Index No.: 153996/2019 IAS Part 6 (Sweeting, J.)

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

In the Matter of the Application of
RECLAIM THE RECORDS,

Petitioner,

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

- against -

THE 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.

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED ANSWER

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Matter No. 2019-028789

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

Background 2

Petitioner's FOIL Request 5

ARGUMENT

POINT I

THE RECORDS REQUESTED BY PETITIONER ARE EXEMPT FROM DISCLOSURE PURSUANT TO PUBLIC OFFICERS LAW §§ 87(2)(a) AND 87(2)(b) 7

Public Officers Law § 87(2)(a) 8

Public Officers Law § 87(2)(b) 13

POINT II

PETITIONER FAILS TO STATE A CLAIM AS TO ITS ASSERTION THAT THE BOARD OF HEALTH VIOLATED THE SEPARATION OF POWERS DOCTRINE 17

A. A *Boreali* analysis is not warranted 17

B. Application of the *Boreali* analysis 19

1. First *Boreali* factor 22

2. Second *Boreali* factor 24

3. Third *Boreali* factor 25

4. Fourth *Boreali* factor 25

Page

POINT III

PETITIONER FAILS TO STATE A CLAIM AS TO ITS ASSERTION THAT IN AMENDING SECTION 207.11 OF THE HEALTH CODE THE BOARD OF HEALTH'S ACTIONS WERE ARBITRARY AND CAPRICIOUS 25

CONCLUSION 27

Statutes **Pages**

TABLE OF AUTHORITIES

Cases **Pages**

Matter of Abdur-Rashid v. New York City Police Dept.,
31 N.Y.3d, 217 (2018) 7

Boreali v. Axelrod,
71 N.Y. 2d 1 (1987) 17, 19, 20

Matter of Consolation Nursing Home v. Commissioner of N.Y. State Dept. of Health,
85 N.Y.2d 326 (1995) 26

Dobranski v. Houper,
154 A.D.2d 736 (3d Dept. 1989) 13

Matter of Federation of New York State Rifle and Pistol Clubs v. New York City Police Dept.,
73 N.Y.2d 92 (1989) 14

Garcia v New York City Dept. of Health & Mental Hygiene,
31 N.Y.3d 601 (2018) 9, 17, 18, 21, 24

Matter of General Elec. Capital Corp.,
2 N.Y.3d 249 (2004) 17

Journal Pub. Co. v. Office of Special Prosecutor,
131 Misc. 2d 417 (Sup. Ct. N.Y. Co. 1986) 13

Matter of Juarez,
2021 N.Y. LEXIS 26

Matter of Juarez v. New York State Off. of Victim Servs.,
2021 N.Y. LEXIS 101, 2021 N.Y. Slip Op. 01091 (Feb. 18, 2021).....23

Matter of LeadingAge N.Y., Inc. v. Shah,
32 N.Y.3d 249 (2018) 18, 21, 24

Lesher v. Hynes,
19 N.Y.3d 57 (2012) 13

Morris v. Martin,
Memorandum Decision (Sup. Ct. Albany County, July 29, 1980),
82 A.D.2d 965 (3d Dep't 1981) 11

Statutes **Pages**

Morris v. Martin,
55 N.Y.2d 1026 (1982) 11

Mulgrew v. Board of Educ. of the City School Dist. of the City of N.Y.,
87 A.D.3d 506 (1st Dept. 2011),
lv denied, 18 N.Y.3d 806 (2012).....7-8

N.Y. Times Co. v. City of New York Fire Dept.,
4 N.Y.3d 477 (2005) 14

Matter of New York City C.L.A.S.H.,
27 N.Y.3d at 179-80.....19, 21

Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene,
23 N.Y.3d 681 (2014) 19, 20

Pennington v. Clark,
16 A.D.3d 1049 (4th Dept. 2005),
appeal denied, 5 N.Y.3d 712 (2005).....13

People for the Am. Way v. Natl. Park Serv.,
503 F. Supp. 2d 284 (D.D.C. 2007) 14

Matter of Thomas v. Condon,
128 A.D.3d 528 (1st Dept. 2015).....7

U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press,
489 U.S. 749 (1989).....13

