual died anywhere else in New York State.

8. To put into perspective the records at issue, one might consider historical average life expectancy to assess the average birth years of the decedents here. According to the U.S. Centers for Disease Control, the average life expectancy of Americans in 1950 and 1970 (the approximate limits of the requested range) was about 70 years of age.⁴ If the *average age* of a person dying during the requested records range was 70 years old, then that implies that the average birth year of the individuals whose records are being requested is 1879 to 1898.

Respondents have never provided a basis for demanding a categorical ban to the disclosure of records for individuals who, on average, were born 123 to 142 years ago.

9. New York City's own data reveals similar trends. In 1966, the New York City Department of Health published a summary of vital statistics for the whole city from the prior year, which includes a breakdown by age bracket of those who died in New York City in 1965. Of the 87,395 individuals who died in New York City in 1965, 75,500 of them were reported to have been at least 45 years old at date of death (*i.e.*, born in 1920 or earlier).⁵ This signifies that 86.4% of New York City's decedents from 1965 (the back-end of RTR's requested document range) were born over a century ago.

⁴ See U.S. Centers for Disease Control, *Life expectancy at birth, at age 65, and at age 75, by sex, race, and Hispanic origin: United States, selected years 1900-2016* (2017), <https://www.cdc.gov/nchs/data/hus/2017/015.pdf>.

⁵ See Dep't of Health, The City of N.Y., *Summary of Vital Statistics 1965: The City of New York*, at 10 (1966), <https://a860-gpp.nyc.gov/downloads/x346d5128?locale=en>.

C. The “Support” Received by Respondents was Solicited by Respondents and Is Not Accurate

10. In support of their privacy defense, Respondents cited two letters written in 2017, one from NYSDOH and the other from the National Association for Public Health Statistics and Information Systems (“NAPHSIS”). These two letters were the *only two* statements submitted in favor of the City’s proposals, in contrast to more than six thousand oppositions registered against the proposals. In fact, at the hearings regarding the Access Rules (which I attended and at which I spoke), no one spoke in favor of the Access Rules. Nonetheless, a degree of clarification is necessary in connection with the background of these two letters.

11. First, these letters were actually *solicited by Respondents*, based on text that Respondents had prepared themselves. Specifically, through documents RTR received in connection with a FOIL request, I understand that four days before the first Access Rule hearing, Respondents had still not received a single favorable comment, and consequently, Respondent Steven Schwartz – the drafter of the restrictive rules and then-City Registrar – wrote an email to Robert (“Jake”) LoCicero, Director of Vital Records at NYSDOH. In his email, Schwartz reminded LoCicero of the upcoming hearing and stated that Respondents had “asked NAPHSIS to prepare a letter of support, and [Schwartz was] wondering if [LoCicero] could, too.” A draft letter was then attached, entitled “Transfer of records- NAPHSIS draft letter- 10-20-17.docx.” A true and correct copy of the produced version of this email is attached as Exhibit 1.

12. From another document received in connection with the same FOIL request, I understand that 37 minutes after Schwartz’s email to DOHMH, Respondent Van Wye then emailed Shawna Webster (Executive Director of NAPHSIS), cc’ing Schwartz, with the same attachment that he had just sent to LoCicero, and she wrote: “To follow up on my voicemails.... Attached is a letter of support for a change to our retention rules that we have proposed to our

Board of Health in NYC. Could you sign on NAPHSIS letterhead on behalf of NAPHSIS?” A true and correct copy of the produced version of this email is attached as Exhibit 2.

13. Fifty minutes later, Ms. Webster responded, “Of course, Gretchen! Here you are.” The exact draft – *prepared by Respondents* – was attached, now on NAPHSIS letterhead. A true and correct copy of the produced version of this email is attached as Exhibit 3.

