SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RECLAIM THE RECORDS, Petitioner, - against - NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, NEW YORK CITY BUREAU OF VITAL STATISTICS, NEW YORK CITY BOARD OF HEALTH, OXIRIS BARBOT, in her official capacity as New York City Commissioner of Health, GRETCHEN VAN WYE, in her official capacity as New York City Registrar, and STEVEN P. SCHWARTZ, in his official capacity as former New York City Registrar, Respondents.	:	Index No. __________ Motion Seq. No. __________ **VERIFIED ARTICLE 78 PETITION**

Petitioner Reclaim the Records ("RTR" or "Petitioner"), by and through its undersigned counsel, brings this Verified Article 78 Petition and alleges the following.

INTRODUCTION

1. This Verified Petition is about an agency's irrational and unjustified refusal to disclose information about individuals who died more than a half-century ago. While the rest of the country continues to liberalize access to vital records, including historical death certificates, the New York City Department of Health and Mental Hygiene ("DOHMH") is going in the opposite direction, in conflict with the rest of New York State, by refusing to disclose to the public scans of death certificates of New Yorkers who died *more than fifty years ago*.

2. The saga concerning access to New York City's (the "City") vital records began at a Board of Health ("Board") meeting in September 2017 (the "First Board Meeting"), when the City's Registrar, Steven Schwartz ("Schwartz"), proposed to the Board an amendment to the

New York City Health Code (the "City Health Code") that would create a consistent transfer policy for older records from the Bureau of Vital Statistics, a division of DOHMH, to the City's Municipal Archives, a part of the Department of Records and Information Services ("DORIS"). In principle, this proposal was appreciated; for several decades, DOHMH had utterly ignored City rules that required the agency to periodically transfer its older records to DORIS. In fact, DOHMH had not transferred any vital records to DORIS *in decades*, thus creating a closed-door monopoly on birth and death records, which prevented the public from accessing crucial historical information, even about their own family members. A mere transfer policy could have garnered significant support; however, DOHMH decided not only to create a transfer policy, but to also propose a drastically increased restrictive time bar on access to records, banning public access to birth records for a period of 125 years and to death records for 75 years. DOHMH claimed these new restrictions were necessary due to unspecified "privacy concerns."

3. Shocked by DOHMH's proposed suppression of access to these historical records, the public (comprised of genealogists, historians, researchers and non-profit organizations) submitted more than five thousand comments to DOHMH in opposition to its proposal, while only *two* comments were submitted in favor. A public hearing took place, at which everyone who testified unanimously opposed the proposal. Then, the Board of Health held a meeting to vote on the time restrictions in March 2018. In light of the immense outcry of public opposition, the Board members asked Schwartz some questions at their meeting (the "Second Board Meeting"). Schwartz, out of line with everyone else, provided to the Board remarkably inadequate and vague responses, most of which contradicted the rational oppositions of the five thousand commenters and none of which was accompanied by scientific or statistical support.

Nonetheless, the Board members—far afield from their areas of health expertise—voted at the meeting to approve the new burdensome time restrictions on records access.

4. DOHMH's irrational decisions unfortunately continued. Following the huge public outcry, Schwartz then proposed another rule change, this time regarding who was exempted from the time limitations and could access the vital records that DOHMH held. Although Schwartz suggested that his proposal was in the spirit of expanded access, his amendment *excluded* important categories of individuals, such as researchers and genealogists, as well as certain family members such as cousins and step-relations. His proposal again lacked any substantive rational basis, and another thousand comments from the public poured in, explaining that Schwartz's new access list was irrational and overly restrictive.

5. Through these comments and yet another public hearing where, once again, every speaker opposed the new proposal, the Board was put on notice of inaccuracies and misrepresentations that Schwartz had made at the prior Board meeting in order to push through his unpopular agenda. Nonetheless, when the Board met again to vote upon Schwartz's access restrictions in June 2018 (the "Third Board Meeting"), the Board only asked Schwartz five general questions. None of them, however, involved the key concerns raised by the one thousand new public comments, such as researcher access, the possibility of offering uncertified "informational" copies instead of certified copies, and any proof of identity theft in this context. The Board then approved the arbitrary access restrictions unanimously. Thus, read together, the newly revised City Health Code §§ 207.11 and 207.21 (together, the "Access Rules") ban the public's access to birth records for 125 years and death records for 75 years.

6. No one with expertise—neither genealogists nor privacy experts—was included at the Board meetings. Instead, the sole person present was Schwartz, who contradicted the

approximately 6,000 opposition comments and misled the Board to believe that DOHMH's new restrictions on public access to historical materials were in line with the norms and rules currently in place throughout the rest of the United States, when in reality Schwartz was making the City become one of the strictest jurisdictions for vital records access in the country.

7. After the Access Rules came into effect, Petitioner RTR filed a Freedom of Information Law ("FOIL") request with DOHMH to receive copies of digital scans that DOHMH previously made of the City's death certificates from 1949 through 1968 (the "Scans"). As RTR explained, the new Access Rules are *not* state statutes, and therefore they do not create an exemption under FOIL. Additionally, RTR explained that there were no legitimate privacy concerns that would warrant preventing disclosure of the Scans.

8. Despite ample New York case law holding that City regulations are *not* state statutes, DOHMH denied disclosure on that basis, and its appeals officer, Thomas Merrill ("Merrill"), affirmed denial on that ground. Additionally, both DOHMH and Merrill denied disclosure on the basis of privacy, despite failing to enumerate a single example of *actual* privacy concerns. In whole, both the initial denial and administrative appeal denial lacked any rational basis, and DOHMH came far short of meeting the significant burden resting with the agency to establish a FOIL exemption.

9. RTR thus petitions this Court to declare DOHMH's denial under FOIL impermissible because it failed to meet its burden of establishing that an exemption applies. Additionally, in light of the fact that DOHMH denied access to RTR based on the new Access Rules, RTR seeks a judgment declaring that the Access Rules are invalid and void because they are arbitrary, enacted without any evidence and beyond the scope of the Board's authority.

PARTIES

10. Petitioner Reclaim the Records is a 501(c)(3) not-for-profit organization. RTR is an activist group of genealogists, historians, researchers, teachers and journalists, which works to identify important genealogical and historical record sets that are not currently available to the public. Since its founding in 2015, RTR has successfully used freedom of information laws throughout the country to make available tens of millions of previously inaccessible records that were held at agencies ranging from city clerks' offices to the National Archives. Among other things, RTR has prevailed in four separate FOIL matters against New York State and City agencies.

11. Respondent New York City Department of Health and Mental Hygiene is an administrative agency of the City of New York, within the executive branch of the government of New York City.

12. Respondent New York City Bureau of Vital Statistics is a subdivision of DOHMH. It is responsible for collecting, managing and disclosing New York City's vital records that have not been transferred to the New York City Municipal Archives.

13. Respondent New York City Board of Health consists of eleven members, who are responsible for overseeing the New York City Health Code.

14. Respondent Oxiris Barbot is the Commissioner of the New York City Department of Health and Mental Hygiene and is a member of the Board of Health.

15. Respondent Gretchen Van Wye is the New York City Registrar, a position within the Bureau of Vital Statistics. In this capacity, Van Wye is the senior official for overseeing New York City's vital records issuance and management. Prior to being appointed Registrar, Van Wye was an Assistant Commissioner within the Bureau of Vital Statistics.

16. Respondent Steven P. Schwartz is the former New York City Registrar, a position he held at all relevant times in connection with the amendment process to the City Health Code. Schwartz is also the former President of the National Association for Public Health Statistics and Information Systems ("NAPHSIS").

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction to decide this Petition pursuant to Public Officers Law § 89(4)(b), as an appeal of a FOIL denial following an administrative appeal denial, and pursuant to CPLR 7803 because the Access Rules were determined in an arbitrary and capricious and *ultra vires* manner by the Respondents.

18. Venue is proper pursuant to CPLR 506(b) and 7804(b) because material events took place in this county and the principal office for vital records management is in this county.

FACTUAL BACKGROUND

A. The World of Genealogy

19. Genealogy, the study of family history, is a rapidly growing enterprise and the second-largest hobby in the United States. With the advent of commercial DNA testing, Americans' interests in their pasts have grown exponentially; for example, between February 2018 and 2019, the number of individuals that had taken consumer DNA tests skyrocketed from 12 million to 26 million.[1] The interest in genealogy has also sparked several popular television shows, including *Who Do You Think You Are?* and *Finding Your Roots*.

20. In tandem with the increasing interest in genealogy has been the increasing public availability of records. In the past several years, commercial websites including Ancestry.com

[1] Antonio Regalado, *More than 26 million people have taken an at-home ancestry test*, MIT Tech. Rev. (Feb. 11, 2019), https://www.technologyreview.com/s/612880/more-than-26-million-people-have-taken-an-at-home-ancestry-test/; Antonio Regalado, *2017 was the year consumer DNA testing blew up*, MIT Tech. Rev. (Feb. 12, 2018), https://www.technologyreview.com/s/610233/2017-was-the-year-consumer-dna-testing-blew-up/.

and MyHeritage.com, as well as non-profit organizations' websites such as FamilySearch.org, have garnered substantial interest. Access to public records remains at the core of these sites. Ancestry currently boasts access to 20 billion historical records,[2] while FamilySearch announced last year that it had digitized more than two billion images from its microfilm collection of records, which are now available online.[3] RTR takes an active part in the pursuit of records accessibility, and it has helped make available online more than 28 million records.

21. In light of this genealogy phenomenon, it comes as no surprise that Americans desire records from New York, and most prominently New York City. According to the Statue of Liberty-Ellis Island Foundation, between 1880 and 1930, about twelve million immigrants arrived in New York Harbor.[4] Their descendants, who today number in the tens of millions, continue to research and pursue information about individuals that at some point immigrated to, passed through, lived and/or died in this City.

B. <u>National Landscape of Access to Death Records</u>

22. Death records are foundational documents in genealogy research because they are primary sources that contain a considerable amount of valuable information. Death records typically include the decedent's date of birth, place of birth, spouse's name, parents' names and places of birth, date of death, place of death, cause of death, burial location and an informant's name, relation and address. (*See* Ex. 1, Sample NYC Death Certificate.) These documents, therefore, offer remarkably valuable information to genealogists. However, they are also used

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[2] *See Company Overview*, Ancestry.com, https://www.ancestry.com/corporate/about-ancestry/company-facts (last visited Apr. 10, 2019).