United States Dept. of State v. Wash. Post Co.,
456 U.S. 595 (1982).....14

Statutes

10 N.Y.C.R.R. § 35.4(a) 10

5 U.S.C § 552, *et seq.*.....13

Admin. Code § 567-4.0.....8

CPLR 3211(a)(7) 25

CPLR 7803(3).....7

Greater New York Charter, Charpter 466 of the Law 1901 § 1175 8

Greater New York Charter §1241-a.....8, 9

Statutes **Pages**

Health Code § 207.11 .....1, 4, 5, 6, 9, 16, 18, 21, 22, 24, 25, 26, 27

Health Code § 207.11(a) 10

Health Code § 207.11(b) 25

Health Code § 207.11(b)(1) 4

Health Code § 207.21 .....1, 3, 4, 6, 7, 9, 15

Health Code § 325 5

Health Code § 558(b) 18

Health Code § 558(c) 18

Health Code § 558(g) 18

N.Y.C. Admin. Code § 17-112 .....2, 6, 8, 12, 17, 18, 22, 23

N.Y.C. Admin. Code § 17-169 .....5, 8, 17, 18, 23

N.Y.C. Admin. Code § 17-169(b) 2, 6, 8, 12

N.Y.C. Admin Code §17-169(2)(b) 22

N.Y.C. Admin. Code § 17-170 17

N.Y.C. Charter, § 556 2

N.Y.C. Charter § 556(c)(1) 2, 17

N.Y.C. Charter § 558(a) 9

N.Y.C. Charter § 558(b) 2, 17

N.Y.C. Charter § 558(c) 2, 17, 18

N.Y.C. Charter § 558(g) 2, 17

PHL § 4104 .....10, 11

PHL§ 4174 .....10, 11

PHL § 4174(1)(a) 11, 12, 16

PHL § 4174(1)(d) 10

PHL § 4174(a)(1) 10, 24

Statutes **Pages**

Pub. Off. Law § 84, *et seq.* 1

Pub. Off. Law § 87(2) 7

Pub. Off. Law § 87(2)(a).....1, 5, 7, 8, 11, 12, 13

Pub. Off. Law § 87(2)(b) 1, 5, 7, 13, 14, 16

State Legislature Charpter 929 of the Laws of 1937 § 556-9.0 9

PRELIMINARY STATEMENT

Petitioner, a non-profit activist group, brings this Article 78 proceeding to challenge the determinations of the New York City Department of Health and Mental Hygiene ("DOHMH") that denied its request pursuant to the Freedom of Information Law ("FOIL"), New York Public Officers Law § 84, *et seq.* for copies of death records from 1949 through 1968. Because the FOIL request was denied, in part, based on the New York City Health Code §§ 207.11 and 207.21 that regulate public access to death records, Petitioner challenges the validity of these rules and seeks to have them vacated and annulled on the basis that the New York City Board of Health and DOHMH exceeded their statutory authority in enacting section 207.21 and in amending section 207.11, and that these "access rules" are arbitrary and capricious.

On December 16, 2020, the Court granted Respondents' motion to dismiss, in part, finding that Petitioner's challenge to Health Code § 207.21 was time-barred. As a result, the remaining claims concern Petitioner's appeal of DOHMH's denial of its FOIL request and a challenge to Health Code § 207.11.

As discussed more fully below, the first cause of action, challenging DOHMH's denial of Petitioner's FOIL request, should be dismissed because DOHMH properly withheld the responsive records under (i) Public Officers Law § 87(2)(a) on the basis that they are protected from disclosure to the public by applicable law and (ii) Public Officers Law § 87(2)(b) because such disclosure would constitute an unwarranted invasion of personal privacy. With respect to the second, third, and fourth causes of action challenging the Board of Health's amendment to Health Code § 207.11, these claims should be dismissed because the Board of Health's enactment of the amendment was a valid exercise of its rulemaking authority and rational. Accordingly, the Petition should be dismissed in its entirety.

STATEMENT OF FACTS

For a complete statement of relevant facts, the Court is respectfully referred to Respondents' Verified Answer. A summary of the facts follows:

Background

Pursuant to the New York City Charter, the New York City Department of Health and Mental Hygiene ("DOHMH") has "jurisdiction to regulate all matters affecting health in the City of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city[.]" N.Y.C. Charter, Chapter 22, § 556. Among its duties include the supervision and control over "the registration of births, fetal deaths and deaths[.]" *Id.*, § 556(c)(1).