14. I later learned, though, that despite pasting Respondents’ draft letter onto NAPHSIS letterhead and sending it to the City during the public comments period, Ms. Webster did not appear to actually hold the beliefs to which she had signed her name. In August 2019 (after the filing of the Petition in this action), I went to the annual conference of the Federation of Genealogical Societies and attended a panel entitled, “RPAC [Records Preservation and Access Coalition] Works with Congress, NAPHSIS, and Federal Agencies to Keep Records Accessible.” One of the speakers on this panel was the above-mentioned Executive Director of NAPHSIS, Shawna Webster, the same person who had put Respondents’ requested draft on NAPHSIS letterhead. This time, though, Ms. Webster’s comments were explicitly the opposite of what she had previously signed, and instead, now *she supported RTR’s position*.

15. Among other things, Ms. Webster discussed on the panel how NAPHSIS was working on a new “Model Law” that would completely reverse the prior model law’s suggested increased “embargo” periods on vital records access (*i.e.*, the number of years a member of the public must wait to receive a copy of a birth or death certificate). In fact, Ms. Webster stated that NAPHSIS was reversing its previous stance of *increasing* embargos and now anticipated a new model law that would *decrease* embargo periods on death records, perhaps down to *zero* years.⁶

⁶ Note that in California (where I live) and many other states in the country, the norm is an embargo period of zero years for uncertified copies. For instance, in California, I am able to order an uncertified copy of a death certificate regardless of relationship, and without any embargo period.

Ms. Webster made it evident that *even NAPHSIS* – a non-profit organization where Respondent Schwartz himself recently served as Executive Director – no longer wants to see older death records restricted from public access. Ms. Webster also appeared to acknowledge that another impetus for the upcoming change in the Model Law was that barely any agencies at either the state or federal level had adopted the 2011 Model Law, as they believed it was over-restrictive.

16. Further and even more importantly, Ms. Webster explicitly noted that she had seen *no evidence* of data theft at all from the disclosure of historical death records. In relevant part, I listened to Ms. Webster state the following:

We are currently starting . . . putting together a large group of people from our membership to begin working on the newest revision [of the Model State Vital Statistics Act (the “Model Law”)]. The last revision of the Model Law was in 2011. It increased embargo dates to the data, and I know none of you were huge fans of that, and I don’t blame you. Speaking for myself personally, but also I think on behalf of the Board, I don’t think anyone would argue this – ***there’s really no data that supports privacy issues and/or fraud is inhibited more in a state that has closed records or huge embargo dates than in states that have open records, or in countries that have open records. I haven’t seen any data.*** I’m sure if you saw data, you would have let me know a long time ago.

So that being the case, we have a couple of goals in mind for this latest revision. Access to the data first and foremost. So how far can we bring those embargo dates down? . . . ***My hope is that they will come down to zero on the death side.*** . . . Zero on the death side would be my hope, and maybe 20 to 25 years on the birth side.⁷

C. **Federal Policy and Practice Actually Support RTR’s Position**

17. Respondents cite the federal Freedom of Information Act (“FOIA”) for alleged support to restrict access to historical records that are not “*about*” the government. (*See Opp.* at 13-14.) This is, however, not how FOIA works in practice. In fact, there are countless federal

⁷ See Exhibit 4, Excerpt of Audio Recording from *RPAC Works with Congress, NAPHSIS, and Federal Agencies to Keep Records Accessible*, Federation of Genealogical Societies 2019 Conference (Aug. 21, 2019), at 00:07:23-00:15:30 (emphasis added). The complete audio recording, which can be provided to the Court upon request, is available for purchase on the website for the 2019 Federation of Genealogical Societies Conference, *see* https://www.fleetwoodonsite.com/product_info.php?cPath=299_602&products_id=20933 (last visited Mar. 18, 2021).

agencies that have FOIA programs to disclose personal records for historical and genealogical purposes. I have used these services myself, as have many of RTR's board members, as well as tens of thousands of other historians, genealogists, journalists, teachers, and other types of researchers. Some examples include:

- a. Anyone can request a copy of a deceased person's original Application for a Social Security Card (SS-5) through an online FOIA request with the Social Security Administration. In addition to Social Security Number, these records contain an individual's date and place of birth, residence, parents' names, and employer.⁸
- b. Anyone can request passport records of a deceased individual from the U.S. Department of State. Passport records may include, in addition to date and place of birth, information on family members, immigration and naturalization, residence, intended destination and rationale for travel.⁹
- c. Anyone can request a deceased individual's immigration file ("A-File") through a FOIA request with U.S. Citizenship and Immigration Services (USCIS). These files include a remarkable array of information, including, among other things, date and place of birth, date and place of immigration to the United States, rationale for immigration (*e.g.*, seeking refuge or asylum), parents' names, dates and places of birth and residence, and employment history. In fact, in evident support of the release of historical records, USCIS transferred to the National Archives more than 1,100,000 A-Files for individuals who were born in 1918 and prior; these can be requested by the public.¹⁰