[3] *FamilySearch Adds 2 Billionth Image of Genealogy Records*, FamilySearch (Apr. 23, 2018), https://media.familysearch.org/familysearch-adds-2-billionth-image-of-genealogy-records.

[4] *Immigration Timeline*, The Statue of Liberty-Ellis Island Foundation, https://www.libertyellisfoundation.org/immigration-timeline (last visited Apr. 10, 2019).

for countless other purposes, including for probate and kinship proceedings, military repatriation efforts, citizenship acquisition, understanding one's family medical history and more.[5]

23. Vital records administration is governed by state law, and each state has its own rules for the disclosure of its records, including death certificates.[6] There are thirteen states that have "open access" laws, pursuant to which *all* death records are available to the general public. For instance, in Massachusetts, "[d]eath certificates are public record, and can be requested by anyone,"[7] and in California, anyone may receive an "Informational Certified Copy," which includes on the face of the document "INFORMATIONAL, NOT A VALID DOCUMENT TO ESTABLISH IDENTITY."[8] Another eight states have restrictions on death certificate accessibility that are more than zero but less than 50 years. (*See* Ex. 2.)

24. The most common time restriction for death record access in the U.S. is 50 years, which is the rule in 23 states, including New York State. (*See id.*) As described on the New York State Department of Health's website, the Department of Health will provide uncertified copies of death certificates for genealogical purposes if a death certificate is "on file for at least 50 years."[9] Meanwhile, *only six states* have public access restrictions longer than 50 years: four

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[5] Accompanying this Petition are the Affidavits of Megan Smolenyak ("Smolenyak Aff."), Roger D. Joslyn ("Joslyn Aff."), David Bushman ("Bushman Aff.") and Kelly Bodami ("Bodami Aff."), each of which addresses different aspects of how the new Access Rules apply in contexts far beyond personal family research and affect people's lives. Additionally, as to citizenship acquisition, there has been a significant trend in recent years for Americans to seek dual citizenship based on descent. For example, an Irish newspaper recently reported that in 2018, about 8,900 Americans applied for Irish citizenship based on descent. Sorcha Pollak & Jennifer Bray, *What is driving increased demand for Irish passports?*, Irish Times (Feb. 2, 2019), https://www.irishtimes.com/news/ireland/irish-news/what-is-driving-increased-demand-for-irish-passports-1.3779085; *see also* Gretchen Lang, *When roots translate into a 2d passport*, N.Y. Times (Sept. 29, 2006), http://www.nytimes.com/2006/09/29/style/29iht-areturn.2977035.html.

[6] The public accessibility of each state's death records is enumerated in Exhibit 2.

[7] *Request a death certificate*, Mass.gov, https://www.mass.gov/how-to/request-a-death-certificate (last visited Apr. 10, 2019).

[8] *Request a Copy of a Vital Record Online*, California Dep't of Public Health, https://www.cdph.ca.gov/Programs/CHSI/Pages/Obtaining-Certified-Copies-Online.aspx (last visited Apr. 10, 2019).

[9] *Genealogy Records & Resources*, N.Y.S. Dep't of Health, https://www.health.ny.gov/vital_records/genealogy.htm (last visited Apr. 10, 2019).

(Colorado, Georgia, Hawaii and Iowa) have a 75-year restriction, and two (Kansas and Nevada) restrict public access back to the records that were archived, dating from 1911. (*See id.*)

25. At present, more than 25 states have their death certificates available online at least into the 1950s, and many go even further. (*Id.*) For instance, Ancestry.com makes available death certificates from Indiana through 2011, Vermont through 2008, Virginia through 1991 and Texas through 1982.[10] Additionally, state agencies in Arizona, Missouri and West Virginia have created their own publicly-accessible and searchable online databases with scanned images of those states' death certificates through 1968.[11]

C. DOHMH Bans Access to Death Certificates for 75 Years

26. New York City is the only city in the country (other than District of Columbia) with its own administration of vital records. All requests for New York City's vital records that have not been transferred to the City's Municipal Archives are directed to and considered by the New York City Bureau of Vital Statistics in Manhattan, a subdivision of DOHMH. New York City has *never* codified any time periods for accessing its records. Instead, the City's Administrative Code § 17-170(b) merely required DOHMH to transfer the vital records held by the Bureau of Vital Statistics to DORIS "at such times as the board of health shall determine." However, DOHMH wholly shirked its responsibilities, violating this regulation, as *decades* have passed since any vital records have been transferred to the Municipal Archives.[12] Meanwhile,

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[10] *Indiana, Death Certificates, 1899-2011*, Ancestry.com, https://www.ancestry.com/search/collections/indianavitalsdeaths/ (last visited Apr. 10, 2019); *Vermont, Death Records, 1909-2008*, Ancestry.com, https://www.ancestry.com/search/collections/vermontdeaths/ (last visited Apr. 10, 2019); *Texas, Death Certificates, 1903-1982*, Ancestry.com, https://www.ancestry.com/search/collections/txdeathcerts/ (last visited Apr. 10, 2019).

[11] *Arizona Genealogy Birth and Death Certificates*, Ariz. Dep't of Health Servs., http://genealogy.az.gov/ (last visited Apr. 10, 2019); *Missouri Death Certificates, 1910-1968*, Mo. Sec. of State, https://s1.sos.mo.gov/records/Archives/ArchivesMvc/DeathCertificates#searchDB (last visited Apr. 10, 2019); *Search Death Records*, W. Va. Dep't of Arts, Culture & History, http://www.wvculture.org/vrr/va_dcsearch.aspx (last visited Apr. 10, 2019).

[12] At the First Board Meeting, Mr. Merrill stated that a records transfer "was last done before Steve [Schwartz] was here, I think, in the 1980s." (Ex. 3, 1st Bd. Mt'g (Sept. 12, 2017) Tr. 72:13-15.)

DOHMH's copies of these records have never been open to the public. As a result, the public has not gained access to additional birth and death records from New York City in more than two decades, and public access to death records since that time has been halted at the year 1948.

27. In light of the City's lack of guidance, at the First Board Meeting on September 12, 2017, Schwartz proposed to the Board an amendment to the City Health Code to create a consistent transfer policy for its birth and death records to DORIS. However, instead of merely creating a transfer policy (which would have been lauded), Schwartz's proposal, which DOHMH published, included *extended restriction periods* on access to vital records. While the most recent transfer of death records to the Municipal Archives was about 40 to 50 years after the date of death, Schwartz's proposal stated that birth records would now only be transferred after 125 years and death records after 75 years, before which time they would not be available to the public.[13] Not only was this proposal a significant blow to public access of historical records, but it was also in conflict with the *New York State* Department of Health's policy, pursuant to which births are public after 75 years and deaths are public after 50 years. *See* 10 NYCRR 35.5.

28. Recognizing the increased time restrictions for death records, DOHMH (*i.e.*, Schwartz and Van Wye) stated in its proposal: "[T]he Department is very interested in receiving comments about the appropriateness of these time periods, in particular both from privacy groups and genealogists, and about adopting a 50-year confidentiality period for death records rather than the 75-year period proposed here." (*See* Ex. 4 at 3.)[14] In actuality, though, DOHMH ignored the unanimously negative public response.

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[13] Ex. 4, *Notice of Opportunity to Comment on the Amendment of Provisions of Article 207 of the New York City Health Code*, N.Y.C. Dep't of Health & Mental Hygiene, Bd. of Health (2017).

[14] Indeed, at the First Board Meeting, Schwartz likewise stated, "we would be looking for comments in particular on the 75 year mark, specifically inviting comments on the appropriateness of this period of time versus 50 years or other years." (1st Bd. Mt'g Tr. 57:6-11.)

29. DOHMH received *more than 5,000* written comments (including more than 3,800 signatures to a petition in opposition) from historical and genealogical organizations throughout the country, professional genealogists and concerned citizens, as well as a letter from FamilySearch. In total, 5,026 comments opposed the proposal, and *two* were in favor.[15]

30. DOHMH then held a hearing on October 24, 2017. (Ex. 5, DOHMH Hr'g (Oct. 24, 2017).) More than 30 people testified, all in opposition. No one at the hearing promoted extended privacy periods. Instead, those who testified addressed how DOHMH had offered no proof whatsoever that the disclosure of these records would lead to identity theft and that DOHMH was over-restricting access to valuable information, ranging from serious family health assessments to personal family research. One individual even presented DOHMH with his own study of state-by-state vital record disclosure time periods as compared to state-by-state reported instances of identity theft, which revealed no statistical correlation. (*See id.* at 53:12-55:13.) Schwartz and Van Wye both attended the hearing but sat silent the entire time.

31. The Board of Health met on March 13, 2018 to discuss the proposal, and only Schwartz was present to vouch for the regulation. At this Second Board Meeting, Schwartz reiterated that his rationale for the revised rules was to "conform to [the] Model State Vital Statistics Law," and to "ensure that no personally identifiable information of a person becomes public prior to a person's death." (Ex. 6, 2d Bd. Mt'g (Mar. 13, 2018) Tr. 27:8-12.)

32. In terms of conforming to the Model State Vital Statistics Act and Regulations (the "Model Act"), the version currently in effect is from 1992, and it provides that death records

[15] The over 1,300 pages of comments are available for viewing online at https://www1.nyc.gov/assets/doh/downloads/pdf/comment/comments-article207.pdf. A copy can also be provided at the Court's request.

should be made public after *50* years, not the 75 years Schwartz was now proposing.[16] In 2011, a small working group of individuals, including Schwartz, sought to revise the 1992 Model Act, and the revised version that Schwartz prepared does include a 75-year ban on death certificates.[17] However, that revision has not been adopted nearly anywhere in the United States—the U.S. Department of Health and Human Services has not adopted it (it still references the 1992 revision), and only *one state* in the United States, Oklahoma, incorporated its rules, only to subsequently amend its rules again shortly thereafter to abandon it.[18] Thus, Schwartz was asking the Board to conform to a revision that he had written but no one else had adopted. During the meeting, when Schwartz was confronted by the fact that virtually no state in the country had conformed to the 2011 revision, Schwartz merely responded: "This may surprise people, but vital records to state legislatures are not always their highest priority. . . . [I]t's also pretty long. The [Act] is some 70 pages, hard to get that through." (2d Bd. Mt'g Tr. 37:24-38:17.)