To that end, the Board of Health, which is within DOHMH, is required to include in the New York City Health Code (the "Health Code") provisions related to maintaining a registry of births and deaths, as well as the "examination and issuance of transcripts" of birth and death certificates. *Id.*, § 558(c). The Health Code may also include all other "matters and subjects to which the power and authority of the department extends." *Id.* The Board is specifically authorized to add to, alter, and amend any part of the Health Code. *Id.*, § 558(b), (g).

Section 17-169(b) of the New York City Administrative Code prevents the issuance of a death record where such issuance would not be "necessary or required for a proper purpose." Section 17-112, in turn, provides that DOHMH may establish "reasonable regulations" regarding making any of its records public.

On March 13, 2018, in accordance with the City Administrative Procedure Act and after a hearing and a period of notice and comment, the Board of Health adopted a resolution to establish a fixed schedule for making birth and death records accessible to the public. *See* Verified Answer, ¶ 80 and Ex. A thereto. This resolution was codified in the Health Code as

§ 207.21, and made final in the City Record on March 19, 2018, with the effective date of April 18, 2018. Verified Answer, ¶ 80.

Health Code § 207.21 states, in relevant part, that "a birth record in the Department's possession and control becomes public on January 31st of the year following 125 years after the date of birth and a death record . . . becomes a public record on January 31st of the year following 75 years after the date of death." Health Code § 207.21.

Notably, the Board of Health received a comment from the New York State Department of Health, Bureau of Vital records, in support of its proposal to amend the Health Code to establish a schedule for making birth and death records public. *See* Verified Answer, ¶ 82 and Ex. B thereto. In supporting the amendment, the Department of Health stated that "[i]t is significant to note, that the proposal would align New York City's proposal with the 2011 Model State Vital Statistics Act and Model State Vital Statistics Regulations," as under the Model Act, vital records become public 125 years after the date of birth or 75 years after the date of death have lapsed. Verified Answer, Ex. B at 1. Among the factors listed in support of the Board of Health's amendment was the confidential nature of vital records. *Id.* The Department of Health detailed the methods by which identifiable information contained in such records could be used improperly by criminals to establish a fictitious identity:

> A birth certificate contains an individual's first and last name, date of birth, sex, home address, and mother's maiden name. In addition, a death certificate contains an individual's first and last name, sex, date of death and birth, gender, Social Security Number, marital status, full name of surviving spouse, residence, and full names of both parents. All this information can be used to identify an individual.

Id.

Further support for the promulgation of § 207.21 was provided by the National Association for Public Health Statistics and Information Systems ("NAPHSIS"), which is the

national nonprofit membership organization representing the 57 vital records and public health statistics offices (the 50 states, 5 territories, New York City, and the District of Columbia) in the United States. *See* Verified Answer, ¶ 83 and Ex. C thereto. In supporting § 207.21, NAPHSIS noted that the proposed amendment to the Health Code would align the City's access rule with the relevant State law and that the "revision reflects an increased emphasis on electronic records, fraud prevention and security, and protection of the records both for individual privacy and for preservation purposes." Verified Answer, Ex. C at 1.

Also after hearing and a period of notice and comment, the Board of Health adopted a resolution concerning Health Code § 207.11 designed to expand the group of family members who can access birth and death records prior to their public release. *See* Verified Answer, ¶ 84 and Ex. D thereto. At the time this resolution was adopted, death records were only available to: (1) the spouse, domestic partner, parent, child, sibling, grandparent, grandchild, [or] great grandchild of the decedent." *See* Verified Answer, Ex. D at 4. Access was not available to Petitioner's members, who are purportedly comprised of genealogists, historians, researchers, teachers and journalists. *See* Verified Petition, ¶ 10. In enacting the amendment, the Board of Health expanded the list of relatives given in Health Code § 207.11(b)(1) who can request a death certificate to also include nieces, nephews, aunts, uncles, great-great grandchildren, grandnieces, and grandnephews. *See* Verified Answer, ¶ 84 and Ex. D thereto at 2, 4. The Board of Health also provided access to the certification of birth of a deceased individual, listing spouses, domestic partners, parents of children over the age of 18, children, siblings, nieces, nephews, aunts, uncles, grandchildren, great grandchildren, grandnieces, and grandnephews among the groups of family members who may obtain access. Verified Answer, ¶ 84 and Ex. D thereto at 1-4. These modifications were included and made final in the City Record on June 12,

2018, and became effective August 12, 2018, although they were not implemented until January 1, 2019. Verified Answer, ¶ 84.