18. Additionally, social security numbers and information in connection with an individual's death are likewise publicly available in federal resources, including through the Social Security Administration's Numident Collection, which is now publicly available and

⁸ See U.S. Soc. Sec. Admin., *FOIA Request Methods and Fees* ("You can make a request for a copy of a deceased person's original Application for a Social Security Card (SS-5)."), <https://www.ssa.gov/foia/request.html> (last visited Mar. 18, 2021).

⁹ See U.S. Dep't of State, *Information Access Guide* ("Visa records continue to be protected under the visa confidentiality provisions of INA Section 222(f) even after the subject is deceased. Accordingly, they will not be released. For other than visa records, your request will be processed under provisions of the FOIA."), <https://foia.state.gov/request/guide.aspx> (last visited Mar. 18, 2021).

¹⁰ See U.S. Citizenship & Immigr. Servs., *Request Records through the Freedom of Information Act or Privacy Act*, <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act> (last visited Mar. 18, 2021); see also U.S. Nat'l Archives, *Alien Files (A-Files)*, <https://www.archives.gov/research/immigration/aliens> (last visited Mar. 18, 2019).

searchable on the National Archives' website. This collection includes names of the deceased, birth and death date, social security number, and for many individuals, the names of their parents and the place of birth.¹¹

19. As a result, the practices of the federal agencies actually support our request for records in this case. The federal equivalent to FOIL – FOIA – is commonly used to access information from multiple federal government agencies about deceased individuals, and the resulting records often include very detailed information about their lives and their families. FOIA has been used in this manner for decades. Respondents' repeated insistence that research about *individuals* (rather than broader research about governmental actions or agency policies) is somehow a disallowed rationale for using the federal law is clearly untrue and should not be considered a legitimate basis for why a genealogist or historian should not also employ the State's FOIL statute to conduct similar types of research in records held by state agencies.

Signed this 18th day of March, 2021.



Brooke Schreier Ganz

¹¹ See U.S. Nat'l Archives Access to Archival Databases (AAD), *Numerical Identification Files (NUMIDENT)*, created, 1936 - 2007, documenting the period 1936 - 2007 ("This series contains records for every social security number (SSN) assigned to individuals with a verified death or who would have been over 110 years old by December 31, 2007. . . . Information contained in NUMIDENT records includes: each applicant's full name, SSN, date of birth, place of birth, citizenship, sex, father's name, mother's maiden name, and race/ethnic description (optional). NUMIDENT includes information regarding any subsequent changes made to the applicant's record, including name changes and life or death claims. . . . There are 72,182,729 SS-5 records entries; 25,230,486 claim record entries; and 49,459,293 death record entries."), <https://aad.archives.gov/aad/series-description.jsp?s=5057> (last visited Mar. 18, 2021).

ACKNOWLEDGEMENT

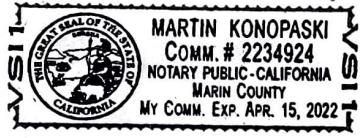
STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

On March 18, 2021, before me, the undersigned, personally appeared Brooke Schreier Ganz, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

MA

NOTARY PUBLIC, STATE OF CALIFORNIA

Printed Name: *Martin Konopaski*



ATTORNEY CERTIFICATION PURSUANT TO SECTION 202.8-b

I, Michael D. Moritz, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Affidavit complies with the word count limit set forth in Section 202.8-b of the Uniform Rules for New York State Trial Courts because it contains 2,908 words, excluding the parts of the document that are exempted by that section. In preparing this certification, I have relied on the word count of the word-processing system used to prepare the document.

Dated: March 19, 2021

/s/ Michael D. Moritz
Michael D. Moritz