33. Schwartz was also asked a variety of questions about the amendment, to which he provided vague and evasive responses. When Schwartz was asked how he "thought about coming up with these years" (*id.* at 36:4-5), he responded: "It's a challenge . . . . So we did a survey; we talked to people. We feel that what we have proposed is the right thing to do." (*Id.* at 36:17-25.) When Schwartz was asked about a comment that the U.S. Department of Health in 2013 established a 50-year post-death accessibility rule (*id.* at 38:25-39:8), Schwartz responded:

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[16] Model State Vital Statistics Act and Model State Vital Statistics Regulations: 1992 Revision (U.S. Dep't of Health & Human Servs.), at § 23(d) (1992), https://www.cdc.gov/nchs/data/misc/mvsact92b.pdf.

[17] Model State Vital Statistics Act and Model State Vital Statistics Regulations: 2011 Revision, Working Group to Revise the Model State Vital Statistics Act and Model State Vital Statistics Regulations, at § 26(c) (Sept. 7, 2011), https://naphsis-my.sharepoint.com/personal/cldmn_naphsis_onmicrosoft_com/Documents/Shared%20with %20Everyone/FinalMODELLAWSeptember72011.pdf.

[18] After public dissent following Oklahoma's restriction of access in accordance with the new Model Act, Oklahoma amended its rules to remove the 75-year ban and return to a 50-year restriction for death records. *See* Okla. Bill No. 2703 (May 27, 2016), http://kautschlaw.com/wp-content/uploads/2017/01/VITALS1.pdf.

"I'm not aware of that." (*Id.* at 39:9-13.)[19] As to privacy concerns, a Board member queried: "[F]rom the various credible societies, representatives were saying that there really hasn't been much evidence of identity theft using birth and death records. . . . [W]hether you were strict or lenient, it didn't seem to affect the identity thefts that could be attributed to birth and death records. Is that something that – is your sense of information accurate." (*Id.* at 40:21-41:18.) Schwartz's response was far from scientific: "Well, I don't know how many people, if they were given a choice of having their records kept confidential or not – I'm not going to do a poll here – but how many people would really want to have their records completely open, including Social Security numbers?" (*Id.* at 42:1-7.)

34. Meanwhile, the Board remained generally unaware of what it was actually voting on and appeared uninformed as to the current state of play. As one Board member incorrectly stated: "I want to reemphasize [another's] point that the situation right now is that there are records, which, I presume, which are more than 125 years since birth and 75 years since death, which will not be released until we act on this." (*Id.* at 55:12-18.) Another member responded that "the last time the records were released was 108 years ago for birth records and 68 years ago for death records" (*id.* at 56:9-12), to which another member responded: "That may be the release, but there may be records that were not released at that time which now are over this limit. It's just a math issue." (*Id.* at 56:16-20.) The other member thus responded, "I'm not quite sure." (*Id.* at 56:21.) There was a complete unawareness of the underlying facts of the proposal, regarding which Schwartz *provided no clarity*; he sat silent.

[19] As the U.S. Department of Health and Human Services explains: "The HIPAA Privacy Rule applies to the individually identifiable health information of a decedent for 50 years following the date of death of the individual. The Rule explicitly excludes from the definition of 'protected health information' individually identifiable health information regarding a person who has been deceased for more than 50 years." U.S. Dep't of Health & Human Servs., *Health Information of Deceased Individuals*, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/health-information-of-deceased-individuals/index.html (last accessed Apr. 10, 2019).

35. On March 19, 2018, DOHMH adopted the 125/75-year transfer rule for birth and death records and agreed to postpone voting on access to those records. Despite 5,000 oppositions, in DOHMH's Notice of Adoption, it stated: "*No changes have been made* to the proposed amended to Article 207 based on the comments received."[20] DOHMH merely alleged (citing generally to whole federal statutory regimes) that personal information is protected "in other contexts," that birth and death records can be used for several purposes and that New Yorkers are living longer. (*See* Ex. 7, at 1–3.) As to privacy concerns relating to death certificates, DOHMH provided one example—the exception to the exception—stating "a teenage mother named on the death certificate of an infant may still be alive 75 years after her infant had died." (*Id.* at 3–4.)[21] As to fraudulent use, DOHMH cited to general sources on identity theft and stated that information on a birth or death certificate "has the potential to be used in various fraudulent ways, including identity theft." (*Id.* at 4.) Never did DOHMH state whether a death certificate from more than 50 years ago had *ever* been used for fraudulent purposes, nor did the Department even present a hypothetical example of how this could actually occur.

36. The enacted rule, which became effective April 18, 2018, states:

> Notwithstanding any other provision of this Code, a birth record in the Department's possession and control becomes a public record on January 31st of the year following 125 years after the date of birth and a death record in the Department's possession and control becomes a public record on January 31st of the year following 75 years after the date of death. The Department shall transfer to the City's department of records and information services all public birth records, death records, and index books.[22]

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[20] Ex. 7, *Notice of Adoption of Amendment to Article 207 of the New York City Health Code*, N.Y.C. Dep't of Health & Mental Hygiene, Bd. of Health (2018).

[21] This exact example was the only rationale given by Schwartz to the Board for why the 75-year rule was appropriate. (*See* 1st Bd. Mt'g Tr. 61:12-18 ("So why the 75 years for death records? Death records have data on living people. For example, a teenage mother on a death record can still be alive 75 years after her infant's death. That information is on that death record.").)

[22] N.Y.C. Health Code § 207.21.

D. DOHMH Is Put on Notice that Schwartz Misled the Board of Health

37. Even before the effective date of the above provision, in March 2018, DOHMH published a Notice of Opportunity to Comment for Schwartz's new proposal about who could access death certificates during the 75 years before they are transferred to DORIS, which was discussed but put off by the Board at the Second Board Meeting. The amendment proposed that before 75 years passed, only those "within a close degree of consanguinity" could receive access, specifically: a spouse, domestic partner, parent, child, sibling, niece, nephew, aunt, uncle, grandparent, grandchild, great grandchild, great-great grandchild, grandniece, or grandnephew of the decedent.[23] Despite public commentary, DOHMH's proposal still refused to permit *public* access to death records before 75 years had passed and ignored innumerable suggestions to provide uncertified copies for genealogical and research purposes (like New York State does) and to certain familial relations including cousins and step family members.

38. In advance of a second public hearing, DOHMH opened up another round of public comments, and it received nearly one thousand more oppositions. (Ex. 9, Comments to Proposal No. 2.) One especially valuable letter that DOHMH received was from the International Association of Jewish Genealogical Societies ("IAJGS"), which specifically highlighted various inaccuracies in Schwartz's responses to the Board at the Second Board Meeting. (*Id.* at 33 (the "IAJGS Letter").)

39. First, a Board member had asked Schwartz about step relations being included in the access categories. Despite being the former President of NAPHSIS (which assesses vital records regimes in the whole country), Schwartz replied: "We do not permit that, and I'm not

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[23] Ex. 8, *Notice of Opportunity to Comment on the Amendment of Provisions of Article 207 of the New York City Health Code*, N.Y.C. Dep't of Health & Mental Hygiene, Bd. of Health, at 3–5 (2018). This proposal was actually made at the Second Board Meeting. (*See* 2d Bd. Mt'g Tr. 31:20-32:7.)

aware of any state that does." (2d Bd. Mt'g Tr. 33:19-21.). Yet, IAJGS responded: "A quick Google search resulted in finding states that **do** permit step-parents the same immediate access," and it then listed five states as examples. (IAJGS Letter, at 1.)

40. Next, IAJGS refuted Schwartz's statement that genealogists do not "have an authority or a right to get the record[s]" themselves. (2d Bd. Mt'g Tr. 35:11-12.) The IAJGS enumerated six situations in which there is "a governmental need for professional genealogists serving as federal, state or local government contractors or for genealogists working with law firms to assist in the identification of family members": (1) assisting the U.S. Department of Defense to locate heirs for repatriation of remains from previous wars overseas;[24] (2) assisting county coroners in the identification of unidentified persons;[25] (3) working with attorneys to locate missing and unknown heirs in legal proceedings;[26] (4) tracing inheritable medical conditions;[27] (5) repatriation of art stolen during the Holocaust; and (6) identifying Native American ancestry to determine eligibility for tribal benefits. (IAJGS Letter, at 3.) Thus, despite Schwartz's representations to the contrary, "[g]enealogists have legitimate professional and life-saving reasons to have immediate access to birth and death records." (*Id.*)

41. IAJGS also explained that while Schwartz represented that states such as Vermont changed their laws from "open" to "closed,"[28] Vermont actually "provides for non-certified or informational copies of birth, marriage and death records available immediately—no embargo periods." (IAJGS Letter, at 4.) Additionally, despite Schwartz's desire to conform to the Model Vital Statistics Act revision that he helped write, IAJGS explained that *only one state*

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[24] *See generally* Smolenyak Aff.
[25] *See also* Smolenyak Aff. ¶ 12.
[26] *See also* Joslyn Aff. ¶ 5.
[27] *See generally* Bushman Aff.
[28] *See* 2d Bd. Mt'g Tr. 36:13-16 ("Vermont just recently, I think in the last year, closed its records. That was a completely open-records state.").

(Oklahoma) had adopted Schwartz's revision, but after implementation, "Oklahoma found that it was not workable and later amended the law. Today, the death record embargo period is 50 years, not 75 years." (*Id.* at 4.) Lastly, IAJGS addressed the issue of there being *no proof* of identity theft from death certificates. Specifically, it cited to a report from the New York State Attorney General, which "listed the over 1,500 data breaches reported to his office, and none were related to vital records theft." (*Id.* at 5.)

42. Countless other letters also highlighted the poor logic exhibited by Schwartz and the Board. One such letter came from the Records Preservation and Access Committee, which is sponsored by the Federation of Genealogical Societies, the National Genealogical Society and the International Association of Jewish Genealogical Societies. The committee highlighted its disappointment with the Board's decision to "disregard 1,300 pages of comments made by family historians and genealogists and more than 3,800 signatures on a petition against longer embargo periods." (Ex. 9, at 38–40.) The letter addressed other aspects, such as the importance of access for step-children and adoptees, and that among others, "second and third cousins need access to these deaths records" to assess family medical history as well. (*Id.*)

E. DOHMH Enacts Arbitrary Access Rules

43. Following Schwartz's second proposal that purported to "expand access" but in reality maintained a remarkably closed-access regime, DOHMH was given another chance to reconsider the more than 5,000 comments it had previously received and all the hours of public testimony. DOHMH scheduled a second public hearing for April 23, 2018, and in advance of that hearing it received 964 written comments (virtually unanimous in their opposition), including the IAJGS Letter addressed above.