The Board of Health considered comments on the proposed amendment to Health Code § 207.11, some of which suggested that professional researchers should have broad access to birth and death records and that additional family and social relationships should be added to the list of individuals with such access. *See* Verified Answer, ¶ 85 and Ex. D thereto. Balancing the privacy and historical interests at stake, the Board of Health determined that no additional changes should be made to the amendment. *Id.*

Petitioner's FOIL Request

Petitioner, Reclaim the Records, is a self-described non-profit activist group consisting of genealogists, historians, researchers, teachers and journalists, that "works to identify important genealogical and historical record sets that are not currently available to the public." *See* Verified Petition, ¶ 10.

On February 7, 2019, DOHMH received a request from Petitioner pursuant to FOIL. *See* Verified Petition, Ex. 13 (Dkt. No. 15); Verified Answer, ¶ 89. The FOIL request sought "one complete set of the digital scans, in uncertified form, previously made by [DOHMH] of all New York City death certificates issued between and including 1949 and 1968." Verified Petition, Ex. 13.

On February 11, 2019, DOHMH's Records Access Officer (the "RAO") timely responded to the FOIL request, denying the request in its entirety on the grounds that the responsive records are exempt under (i) Public Officers Law §§ 87(2)(a) as records that are exempt under applicable law, including Administrative Code § 17-169 and Health Code §§ 3.25 and 207.11 and (ii) Public Officers Law §§ 87(2)(b) and 89(2)(b) on the basis that disclosure would constitute an unwarranted invasion of personal privacy. *See* Verified Petition, Ex. 14;

Verified Answer, ¶ 90. Petitioner appealed the decision on March 7, 2019, arguing, in part, that DOHMH cannot rely on the Health Code provisions to deny disclosure under FOIL and that the privacy exemption did not apply to these records. *See* Verified Petition, Ex. 15; Verified Answer, ¶ 91.

On March 21, 2019, DOHMH's Appeals Officer timely denied the appeal, setting forth the legal bases on which the records were withheld and describing in detail the applicability of the asserted exemptions. *See* Verified Petition, Ex. 16; Verified Answer, ¶ 92. Specifically, the Appeals Officer detailed how disclosure of the requested records was not permitted pursuant to section 17-169(b) and 17-112 of the Administrative Code and section 207.11 and 207.21 of the Health Code, and explained that the records were entirely exempt from FOIL outside New York City by State law. *Id.* The Appeals Officer also explained that disclosure would impact the privacy interests of multiple parties. *Id.*

Petitioner commenced this Article 78 proceeding by filing a Verified Petition on April 17, 2019. (Dkt. No. 1). In this proceeding, Petitioner (i) seeks an order directing DOHMH to produce the records responsive to its FOIL request (first cause of action), and (ii) challenges the amended § 207.11 of the Health Code and the newly-enacted § 207.21 of the Health Code as enacted *ultra vires* and arbitrary and capricious, and as and seeks to have both sections vacated and annulled (second, third and fourth causes of action). *See* Verified Petition, ¶¶ 102-115.

On July 8, 2019, Respondents moved to dismiss the second, third, and fourth causes of action on the basis that they were barred by the applicable statute of limitations, and that the fourth cause of action also failed to state a claim. *See generally,* Memo. of Law in Support of Cross-Motion (Dkt. No. 37).

On December 16, 2020, the Court issued a decision granting Respondents' motion in part, and severed and dismissed Petitioner's challenge to Health Code § 207.21. *See* Decision (Dkt. No. 52) at 28.

ARGUMENT

POINT I

THE RECORDS REQUESTED BY PETITIONER ARE EXEMPT FROM DISCLOSURE PURSUANT TO PUBLIC OFFICERS LAW §§ 87(2)(A) AND 87(2)(B)

By enactment of the Freedom of Information Law, the New York legislature established a general policy of disclosure of agency records. That policy, however, is not absolute. Excluded are records which, if disclosed, would create a risk that certain defined harms would occur. As expressed by the Court of Appeals, "[w]hile FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL." *Matter of Abdur-Rashid v. New York City Police Dept.*, 31 N.Y.3d, 217, 225 (2018) (internal quotation marks and citation omitted). Consequently, a matter cannot be decided simply by claiming that the purpose of FOIL is disclosure, as Petitioner urges here.

Section 87(2) of the Public Officers Law permits a public agency to withhold records from disclosure when one of the exemptions enumerated in the statute applies. *See* Pub. Off. Law § 87(2). As set forth more fully below, DOHMH properly asserted exemptions under §§ 87(2)(a) and (2)(b) in denying Petitioner's FOIL request, and the denial of the request was not affected by an error of law. *See Matter of Thomas v. Condon*, 128 A.D.3d 528, 529 (1st Dept. 2015) ("[t]he appropriate standard of review is whether the determination 'was affected by an error of law'") (quoting CPLR 7803(3)); *see also Mulgrew v. Board of Educ. of the City School*

Dist. of the City of N.Y., 87 A.D.3d 506, 507 (1st Dept. 2011) ("The court should have determined whether respondents' determination 'was affected by an error of law.'" (quoting CPLR 7803(3))), *lv denied*, 18 N.Y.3d 806 (2012).

Public Officers Law § 87(2)(a)

The records sought by Petitioner in the FOIL request at issue are exempt from disclosure pursuant to Public Officers Law § 87(2)(a), which permits an agency to deny access to records that are "specifically exempted from disclosure by state or federal statute[.]" Pub. Off. Law § 87(2)(a). Petitioner argues that DOHMH's denial of the FOIL request on the basis of the Administrative Code and the Health Code is inappropriate because they are not "state statutes" that would exempt records from disclosure under §87(2)(a). *See* Verified Petition, ¶¶ 58-67. That assertion, however, ignores the legislative history of the relevant sections of the Administrative Code, as well as the State's exemption of death records from disclosure pursuant to FOIL outside of New York City.

Section 17-169(b) of the Administrative Code prevents the issuance of a death record where such issuance would not be "necessary or required for a proper purpose." This section was enacted, for relevant purposes in its present form, by the New York State Legislature in Chapter 197 of the Laws of 1937 as an amendment to Section 1241-a of the Greater New York Charter (a predecessor to the present New York City Charter and Administrative Code). *See* Affirmation of Lana Koroleva dated March 1, 2021, ¶ 3 and Ex. A thereto. The section became Section 567-4.0 of the City's 1937 Administrative Code, pursuant to Chapter 929 of the Laws of 1937. Section 17-112 of the Administrative Code, which must be read in tandem with Section 17-169, provides more generally that DOHMH "may establish reasonable regulations as to the publicity of any of its papers, files, reports, records and proceedings[.]" This provision was also enacted by the New York State Legislature, for relevant purposes in its present form, as Section

1175 of the 1901 Greater New York Charter (Chapter 466 of the Laws of 1901), which was made part of the first New York City Administrative Code (as Section 556-9.0), again by an act of the State Legislature (Chapter 929 of the Laws of 1937). *See* Koroleva Aff., ¶ 4 and Ex. B thereto. Both of these provisions were renumbered by means of State legislation (Chapter 907 of the Laws of 1985). Because these two key provisions of the Administrative Code derive from provisions of the Greater New York Charter that were enacted by the New York State Legislature, they represent policy of the Legislature and have the "force and effect of law."

Indeed, this issue was firmly decided by the Court of Appeals in *Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601 (2018). There, the Court considered a Health Code provision mandating the influenza vaccine for certain children. In upholding the provision, the Court found that the Administrative Code provision pursuant to which it was adopted was originally enacted by the State Legislature, which reflected a state policy that the Board of Health regulate vaccinations in the City of New York and had "the force of law." *Garcia*, 31 N.Y.3d at 610.

Here, too, in accordance with the authority granted by the State Legislature, the Health Code defines "proper purpose" in section 207.11 and, in section 207.21, establishes when death records become public information (*i.e.*, on January 31st of the year following 75 years after the date of death). As in *Garcia*, these Health Code provisions were enacted pursuant to the mandate of State law and have the "force and effect of law" under section 558(a) of the City Charter.