44. Fifteen people testified at the April 23 hearing, and the speakers explained that the proposed amendments were insufficient. (Ex. 10, DOHMH Hr'g (Apr. 23, 2018).) Many people stressed how the categories chosen by DOHMH were arbitrary and irrational. As Joshua Taylor, the President of the 150-year-old New York Genealogical and Biographical Society, explained:

> For example, who are we to say that an individual, who on paper, might only be a child's step-grandfather, but in reality was never viewed as anything other than that person's grandfather throughout their entire lifetime? What do we say to the individual whose DNA test has revealed that his or her biological great-grandfather is indeed a very different man than actually listed on the paper records? . . . More than 40 percent of our nation is made up of what is termed a "blended family," those consisting of some type of step relationship.

(*Id.* at 11:7-12:1.) Noting how the Department's proposal was "an outdated, out-of-touch approach to the actual needs of genealogists and general researchers," and highlighting how difficult it will be to locate someone with a common name (*see id.* at 12:5-13:5), Taylor, on behalf of his society and consistent with many others, proposed that DOHMH permit researchers to access records. As he described: "This category ensures that a third cousin, a step-granddaughter, a town historian, a biographer, a fourth cousin, a fifth cousin, or a child, could access these materials." (*Id.* at 13:24-14:4.)

45. Mr. Taylor also addressed Schwartz's representation to the Board that people simply walk in and out of DOHMH with the records they request. As Mr. Taylor testified, anecdotal experiences revealed that to receive records, individuals must "provide the exact name of an individual's parents or other information that would be on the record. Yet, this is the precise type of information they are attempting to obtain in requesting the record in the first place." (*Id.* at 15:13-19.) As another individual later elaborated: "I'm not sure if the Board is aware that an application for a deceased relative's birth certificate currently requires a notarized application, a copy of a government ID, a copy of a utility bill, and a certified death certificate, if

the person died outside of New York City." (*See id.* at 28:18-25.) Further, DOHMH's rules made it impossible for people who did not know specifics regarding the death of an individual to acquire records. As one person explained: "There are 36 Thomas Dolans in the early census records, and you really have to go through each one of them." (*Id.* at 36:8-11; *see also* Bodami Aff. ¶¶ 7–11; Smolenyak Aff. ¶ 11.) Schwartz and Van Wye were present at this hearing as well, but they yet again sat silent.

46. On June 5, 2018, the Board adopted Schwartz's proposal without amendment. The amendments to Section 207.11 of the Health Code, maintaining severe limitations on rights to public access for 75 years, became effective January 1, 2019. The discussions from that Board meeting highlight just how arbitrary and capricious the privacy limitations are.

47. First, Schwartz stated that he was going to "exclude important family relationships, such as adoptees, step-family members, and other family generations." (Ex. 11, 3d Bd. Mt'g (June 5, 2018) Tr. 26:9-12.) His simple rationale for excluding step relations was that "we have no proof of relationship." (*Id.* at 26:14-15) Meanwhile, only a few moments later, Schwartz stated he would allegedly permit an attestation of relationship or notarized request *instead* of proof, thus eliminating his just-stated rationale for preventing disclosure to step family members (who could likewise provide an attestation). (*See id.* at 28:18-25, 32:12-20.)

48. As to the possibility of providing uncertified copies of records, a proposal supported by thousands of individuals and approved in countless states *including the rest of New York*, Schwartz merely stated: "We think that is a really bad idea. If the records should be opened, they should be opened. If they are closed, they should be closed. But simply stamping something, 'Not for Legal Purposes,' is a problem." (*Id.* at 27:2-7) Excluded from Schwartz's

response was *what the "problem" was*, or what types of "problems" these many other states (and every other county in New York) were having. No Board member asked.

49. Schwartz did not mention to the Board any formal studies undertaken to assess who should have access to records or what privacy concerns were involved. Instead, he merely stated that he "*did an informal poll around our office*" (*id.* at 28:25-29:1), and then he later added when discussing family relations, "*[w]e did this, basically, based on talking to our own staff*." (*Id.* at 29:24-30:1.) Additionally, despite scores of comments and testimony about the hassles and hurdles and immeasurable delays of receiving records, Schwartz again represented to the Board that "we move at almost lightning fast," and people "walk in and walk out" with certificates, further adding that "[d]eath certificates are superfast also." (*Id.* at 33:13-16, 34:2)[29]

50. The Board asked five questions. No one asked about uncertified copies or genealogical access. No one asked about the IAJGS Letter or others that highlighted how Schwartz had given the Board misleading and inaccurate information. The proposal passed unanimously. DOHMH then publicly stated: "After consideration of the comments received, no changes have been made to the proposed amendment."[30] DOHMH's explanation in response to the public outcry in its adoption notice was done summarily:

> Most of the comments on the proposed rule requested that the Board give additional categories of individuals access to birth and death records prior to their transfer to DORIS. Some comments suggested that professional researchers with no family connection to the people's histories they are researching should have broad access to birth and death records. Other comments requested that additional family and social relationships be added to the list of individuals with such access. The Department believes that the amendment appropriately balances the privacy and historical interests at stake, [and] does not agree that any additional changes should be made to the amendment.

[29] *But see* Bodami Aff. ¶¶ 12–13 (explaining that in practice there are significant delays for record requests).

[30] Ex. 12, Notice of Adoption of Amendment to Article 207 of the New York City Health Code, N.Y.C. Dep't of Health & Mental Hygiene, Bd. of Health, at 1 (2018).

(Ex. 12 at 3.) The Board's adoption notice provided no information about what privacy concerns were in fact at stake. Indeed, *not once* in the year-long amendment process of Sections 207.11 and 207.21 did DOHMH ever provide the public with any studies about identity theft relating to historical vital records. Nonetheless, DOHMH concluded that it would (i) retain the 75-year time restriction to the public for death records; (ii) not disclose uncertified copies for genealogical or research purposes; and (iii) only disclose certified copies to an arbitrary subset of individuals upon proof of relation.

51. In relevant part, the newly-revised Section 207.11 as adopted states that "no transcript, paper, file, report, record, or proceeding concerning a death shall be provided" for a period of 75 years except to "the spouse, domestic partner, parent, child, sibling, niece, nephew, aunt, uncle, grandparent, grandchild, great grandchild, great-great grandchild, grandniece, or grandnephew of the decedent."[31] The rule became effective as of January 1, 2019.

F. <u>This Action</u>

52. On February 7, 2019, RTR submitted a FOIL request to DOHMH, requesting "one complete set of the digital scans, in uncertified form, previously made by your agency of all New York City death certificates issued between and including 1949 and 1968." (*See* Ex. 13, FOIL Request, at 1.) RTR stated that "[t]o ensure that the Scans will not be used for improper purposes," before the Scans would be made available to the public, RTR would undertake to stamp or watermark the digital images "UNCERTIFIED COPY – FOR GENEALOGICAL PURPOSES ONLY," or something substantially similar, as is done in other states. (*Id.* at 2.)

53. RTR emphasized that its request was exempted neither by a state or federal statute nor by any legitimate privacy concerns. RTR added that DOHMH's fulfillment of the FOIL

[31] N.Y.C. Health Code § 207.11(b)(1).

request "would be in line with the more than twenty states that have already permitted genealogy service providers, including Ancestry.com and FamilySearch.org, to make available online death certificates into at least the 1960s, including those from Texas, Virginia, Pennsylvania, North Carolina and California." (*Id.* at 3.)

54. DOHMH denied the FOIL request on February 11, 2019. (Ex. 14, FOIL Denial.) DOHMH first claimed that the Scans "are protected by the applicable law and by FOIL § 87(2)(a)." At the core of DOHMH's denial was that NYC Health Code §§ 207.11 and 207.21 prevent disclosure of death records to the public for 75 years. DOHMH further stated that the City is exempted from compliance and that the City does not permit the release of uncertified copies. (*Id.*) DOHMH also claimed an exemption based on privacy grounds pursuant to FOIL §§ 87(2)(b) and 89(2)(b). DOHMH's explanation was short and conclusory: "The records you seek include information on persons still living such as next of kin. . . . [I]t would therefore be an unwarranted invasion of these person's [*sic*] privacy to release these death certificates." (*Id.*)

55. On March 7, 2019, RTR appealed the FOIL Denial. In its appeal, RTR highlighted that DOHMH failed to meet its burden of establishing either a statutory exemption or a privacy exemption. (Ex. 15, FOIL Appeal.) On March 18, Thomas Merrill of DOHMH formally denied RTR's appeal. On March 19, Mr. Merrill informed counsel for RTR to disregard his denial from March 18, and RTR received an amended denial on March 21 (the "FOIL Appeal Denial").[32] The FOIL Appeal Denial likewise refused to disclose the Scans based on FOIL §§ 87(2)(a) and 87(2)(b). (*See* Ex. 16, FOIL Appeal Denial.)

[32] Merrill provided no basis for RTR to disregard the denial it received. Nonetheless, Merrill sent a new denial, which included several additional arguments not raised in the original denial that he sent three days prior.

ARGUMENT

56. This Court should order Respondents to produce one copy of the requested Scans and also invalidate the Access Rules. First, Respondents should produce the Scans because DOHMH failed to meet its burden of establishing an exemption under FOIL. Second, this Court should invalidate the Access Rules, upon which DOHMH based its FOIL denial, because the rules are arbitrary and capricious, and the Board's enactment of them lacked any rational basis and was beyond the scope of its authority.

I. DOHMH FAILED TO MEET ITS BURDEN OF ESTABLISHING AN EXEMPTION UNDER FOIL

57. New York's Freedom of Information Law is "based on a presumption of access" to agency records, and every agency therefore "carries the burden of demonstrating that the exemption applies to the FOIL request." *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007). Because FOIL's exemptions "are to be narrowly interpreted so that the public is granted maximum access to the records of government," DOHMH "must meet this burden in more than just a 'plausible fashion.' In order to deny disclosure, [DOHMH] must show that the requested information 'falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.'" *Id.* at 462–63 (citation omitted). If the agency's justification is inadequate, then FOIL "compels disclosure, not concealment." *Id.* at 463 (citation omitted). Thus, "the burden of proof rests solely with the [agency] to justify the denial of access to the requested records." *Id.* DOHMH's summary rationales for denying disclosure of copies of death certificates that are over fifty years old based on alleged statutory and privacy grounds fail to meet this high burden. As a result, the Scans should be produced.