Further, DOHMH's denial of the FOIL request is consistent with the State law exempting death records from disclosure pursuant to FOIL outside of New York City.[1] Specifically, section 4174(a)(1) of the New York State Public Health Law ("PHL"), which requires the New York State Commissioner of Health to issue death certificates only when they are required for certain enumerated purposes, provides that "no certified copy or certified transcript of a death record shall be subject to disclosure under article six of the public officers law[.]" This language is comparable to the provision of section 207.11(a) of the Health Code, which provides that "the collection of information for sale or release to the public . . . shall not be deemed a proper purpose." The language originates in amendments made by Chapter 644 of the Laws of 1988. A letter of the State Department of Health stated (at page 7 of the official bill jacket) that the amendment would "make clear that death certificates are not disclosable pursuant to the Freedom of Information Law. This measure will guarantee the continued confidentiality of death certificates…" *See* Koroleva Aff., Ex. C at 7.

In addition, the State Department of Health amended its regulations to remove death records from the ambit of FOIL and to clarify that release of information for a "proper purpose" pursuant to PHL § 4174(1)(d) permits release of only "the name, the date of death and the place of death of the person to whom it relates[.]" *See* 10 N.Y.C.R.R. § 35.4(a) ("No certified copy or certified transcript of a death certificate shall be subject to disclosure under article six of the Public Officers Law."). When proposing this regulation in the State Register of January 18, 1989, the State Department of Health explained: "Vital records contain confidential and highly sensitive personal and medical information. In recognition of the unwarranted invasion of personal privacy to the persons named on vital records forms or to such persons' next of kin, the

[1] Section 4104 of the New York State Public Health Law explicitly exempts the City of New York from most of the Public Health Law, including section 4174.

Legislature enacted Chapter 644 of the Laws of 1988 to define more clearly the circumstances under which access to vital records is authorized."

There is thus simply no evidence that the Legislature intends FOIL to include or require the disclosure of death records. Indeed, it would be particularly anomalous to conclude that the Legislature, having restricted the release of death records in response to FOIL requests *outside* of New York City as outlined in PHL § 4174(1)(a), intended to grant open access to recent death records of millions of decedents *within* New York City. The exemption of the City from the relevant provisions of PHL § 4174 (by virtue of PHL § 4104) unquestionably manifests the Legislature's intention to defer to the City's regulation of such records within its jurisdictional bounds. To endorse Petitioner's position would potentially result in all of the death records maintained by DOHMH in New York City being open to any and all requests under FOIL, while the rest of the state would be subject to severe restrictions upon access. This, surely, could not have been the intention of the Legislature in restricting PHL § 4104 to only those counties outside the City limits. To hold that the Legislature had such an intention would wholly disregard the privacy concerns identified by the Legislature and highlighted by the State Department of Health in the State Register.

Moreover, Petitioner's reliance on *Morris v. Martin*, 55 N.Y.2d 1026 (1982) is misplaced. In *Morris*, the Court of Appeals upheld the trial court's finding that the records requested pursuant to FOIL were not exempt from disclosure pursuant to Public Officers Law § 87(2)(a). *See Morris v. Martin*, Memorandum Decision (Sup. Ct. Albany County, July 29, 1980) (Dkt. No. 21). Although the Court of Appeals did not explain its reasoning, the dissent at the Appellate Division (82 A.D.2d 965, at 966 (3d Dep't 1981)) elucidates the ultimate determination of the Court of Appeals in *Morris*. The problem did not turn primarily upon

whether a provision originated in a statute, but rather on the fact that the relevant confidentiality statute contained specific exceptions that reflected underlying policies that did not support the agency's assertion of confidentiality, or the exercise of reasonable agency discretion. The contrast with the present scheme is striking. Here, as discussed above, sections 17-169(b) and 17-112 of the Administrative Code not only derive from state law and represent a policy of the State Legislature, but also confer upon DOHMH and the Board of Health the power and duty to establish reasonable standards for access to death certificates based upon the restriction permitting access only to those for whom it is "necessary or required for a proper purpose." This entire framework of statutory delegation is absent from *Morris*, and is far closer to the framework contained in the more recent *Garcia* decision of the Court of Appeals, which is discussed above and concerned (like this case) Health Code provisions implementing a State statutory delegation that is codified in the Administrative Code. In addition, as outlined in PHL § 4174(1)(a), the Legislature has clearly expressed its intent to restrict the release of death records in response to FOIL requests outside of New York City, and, in granting the City an exemption from this provision, deferred to the City's regulation of such records.