A. DOHMH Failed to Meet Its Burden of Establishing a Statutory Exemption

58. DOHMH alleges that disclosure is protected by statute, but its explanation is inconsistent with applicable law because no state statute prevents disclosure of the Scans. FOIL exempts agencies from disclosing records when those records "are specifically exempted from disclosure by state or federal statute." Pub. Off. Law § 87(2)(a). Here, DOHMH's purported basis for denial is that §§ 207.11 and 207.21 of the City Health Code do not permit public access to death records for a period of 75 years.

59. In the FOIL Appeal Denial, Merrill does not claim that any New York City rule is actually a state statute, and indeed he even concedes that the actual Health Code provisions at issue, pursuant to which he bases his denial, *do not create exemptions under FOIL.* (*See* FOIL Appeal Denial, at 2 ("It is true that any provision of the New York City Health Code, standing by itself, does not have the force of state law.").) That should end the inquiry.[33] Nonetheless, Merrill claims that the Scans are exempt from disclosure because "[t]he key New York City Administrative Code provisions at issue derive from the Greater New York Charter" and therefore "represent a policy of the State Legislature, having the force of state law." (*Id.* at 1.) Thus, he alleges that when the City's Health Code provisions are "construed together with authorizing provisions that do have such force, it represents and implements the policy of the

[33] As New York's Committee on Open Government ("COOG") explained: "[A]n assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. . . . If there is no statute upon which an agency can rely to characterize records as 'confidential' or 'exempted from disclosure,' the records are subject to whatever rights of access exist under FOIL. . . . Moreover, it has been held by several courts, including the Court of Appeals, the state's highest court, than an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a 'statute.' Therefore, a local enactment, such as a municipal code, cannot confer, require or promise confidentiality." Ex. 17, COOG Advisory Op., at 2 (Mar. 4, 2019) (citations omitted). Additionally, the Queens County Supreme Court previously held that a section of the New York City Health Code "is not a state or federal statu[t]e, thus this exemption in Public Officers Law § 87(2)(a) is inapplicable." Ex. 18, *Berger v. N.Y.C. Dep't of Health & Mental Hygiene*, No. 7618/2013, Short Form Order/Judgment, at 7 (Sup. Ct. Queens Cty. Dec. 13, 2013) (denied on other grounds), *aff'd*, 137 A.D.3d 904.

State Legislature," thereby creating a FOIL exemption. (*Id.* at 2.) This argument, however, has been rejected by the Court of Appeals, and therefore, Merrill's basis for denial is meritless.

60. In *Morris v. Martin*, the petitioner requested copies of a list of sales of real property in New York City that was prepared by the City and submitted to the State. (Ex. 19-1, *Morris* FOIL Denial, at 1.) The agency at issue, however, denied disclosure, alleging that the City's Administrative Code prevented disclosure, and "[s]ince the State Legislature has authorized New York City to levy a tax on real property transfers . . . in my opinion, this provision constitutes an exemption from disclosure." (*Id.*) The administrative appeal was likewise denied, as the agency noted among other things that "[t]o hold otherwise would, by indirect means, allow the dissemination of information specifically made confidential pursuant to the Administrative Code." (Ex. 19-2, *Morris* FOIL Appeal Denial, at 2.)

61. The petitioner appealed the FOIL denial to the Supreme Court of Albany County, arguing among other things that the Administrative Code of New York City "is a local law of the City, and thus properly may not be raised by Respondents to deny access to records pursuant to P.O.L. § 87(2)(a) which deals solely with material specifically exempted pursuant to state or federal statute." (Ex. 19-3, *Morris* Petition, at ¶ 16.) The trial court agreed with the petitioner and required disclosure. As the court explained:

> Section 87(a)(2) of the Public Officers Law provides that an agency may deny access to records or portions thereof that are specifically exempted from disclosure by state or federal statute. The records which petitioner seeks were derived from real property transfer tax returns which are made secret by the Administrative Code of the City New York. As such the information is not specifically exempted from disclosure by state or federal statute. Section 87(a)(2) of the Public Officers Law is therefore not applicable.

Ex. 19-4, *Morris v. Martin*, Memo. Decision, No. 4985-80, 5382-80, at 1–2 (Sup. Ct. Albany Cty. July 29, 1980). The court then entered judgment ordering the respondents to provide copies

of the requested information. Ex. 19-5, *Morris v. Martin*, Judgment, No. 4985-80, 5382-80 (Sup. Ct. Albany Cty. Nov. 14, 1980).

62. The agency appealed the trial court decision, and the Third Department reversed. The Third Department stated:

> [The New York City Administrative Code's] predecessor . . . was amended in 1963 by a special act of the State Legislature, and as a consequence the provisions of [the Administrative Code] became a State statute. . . Thereafter, pursuant to enabling legislation passed by the State Legislature . . . [the Administrative Code] was adopted by local law. That section guarantees the secrecy of real property tax returns and makes it unlawful "to divulge or make known in any manner any information contained in or relating to" any such returns. Given its history, section II 46-15.0 of the Administrative Code is, for all practical purposes, a State statute.

Morris v. Martin, 82 A.D.2d 965, 965–66 (3d Dep't 1981). The Third Department's conclusion that disclosure was exempted by FOIL § 87(a)(2) was nearly identical to Merrill's, as Merrill stated that the City's Administrative Code "was enacted by the state legislature . . . in an amendment of . . . the Greater New York Charter" (FOIL Appeal Denial, at 1), and another administrative code provision "derives from" a prior section of the New York Charter. (*Id.* at 2.)

63. However, *Morris* was appealed again, and the State's highest court agreed with the *trial court*, reversing the decision of the Third Department. As the Court of Appeals succinctly stated: "We agree with [the trial court] that the material requested by petitioner is not exempted from disclosure under Public Officers Law, § 87 (subd. 2, pars. [a], [b] or [g])." *Morris v. Martin*, 55 N.Y.2d 1026, 1028 (1982). Therefore, the binding law of the State is that New York City's Administrative Code does not have the effect of a state statute under FOIL.

64. The same issue again arose in *Brownstone Publishers, Inc. v. New York City Department of Finance*, 150 A.D.2d 185 (1st Dep't 1989). In *Brownstone*, the City Department of Finance claimed that disclosure of statistical and factual records concerning the transfers of

real property in the City would "violate the 'secrecy' provision of the City's Real Property Transfer Tax Law, set forth in [Administrative Code § 11-2115]." *Id.* at 186. The First Department disagreed, stating that "[t]his argument must be rejected, however, in light of the Court of Appeals decision in *Matter of Morris v. Martin*." *Id.* As the court elaborated, *Morris* "held that the 'secrecy' provision did not constitute an exemption from FOIL disclosure because it was not a State or Federal statute, as required for these purposes by Public Officers Law § 87(2)(a)." *Id.* at 186–87. As a result, the agency had "not met the burden of demonstrating that the records fall within one of the narrowly interpreted exemptions." *Id.* at 187.

65. Meanwhile, the sole case cited by Merrill *does not even relate to or mention FOIL*. In *Garcia v. New York City Department of Health & Mental Hygiene*, 31 N.Y.3d 601 (2018), a City Health Code provision was challenged on the basis that the Board violated the separation of powers doctrine in enacting a regulation regarding vaccinations, and that alternatively, the regulation was preempted by state law. *Id.* at 607–08. It was in that specific context, unrelated to FOIL, that the Court of Appeals assessed the authority of the Board and DOHMH to enact regulations, and the Court held merely that DOHMH had the authority "to adopt vaccination measures." *Id.* at 611. There is no reason to believe that *Garcia*—which is silent on FOIL—is meant to overturn the Court of Appeals' binding decision in *Morris*.[34]

66. Further, the only state statute that Merrill raises is Public Health Law § 4174. His reliance on this provision, however, is misplaced. Merrill argues that Section 4174(1)(a) "requires the Commissioner of Health to issue death certificates or transcripts only when they are required for certain enumerated purposes." (FOIL Appeal Denial, at 2). However, RTR's

[34] The original FOIL Denial here also cited *In re Bakers Mutual Insurance Co. of New York*, 301 N.Y. 21 (1950), but (i) that case pre-dates FOIL by nearly two decades and is therefore irrelevant, and (ii) it addressed issues relating to privilege, also irrelevant here. *See, e.g.*, *Doolan v. Bd. of Coop. Educ. Servs.*, 48 N.Y.2d 341, 347 (1979) ("The common-law interest privilege cannot protect from disclosure materials which [FOIL] requires to be disclosed.").

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request was not for *certified* copies, but for *uncertified* copies. Merrill ignores the fact that Public Health Law § 4174 actually provides for uncertified copies, stating that uncertified copies may be given "for authorized genealogical or research purposes." Pub. Health Law § 4174(3). And pursuant to that statute, the New York State Department of Health has enacted a regulation under which uncertified copies may be provided to the public *after 50 years*, exactly what RTR requested here. *See* 10 NYCRR 35.5(a), (c) (death records "may be provided for genealogical research purposes . . . in the form of an uncertified copy" when "on file for at least 50 years"). Therefore, Merrill's argument that state law provides support is likewise meritless.[35]

67. Finally, simply arguing that the City does not permit the disclosure of uncertified copies is not a basis under the law to deny access, and it has no support from the State legislature. Indeed, as described above, New York State permits the disclosure of death certificates that are over 50 years old, in uncertified form, for genealogical purposes. Therefore, the City's mere unwillingness to produce a copy of the Scans without stamping them as certified is no basis to prevent disclosure.[36]

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[35] Merrill also referenced the New York City Charter in a footnote, stating that the Charter may provide an exemption from FOIL in its own right. (FOIL Appeal Denial, at 3 n.3.) However, the cases he cites in fact highlight why there is no FOIL exemption here. All three cases relate to Charter § 557(g), which itself explicitly prevents disclosure of records, stating: "Such records shall not be open to public inspection." Here, instead, DOHMH does not and cannot argue that any provision of the Charter prevents disclosure of scans of death certificates that are older than 50 years old. Additionally, in DOHMH's original denial, it also cited to Public Health Law § 4104 and alleged that § 4104 "exempts New York City from State law" (FOIL Denial, at 1), appearing to claim that that provision even exempts DOHMH from FOIL obligations. That is also incorrect, as Section 4104 does not create any limitations to the disclosure of public records. *See, e.g.*, *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986) ("Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection.").

[36] DOHMH digitally scanned its death certificates in 2006. (*See* 1st Bd. Mt'g Tr. 73:21-23 ("[I]n 2006 we imaged all of our birth and death records, about 13 million records.").) As a result, RTR's request is for records that it knows are in existence. Merrill's statement that the City's records are "scans of certified records" (FOIL Appeal Denial, at 1 n.2), is illogical, as the records only become certified by the City *when issued*. As shown in Exhibit 1, a copy of a death certificate carries Schwartz's certification, which is from the *date of issuance to the requester*. The records that DOHMH maintain are inherently *uncertified*, and Mr. Merrill's representation is plainly incorrect.

B. DOHMH Failed to Meet Its Burden of Establishing a Privacy Exemption

68. DOHMH claimed in its denial that the Scans cannot be disclosed because they "include information on persons still living such as next of kin" and therefore it would be "an unwarranted invasion" of their privacy. (FOIL Denial, at 1.) In the FOIL Appeal Denial, Merrill meanwhile stated that the "recent records contain various personally identifying information about multiple parties, some of which is still subject to correction, and all of which could be abused if made public." (FOIL Appeal Denial, at 3.). DOHMH and Merrill cited no statistics or cases, and did not even attempt to create a hypothetical example regarding these historical records that are at least fifty years old. Absent any context, explanation or basis in law, this theoretical speculation about privacy is insufficient to meet DOHMH's burden under FOIL.

69. Countless decisions from New York have rejected mere speculation as a basis for a FOIL denial, as "[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed." *Baez v. Brown*, 124 A.D.3d 881, 883 (2d Dep't 2015) (citation omitted). In *Baez*, for instance, where an agency redacted documents and denied other requests "upon the 'unwarranted invasion of personal privacy' statutory exemption," but "failed to proffer more than conclusory assertions to support these claims," the Second Department concluded that the trial court had erred in determining that the respondent had met his burden of establishing a statutory exemption. *Id.* (citation omitted); *see also Livson v. Town of Greenburgh*, 141 A.D.3d 658, 661 (2d Dep't 2016) (ordering disclosure of records where town "did not articulate any privacy interest that would be at stake in the disclosure of the records" and where additional bases were speculative); *Mulgrew v. Bd. of Educ. of the City Sch. Dist. of City of N.Y.*, 87 A.D.3d 506, 507 (1st Dep't 2011) (ordering disclosure where "the

release of the information does not fall within one of the six examples of an 'unwarranted invasion of personal privacy' set forth in Public Officers Law § 89(2)(b)").

70. Additionally, despite Merrill's claim that the information from these Scans "could be abused," and even though more than half of the United States has already placed scans of death certificates online from this period, neither DOHMH nor Merrill were able to point to a single example of abuse. Further, in reference to the hypothetical "abuse" of this information, the Supreme Court of Albany County recently considered nearly the identical argument from the State's Department of Health for marriage indices and rejected it. In *Hepps v. New York State Department of Health*, No. 905431-18 (Sup. Ct. Albany Cty. Mar. 13, 2019), the State Department of Health argued that it could not disclose the State's marriage index for the years 1967 to 2017 on privacy grounds—specifically, 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." Ex. 20 at 5. The court, however, rejected this argument, noting that an agency must articulate particularized and specific justifications. *Id.* at 6. The court concluded: "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." *Id.*

71. Next, policies of other agencies throughout New York further bely DOHMH's privacy argument. DOHMH is claiming that the disclosure of the Scans would be an unwarranted invasion of personal privacy, yet, as addressed, New York State discloses to the public the same category of records being requested here. If disclosure is permitted in every county in New York State outside of New York City, without any reported problems, then such

is surely acceptable for New York City as well. Similarly, the New York City Clerk, in charge of the maintenance of marriage records, states on its website that marriage records (which contain much of the same information as death records, including parents, witnesses and addresses), are *public after 50 years*.[37] Lastly, anyone may go to a Surrogate's Court in New York City and view the probate docket of an individual who died this year. If information included therein, such as next of kin and addresses, is public now, then surely disclosing the same information from at least 50 years ago cannot be an unwarranted invasion of privacy.

72. Finally, despite Merrill asserting that a death certificate may state that an individual's death was "caused by accident, suicide, acute or chronic poisoning, or in any suspicious manner" (FOIL Appeal Denial, at 3), it is unclear why that would prevent disclosure of the records. First, these are precisely the types of deaths that one sees regularly reported in the media; the decedent cannot prevent disclosure of his or her cause of death.[38] Second, pursuant to federal law, medical files of individuals who died more than fifty years ago are not private. Pursuant to HIPAA, all medical information regarding an individual becomes public fifty years after death. 45 C.F.R. § 160.103(2)(iv). If an individual's complete and unredacted medical file is open to the public after fifty years, then the mere single-line disclosure of that individual's cause of death on a death certificate likewise cannot be an unwarranted invasion of privacy.

73. Ultimately, the burden to establish a privacy exemption *with specificity* fell squarely with DOHMH and not with RTR. DOHMH failed to enumerate a single substantive basis of any actual unwarranted invasion of privacy. As a result, its denial is meritless.

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[37] *See Marriage Records*, Office of the City Clerk, City of N.Y., https://www.cityclerk.nyc.gov/html/marriage/records.shtml ("A Marriage Record older than 50 years from today's date is considered a historic record and is available to the general public.") (last visited Apr. 10, 2019).

[38] *See also Jones v. Town of Kent*, 46 Misc. 3d 1227(A), 2015 N.Y. Slip Op. 50323(U), at *3 (Sup. Ct. Putnam Cty. 2015) ("The Court has been unable to locate any authority holding that a right of privacy extends to those person[s] no longer living. In fact, the holdings are to the contrary.").

II. DOHMH'S NEWLY-ENACTED REGULATIONS ARE ARBITRARY AND CAPRICIOUS

74. DOHMH's newly-enacted Access Rules, Health Code §§ 207.11 and 207.21, upon which it based its FOIL denial, should be invalidated because they are arbitrary and capricious.[39] An Article 78 proceeding may raise for review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The Court of Appeals has explained: "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty.*, 34 N.Y.2d 222, 231 (1974) (citation omitted). Additionally, "[a]dministrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991). Thus, "[a]bsent a predicate in the proof to be found in the record, [an] unsupported determination . . . must . . . be set aside as without rational basis and wholly arbitrary." *Metro. Taxicab Bd. of Trade v. N.Y.C. Taxi & Limousine Comm'n*, 18 N.Y.3d 329, 334 (2011) (citation omitted). Finally, in assessing an agency's decision, "courts may not substitute their judgment for that of the agency." *Trump on Ocean, LLC v. Cortes-Vasquez*, 76 A.D.3d 1080, 1083 (2d Dep't 2010) (citation omitted).

[39] The amendment processes to Sections 207.21 and 207.11 overlapped and were interrelated, and ultimately, the latter access rule amendments became effective January 1, 2019. If this Court were to invalidate § 207.11 (the access rule), it should also invalidate § 207.21 (the 125/75 rule) because if only the access rule were invalidated, then the 125/75 rule would be left in place without *any* access rule. While RTR expects that DOHMH would agree to propose new *rational* rules, it cannot assure so unless *both* rules are invalidated. *See Boreali v. Axelrod*, 71 N.Y.2d 1, 14 (1987) ("It would be pragmatically impossible, as well as jurisprudentially unsound, for us to attempt to identify and excise particular provisions while leaving the remainder of the PHC's antismoking code intact, since the product of such an effort would be a regulatory scheme that neither the Legislature nor the PHC intended.").

A. DOHMH Considered No Evidence of Actual Privacy Risks

75. Based on Schwartz's written statements on behalf of DOHMH, the only rationale for limiting access was a concern about privacy. However, not once in the year-long amendment process did Respondents provide any proof to warrant such action. This complete lack of evidentiary basis is sufficient grounds to invalidate the Access Rules. *See, e.g.*, *Dorfman v. City of Salamanca Bd. of Pub. Utils.*, 138 A.D.3d 1424, 1425 (4th Dep't 2016) (determination lacked rational basis where "record is silent with respect to facts supporting the Commission's determination"); *McCann v. N.Y.C. Emps. Ret. Sys.*, 60 Misc. 3d 1224(A), 2018 N.Y. Slip Op. 51223(U), at *3 (Sup. Ct. Kings Cty. 2018) (decision was arbitrary and capricious where board's determination was not based on credible evidence and report mainly consisted of "summaries and conclusions" but was "devoid of a discussion and sufficient rational analysis"); *Ahmed v. City of N.Y.*, 44 Misc. 3d 228, 236–37 (Sup. Ct. N.Y. Cty. 2014) (invalidating rule where agency "provided no basis, rational or otherwise" for specific monetary deduction).

76. Among other things, Schwartz did not provide a single example of a 50-plus-year-old death certificate ever being used to commit identity theft, nor is it even clear how such is possible. And no evidence was presented to the Board to show contrary trends from the many more lenient jurisdictions, including the rest of New York State. As a result, the basis for Schwartz's immense concerns about privacy remains unclear and unanswered.[40] Indeed, in further support of the fact that there are no substantial privacy concerns at issue, neither DOHMH nor Merrill in either FOIL denial could enumerate *any basis*—whether scientific or

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[40] New York's Attorney General published a report on all of the 1,583 data breaches reported to his office in 2017, which collectively exposed the personal records of 9.2 million New Yorkers. *See* Eric T. Schneiderman, N.Y.S. Att'y Gen., *Information Exposed: 2017 Data Breaches in New York State* (2017), https://ag.ny.gov/sites/default/files/data_breach_report_2017.pdf. This report was raised to the attention of the Board in the IAJGS Letter, at 5. Wholly absent from the Schneiderman report, though, is any reference to any alleged historical vital records fraud.

legal—to deny access on privacy grounds. One would assume that after the passage of regulations that were purportedly based on privacy concerns, DOHMH would have been able to point to tangible evidence to deny disclosure based on privacy. However, it enumerated nothing.

B. Schwartz Misled the Board of Health to Ignore Overwhelming Public Opposition on Critical Topics

77. The new Access Rules are also arbitrary and capricious because their passage was based on a misunderstanding by the Board of the relevant facts. *See, e.g.*, *Williamsburg Charter High Sch. v. Dep't of Educ.*, 36 Misc. 3d 810, 831 (Sup. Ct. Kings Cty. 2012) ("[T]he court finds that the Chancellor's decision was not based on a complete and accurate picture of the facts."). Despite approximately *six thousand* comments and two hearings highlighting the immense opposition to both Access Rules, Schwartz managed at the Board meetings to calmly inform the Board that he was right and everyone else was wrong. In so doing, however, his misleading and incomplete responses gave the Board a misunderstanding of the topic and the actual considerations of the public.