Ultimately, it is the place of the State Legislature and the New York City Board of Health, exercising its delegation of statutory authority by reasonably construing the "proper purpose" standard set forth in law, to draw precise lines to protect the confidentiality of vital records. There is no policy or mandate of the State Legislature that would open all death records in New York City to public scrutiny – indeed, the relevant statutory frameworks are firmly to the contrary. Accordingly, DOHMH's denial of Petitioner's FOIL request pursuant to Public Officers Law § 87(2)(a) was appropriate.

Public Officers Law § 87(2)(b)

Even if the requested records were not exempt under Public Officers Law § 87(2)(a), they remain exempt in their entirety under FOIL's personal privacy exemption. Pursuant to Public Officers Law § 87(2)(b), an agency may deny access to records or portions thereof if their disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of [§ 89(2)]." The types of matters included in the statute that would constitute an unwarranted invasion of personal privacy are not exhaustive. Pub. Off. Law § 89(2)(b) ("An unwarranted invasion of personal privacy includes, but shall not be limited to . . .").

An unwarranted invasion of personal privacy "is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities . . . [.] This determination requires balancing the competing interests of public access and individual privacy." *Pennington v. Clark,* 16 A.D.3d 1049, 1051-52 (4th Dept. 2005), *appeal denied*, 5 N.Y.3d 712 (2005); *Dobranski v. Houper,* 154 A.D.2d 736, 737 (3d Dept. 1989) (same).

As many of New York's FOIL exemptions were patterned on the federal Freedom of Information Act (5 U.S.C § 552, *et seq.*, "FOIA"), federal case law on FOIA is "instructive" when interpreting FOIL exemptions. *Lesher v. Hynes*, 19 N.Y.3d 57, 64-65 (2012) (reviewing law enforcement exemption); *Journal Pub. Co. v. Office of Special Prosecutor*, 131 Misc. 2d 417, 422 (Sup. Ct. N.Y. Co. 1986) (discussing privacy exemption). The United States Supreme Court explained that FOIA's "central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989) (emphasis in original). The purpose of FOIA "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's

own conduct." *Id.* at 773. Thus, when considering FOIA's privacy exemption, the Supreme Court held "as a categorical matter" the granting of a third party's request for the disclosure of information about a private citizen can reasonably be expected to invade that citizen's privacy. *Id.* at 780. Moreover, "[t]he privacy interest in nondisclosure encompasses an individual's control of personal information and is not limited to that of an embarrassing or intimate nature." *People for the Am. Way v. Natl. Park Serv.*, 503 F. Supp. 2d 284, 304 (D.D.C. 2007) (citing *United States Dept. of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982)).

Although the purpose of FOIL is to facilitate public access to government records, "it is precisely *because* no governmental purpose is served by public disclosure of certain personal information about private citizens that the privacy exemption of section 87(2)(b) fits comfortably within FOIL's statutory scheme." *Matter of Federation of New York State Rifle and Pistol Clubs v. New York City Police Dept.*, 73 N.Y.2d 92, 97 (1989) (emphasis in original).

Here, DOHMH properly invoked the privacy exemption in withholding documents responsive to Petitioner's FOIL request. Indeed, the Court of Appeals has recognized that records pertaining to the deceased may implicate privacy interests warranting their exemption from disclosure under FOIL. *N.Y. Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477, 485 (2005) ("[w]e . . . hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead").