78. While highly-skilled professionals, the Board members did not appear well-versed in vital statistics regimes, and as a result, they appear to have relied heavily on the explanations provided by Schwartz. Many of the considerations at the Third Board Meeting in 2018 were based on the representations that Schwartz made to the Board at the Second Board Meeting, but Schwartz's responses there to important questions were severely inadequate. Indeed, when considering that Schwartz is the former President of NAPHSIS, an organization whose membership is comprised of state vital records registrars who deal with precisely these issues, and that Schwartz has authored publications with titles such as *The United States Vital Statistics System: The Role of State and Local Health Departments*, his responses and guidance to the Board appear dubious at best.

79. When a Board member asked Schwartz to discuss "how do you think about how many generations to go back," Schwartz replied, "how does somebody prove a relationship? . . . [W]e think this is long enough." (2d Bd. Mt'g Tr. 33:25-34:1, 34:12-16.) When asked how he determined the years at issue, Schwartz said that it was a "challenge," so he "did a survey" (*of whom?*) and felt it was "the right thing to do." (*Id.* at 36:16-25.) When asked why no one in the country had adopted Schwartz's 2011 revision to the Model Vital Records Act, he responded, "vital records to state legislatures are not always their highest priorities" and that it was "hard" (*according to whom?*) to get passed because it is seventy pages. (*Id.* at 37:25-38:2, 38:16.) When asked why the U.S. Department of Health had a 50-year rule instead of a 75-year rule, Schwartz responded, "I'm not aware of that." (*Id.* at 39:9-13.) And finally, when confronted with the fact that he had produced no evidence regarding identity theft, Schwartz deflected and merely responded that he did not know how many people would want their records "completely open" (far from what commentators were actually proposing). (*Id.* at 42:1-7.)

80. Additionally, Schwartz's reference to Social Security numbers being "completely open" also misled the Board about the privacy of Social Security numbers of the deceased, as those numbers are actually public records after only a few years following death. The Social Security Death Index is a fully searchable database, *available to the public* on websites such as Ancestry.com, through which anyone can see the Social Security number of a decedent who died at least ten years ago.[41] And the Social Security Administration has made the policy decision that one can even submit a Freedom of Information Request to receive that deceased individual's

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[41] *See U.S., Social Security Death Index, 1935-2014*, Ancestry.com, https://search.ancestry.com/search/db.aspx?dbid=3693 ("Why can't I see the Social Security Number? If the Social Security Number is not visible on the record index it is because Ancestry.com does not provide this number in the Social Security Death Index for any person that has passed away within the past 10 years.") (last visited Apr. 10, 2019).

original Social Security application.[42] Thus, Social Security numbers of the deceased are *not* secrets, and Schwartz's emphasis on this was improper.

81. Additionally, in between the Second and Third Board Meetings, countless commenters wrote to DOHMH to address the shortcomings of the Second Board Meeting so that the Board might be more well-informed for the Third Board Meeting to address access. Indeed, letters such as that from the IAJGS enumerated various misrepresentations made by Schwartz to the Board. (*See supra* at 15–17.) But *none of these* were mentioned at the Third Board Meeting, and many of the key considerations at play that were raised by thousands went silent, such as the permissibility of uncertified records and researcher access. In fact, the only comment made about uncertified copies at the Third Board Meeting was by Schwartz, who stated to the Board in his introduction—without any explanation—that this would simply be a bad policy, *despite the New York State Department of Health* disclosing uncertified copies for death records over 50 years old. Schwartz provided no reason why New York City should be more restrictive than the rest of the State, and the Board asked no questions about it at the Third Board Meeting.

82. The Third Board Meeting consisted of only five questions from the Board: (1) whether a relation by marriage counts for access; (2) how someone proves a relationship; (3) the cost of obtaining a certificate; (4) the length of time to receive a certificate; and (5) the requirements for adopted children. The Board discussed none of the nearly one thousand comments submitted, nor any of the testimony at the second public hearing. Collectively, the unawareness of the Board to the truth of the matter it was discussing, and thus the adoption of rules based on misinformation, is reason alone to invalidate the Access Rules. *See, e.g.*, *Trump*, 76 A.D.3d at 1087 ("Because examination of the Board's findings in light of the evidence

[42] *FOIA Request Methods and Fees*, U.S. Soc. Sec. Admin., https://www.ssa.gov/foia/request.html (last visited Apr. 10, 2019).

reveals that its reasoning misapprehended or disregarded the facts and was overly speculative, the Board's determination lacked a rational basis.").

C. The City Rules Are Stricter than Those From New York State and Nearly the Entire Country

83. The Board was led to believe that it was enacting regulations that were in line with the policies of the rest of the country, but that is incorrect. First, Schwartz's proposal made it appear that conforming to the 2011 revision to the Model Vital Records Act was the norm. However, the federal government has rejected its application, and only one state (Oklahoma) has been known to enact it, yet it shortly thereafter amended its law to return to 50-year death disclosures instead of 75 years. (*See supra* at 12.)

84. Second, a 75-year ban on public access is far from typical in the United States. Indeed, only *six* states ban public access to deaths for that long. (*See supra* at 8–9.) Thus, the Board's assumption that it was acting in line with the rest of the country when it banned public access for 75 years except to an arbitrary sub-category was incorrect and *not* in line with the rest of country, instead making New York City one of the strictest jurisdictions in the whole country, and—for no reason—stricter than the rest of New York State.

85. Finally, Schwartz simply buried his head in the sand when asked about the policies of the U.S. Department of Health. Pursuant to HIPAA, an individual's entire medical file only remains protected for 50 years. *See* 45 C.F.R. § 160.103(2)(iv). Schwartz merely pleaded ignorance and thereby misled the Board as to the permissibly of the disclosure of medical information during this time period.

III. RESPONDENTS ACTED *ULTRA VIRES* AND IN VIOLATION OF *BOREALI*

86. The Board, in enacting Schwartz's proposal, acted in excess of its regulatory authority and therefore violated the doctrine of separation of powers. Courts consider *ultra vires*

rulemaking pursuant to the factors delineated by the Court of Appeals in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987). In *Boreali*, the Court of Appeals "set out four 'coalescing circumstances' present in that case that convinced the Court 'that the difficult-to-define line between administrative rule-making and legislative policy-making ha[d] been transgressed.'" *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 696 (2014) (citation omitted). The four *Boreali* factors are:

> [W]hether (1) the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation[].

LeadingAge N.Y., Inc. v. Shah, 32 N.Y.3d 249, 260–61 (2018) (citation omitted). In assessing the *Boreali* factors, courts "do not regard the four circumstances as discrete, necessary conditions that define improper policymaking by an agency, nor as criteria that should be rigidly applied in every case in which an agency is accused of crossing the line into legislative territory." *N.Y. Statewide Coal.*, 23 N.Y.3d at 696. Instead, courts "treat the circumstances as overlapping, closely related factors that, taken together, support the conclusion that an agency has crossed that line. Consequently, respondents may not counter petitioners' argument merely by showing that one *Boreali* factor does not obtain." *Id.* at 696–97. Ultimately, the analysis should focus on "whether the challenged regulation attempts to resolve difficult social problems in this manner. That task, policymaking, is reserved to the legislative branch." *Id.* at 697.[43]

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[43] The New York City Council "is the sole legislative branch of City government," and the City's Charter "contains no suggestion that the Board of Health has the authority to create laws." *N.Y. Statewide Coal.*, 23 N.Y.3d at 693–94. Thus, "the Board's authority, like that of any other administrative agency, is restricted to promulgating 'rules

(cont'd)

87. In *Boreali*, the Court considered a Public Health Law that defined locations where people could and could not smoke tobacco. In this regard, the Court of Appeals explained that "[e]ven under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives." *Boreali*, 71 N.Y.2d at 9. The Court thus ultimately concluded that the Board "stretched [the enabling] statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be." *Id.*

88. As to the first factor, the Court of Appeals explained that the acting body had "in reality, constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns" and had "no foundation in considerations of public health." *Id.* at 11–12. The Court further noted how the provision had created arbitrary exemptions, explaining that "exemptions ordinarily run counter to [legislatively expressed goals] and, consequently, cannot be justified as simple implementations of legislative values." *Id.* at 12. Likewise, in *New York Statewide Coalition*, where the Court of Appeals assessed DOHMH's "Sugary Drinks Portion Cap Rule," the Court explained that the Board's decision to restrict portion sizes, with consequences on countless individuals and industries, was a "value judgment[]" that "entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch." 23 N.Y.3d at 698. Meanwhile, in *Garcia v. New York City Department of Health & Mental Hygiene*, the Court of Appeals instead found no separation of powers violation when "the Board did not choose between the competing public policies of advancing public health and avoiding economic disruption of specific industries," adding that the regulation at issue

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necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law.' A rule has the force of law, but it is not a law; rather, it 'implements or applies law or policy.'" *Id.* at 695 (citations omitted).

(vaccinations in schools) had a "very direct connection" to "the preservation of health and safety." 31 N.Y.3d at 612.

89. Here, the Board simply adopted the restrictive policy agenda of Schwartz. Meanwhile, most glaringly absent from the Board's meetings was any discussion of *health*; neither Schwartz nor the Board of Health ever grappled with the benefit of making vital records more widely accessible for health reasons. Family health history is promoted by nearly every medical and health organization in the country. As the Centers for Disease Control and Prevention plainly states, "[i]f you have a family health history of a chronic disease like cancer, heart disease, diabetes, or osteoporosis, you are more likely to get that disease yourself," and the American Medical Association thus recommends that individuals collect all medical histories regarding their first, second and third degree relatives.[44] Despite countless people writing to DOHMH and testifying about the need for access to vital records to assess family medical histories and to warn other family members about the potential for disease,[45] there is no indication that the Board of Health actually considered the health implications of its decisions.

90. Instead, DOHMH's proposals purported to limit access to vital records based on *privacy concerns*, as Schwartz created a perception for the Board that identity theft among living New Yorkers was somehow at grave risk upon the disclosure of *any information* from death certificates that are more than a half-century old. And he created a remarkably restrictive

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[44] *Family Health History & Chronic Disease*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/genomics/famhistory/famhist_chronic_disease.htm (last visited Apr. 10, 2019); *Collecting a family history*, Am. Med. Ass'n, https://www.ama-assn.org/delivering-care/precision-medicine/collecting-family-history (last visited Apr. 10, 2019).

[45] *See generally* Bushman Aff.; *see also* Ex. 9 at 1 ("Death records list cause of death and for an adoptee, this is important health information they probably cannot get anywhere else."); *id.* at 2 ("Often times families are fractured and without expansion of family members able to obtain death certificates it will be impossible for many people to correctly evaluate their risk of certain diseases and to make informed health care decisions."); *id.* at 23 ("Those who research family health history, for example, often need to access birth and death records for third and fourth cousins, a provision that is not provided for under the proposed guidelines.").

regulatory scheme based on what appears to be nothing more than his own misguided beliefs regarding what should be public and what should be private. Identity theft and its prevalence, though, appeared to be far beyond the expertise of the Board of Health, and DOHMH's policy decisions—absent any statistics, studies or scientific rationale—exceeded appropriate regulatory rulemaking. *See N.Y. Statewide Coal.*, 23 N.Y.3d at 699 ("By choosing between public policy ends in these ways, the Board of Health engaged in law-making beyond its regulatory authority.").

91. The second *Boreali* factor also favors RTR. In *Boreali*, the Court of Appeals noted that the regulation "did not merely fill in the details of broad legislation describing the over-all policies to be implemented," but instead the rules were written "on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." *Boreali*, 71 N.Y.2d at 13. Courts have looked to whether "legislative guidance" influenced an agency's decision. *Compare N.Y. Statewide Coal.*, 23 N.Y.3d at 700 ("[d]evising an entirely new rule" that was "without benefit of legislative guidance" was "a new policy choice") *with LeadingAge N.Y.*, 32 N.Y.3d at 265 (agency "acted pursuant to a preexisting directive"); *Garcia*, 31 N.Y.3d at 613 (the State "repeatedly reaffirmed" DOHMH's authority to regulate vaccinations).

92. Here, not only did DOHMH *create* its own privacy rules, but these rules were contrary to the rules promulgated by New York State. Pursuant to Public Health Law § 4174(3), death certificates may be made available in uncertified form to researchers. This signifies a conscious decision by the Legislature to declare such is a permissible disclosure. And the State's Department of Health permits disclosure of death records to the public after 50 years. Thus, although there was guidance from New York State on the legislature's interpretation of

appropriate privacy exemptions, the Board specifically *disregarded* those, based on nothing more than a passing comment from Schwartz that this would be a "problem."[46]

93. The third factor also favors RTR. As the Court of Appeals explained in *New York Statewide Coalition*, "inaction on the part of the state legislature and City Council, in the face of plentiful opportunity to act if so desired, simply constitutes additional evidence that the Board's adoption of the Portion Cap Rule amounted to making new policy, rather than carrying out preexisting legislative policy." 23 N.Y.3d at 700. Here, New York State has long had in place the same rules, which New York City has now surpassed. By surpassing the inactive State, this is additional evidence that what is at issue is a policy determination that should not have been first made by the City's Board, based on one individual's personal opinion.

94. Finally, the fourth factor clearly weighs in favor of RTR. In *Boreali*, the Court of Appeals explained that while the underlying issue concerned health, "no special expertise or technical competence in the field of health was involved in the development of the antismoking regulations challenged here." *Boreali*, 71 N.Y.2d at 13–14; *see also N.Y. Statewide Coal.*, 23 N.Y.3d at 701 ("A court might be alerted to the broad, policy-making intent of a regulation, and the absence of any perceived need for agency expertise, by the fact that the rule was adopted with very little technical discussion."). Meanwhile, in *LeadingAge New York*, the Court of Appeals upheld a regulation where the Department of Health had "utilized 'special expertise' [and] . . . drew upon its understanding of the realities of the health care industry," 32 N.Y.3d at 266, and in *Garcia*, the Board compiled a significant array of data and research, thus triggering

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[46] A decision regarding when *historical* records should be made available to the public is not something regarding which the Board has any special expertise. Its decision to exceed New York State's rules is therefore especially startling. In any event, despite the fact that DOHMH has been delegated authority to oversee vital records registration and management, the New York State legislature has not clearly delegated to DOHMH the authority to make its own *privacy exemptions*, let alone ones that *exceed* the privacy exemptions of the State. *See, e.g.*, *Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 608 (2009) (agency cannot adopt regulations that are inconsistent with the statutory language or its underlying purposes).

the Court to conclude that "the Board's health expertise was essential to its determination of whether to require the influenza vaccination." 31 N.Y.3d at 616.

95. Here, it is difficult to imagine an instance where the Board relied on less data—in the face of so much opposition—to pass a regulation with significant consequences. Despite approximately 6,000 comments and testifiers explaining why the rules were irrational and absent support, the Board relied on Schwartz. But Schwartz provided to the Board neither studies about identity theft nor adequate comparisons to other states' vital records privacy regimes. He offered the Board conclusory and misleading responses, upon which it relied to first restrict access under the 125/75 rule and then to maintain arbitrary access rules that did not include the most common suggestions from the public. Additionally, the Board did not discuss *health*, and as the Board meetings reveal, the Board was poorly equipped to adequately assess the issue. *See Ahmed v. City of N.Y.*, 129 A.D.3d 435, 440 (1st Dep't 2015) ("[N]o expertise in the field of health care services or disability insurance was involved in the development of the rule (indeed, this is not TLC's area of expertise), a fact highlighted by the lack of technical discussion at the hearings on the proposed rule amendments.").

96. Overall, the *Boreali* factors all weigh against the Board's decisions in enacting the Access Rules, and they should be invalidated as a result.

<u>FIRST CAUSE OF ACTION</u>
(Order Compelling Respondents to Produce a Copy of the Scans Pursuant to FOIL)

97. Petitioner repeats and realleges the allegations made above as if fully set forth in this paragraph.

98. The New York City Bureau of Vital Statistics, a division of DOHMH, maintains digital copies of death certificates issued in New York City between 1949 and 1968.

99. RTR submitted a FOIL request to DOHMH requesting a copy of its digital scans of death certificates dating between 1949 and 1968, and DOHMH was required to produce the requested Scans absent the applicability of a clear exemption under FOIL.

100. DOHMH had the burden of establishing that an exemption under FOIL applies. However, it failed to meet its burden because there is no state or federal statute that bars the production of the Scans, and DOHMH failed to explain how the Scans' disclosure would constitute an unwarranted invasion of personal privacy.

101. Therefore, this Court should order DOHMH to produce a copy of the Scans pursuant to FOIL.

SECOND CAUSE OF ACTION
(Judgment Invalidating NYC Health Code §§ 207.11 and 207.21 Pursuant to CPLR 7803(3) and 7806)

102. Petitioner repeats and realleges the allegations made above as if fully set forth in this paragraph.

103. DOHMH refuses to disclose the Scans because it alleges that doing so would violate New York City Health Code §§ 207.11 and 207.21.

104. A regulation enacted by DOHMH and the Board of Health cannot be arbitrary and capricious. Here, though, the record does not support that the Board's amendment of §§ 207.11 and 207.21 was rational.

105. Despite basing the new strict limitations on privacy concerns, Respondents did not enumerate any actual statistics or studies showing the necessity of such strict rules in the face of more than 6,000 oppositions. Additionally, then-Registrar Schwartz misled the Board to believe that it was acting in accordance with a national trend, but actually, the new Access Rules

make New York City a stricter access jurisdiction than virtually the entire United States, including the rest of New York State.

106. Because the Access Rules are not rational but instead are arbitrary and capricious, Petitioner is entitled to a judgment under CPLR 7806 to vacate and annul them.

THIRD CAUSE OF ACTION
(Judgment Invalidating NYC Health Code §§ 207.11 and 207.21 Pursuant to CPLR 7803(2) and 7806)

107. Petitioner repeats and realleges the allegations made above as if fully set forth in this paragraph.

108. Administrative agencies, including DOHMH, do not have the authority to create rules beyond the scope of their authority.

109. Here, DOHMH, through the Board, acted *ultra vires* by promulgating and passing the Access Rules, which were policy decisions beyond the purview of DOHMH and the Board, went against all public commentary, and also stand in conflict with New York State precedent.

110. Additionally, the Access Rules were passed by the Board despite having no expertise on the subject matter and not adequately considering the opinions and suggestions of the many commenters with expertise.

111. Therefore, the Access Rules were enacted *ultra vires*, and Petitioner is entitled to a judgment under CPLR 7806 to vacate and annul them.

FOURTH CAUSE OF ACTION
(Declaratory Judgment)

112. Petitioner repeats and realleges the allegations made above as if fully set forth in this paragraph.

113. There exists an actual, substantial and immediate controversy with respect to the recently-adopted Access Rules.

114. The controversy is the result of Respondents' past and present conduct and threat of future conduct consistent therewith, which threatens and harms the interests of Petitioner.

115. Therefore, and for all the reasons set forth above, Petitioner is entitled to a judgment declaring that the Access Rules are arbitrary and capricious and were enacted *ultra vires*, and should be vacated and annulled.

NO PRIOR APPLICATION

116. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests that this Court enter an Order:

A. Issuing a judgment pursuant to the New York Freedom of Information Law compelling Respondents to produce to Petitioner one complete set of the Scans;

B. Issuing a judgment pursuant to CPLR 7806 vacating and annulling the Access Rules, codified at New York City Health Code §§ 207.11 and 207.21;

C. Issuing a judgment declaring that the Access Rules are arbitrary and capricious and were enacted *ultra vires*, and should be vacated and annulled as a result; and

D. Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 16, 2019

Respectfully submitted,

/s/ Michael D. Moritz

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Counsel for Petitioner

VERIFICATION

BROOKE SCHREIER GANZ, being duly sworn, deposes and says:

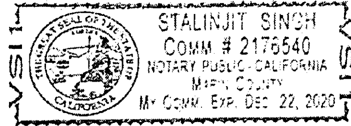
I am the President and Founder of Petitioner Reclaim the Records, a not-for-profit organization, and I make this verification pursuant to CPLR 3020(d)(3) and 3021. I have read the foregoing Petition and know the contents thereof; the same are true to my knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true. To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of these papers or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1 of the Rules of the Chief Administrator (22 NYCRR).

Brooke Schreier Ganz
President and Founder of Petitioner
Reclaim the Records

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

On April 16th, 2019, 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.



NOTARY PUBLIC, STATE OF CALIFORNIA

Printed Name: STALINJIT SINGH