The exemption of death records from FOIL outside New York City indicates the State Legislature's view that these records implicate privacy interests. When that exemption was enacted, the Assembly sponsor was very clear on this point: "In order to guarantee complete reporting of accurate information on the death certificate and to protect the privacy of the deceased and the deceased's family, the legislation will restrict inappropriate access to death

certificates." Koroleva Aff., Ex. C at 15 (Bill Jacket for Chapter 644 of the Laws of 1988). As the Legislature understood when it changed the law for the rest of the State in 1988, death records contain personally identifying information relating not only to decedents but to other parties as well, which could easily invade the privacy interests of the next of kin and be abused if made public. Death certificates issued by DOHMH, which are particular to the City, include sensitive information such as usual residence; marital status; age; occupation; Social Security number; country of origin; parents' names, including mother's maiden name; place of death; precise time of death; general statement as to the cause of death affirming whether death is from natural causes on a regular death certificate; complete cause of death on an Office of the Chief Medical Examiner death certificate; and the name of the funeral director, if any. Verified Answer, ¶ 86 and Ex. E thereto. They also often include the names of next of kin, whose privacy rights may be violated by release of death information. *Id.* These records thus implicate multiple privacy interests that clearly warrant confidentiality.

Further, in supporting the Board of Health's promulgation of section 207.21 of the Health Code that would restrict public access to death certificates to 75 years after the date of death has lapsed, the New York State Department of Health and the National Association for Public Health Statistics and Information Systems emphasized the confidential nature of information contained in such records, which implicates privacy concerns as well as the possibility of identity theft if such information were released. *See* Verified Answer, ¶¶ 82-83 and Exs. B and C thereto. Thus, there can be no dispute that the records at issue are confidential in nature and that their disclosure to the public pursuant to FOIL is not warranted.

Petitioner's request for all death certificates issued in New York City between 1949 and 1968 would put in the public sphere more than half a million such records, thereby

revealing sensitive details about the life and death of individuals whose children or grandchildren are alive today and who are entitled to keep sensitive family matters private. *See* Verified Answer, ¶ 88. It cannot be disputed that the revelation of a family member's country of origin, marital status, occupation, and cause of death would invade the privacy interests of surviving kin, who may not wish for such private family and medical information to be made public. For example, the specific cause of death, or even a statement as to whether the death is from natural causes, is undoubtedly a private family matter for the loved ones of the deceased, and the publication of such information would enable any third party (including neighbors and prospective employers) to learn sensitive details about the death of a family member. Upon release, these records could be posted on the internet for the entire world to view, allowing anyone to obtain information concerning the surviving kin that would otherwise be private. Given the privacy concerns that are implicated, the State has ensured that such records would be exempt anywhere else outside New York City. *See* PHL § 4174(1)(a). To require disclosure of these records to Petitioner would deprive New York City residents of privacy rights that are currently held by all other residents of this State.

Further, as discussed above, it would be particularly anomalous to conclude that the Legislature, having restricted the release of death records in response to FOIL requests outside of New York City as outlined in PHL § 4174(1)(a), intended to grant open access to recent death records of millions of decedents within New York City.

Accordingly, DOHMH properly denied access to the requested records in their entirety pursuant to Public Officers Law § 87(2)(b) on the basis that disclosure would constitute an unwarranted invasion of personal privacy.

POINT II

PETITIONER FAILS TO STATE A CLAIM AS TO ITS ASSERTION THAT THE BOARD OF HEALTH VIOLATED THE SEPARATION OF POWERS DOCTRINE

Petitioner's contention that in amending Health Code § 207.11 the Board of Health "acted in excess of its regulatory authority and therefore violated the doctrine of separation of powers" lacks merit. Verified Petition, ¶ 86. Therefore, the third and fourth causes of action should be dismissed for failure to state a claim.

A. A *Boreali* analysis is not warranted

Although Petitioner asserts that courts should consider *ultra vires* rulemaking according to the four factors set out in *Boreali v. Axelrod*, not every rule needs to be evaluated under *Boreali's* "coalescing circumstances" standard, which is designed to guide whether "the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed." 71 N.Y. 2d 1, 11 (1987). Here, the legislature has specifically delegated rulemaking authority concerning the release of death records to the Board of Health and to DOHMH. *See* N.Y.C. Admin. Code §§ 17-169, 17-112, 17-170; N.Y.C. Charter §§ 556(c)(1) and 558(b),(c), (g). Because the Board of Health's regulatory authority is clear and the rules promulgated by the agency fall within that authority, the Court should dismiss Petitioner's third and fourth causes of action for failure to state a claim without the necessity of applying the *Boreali* factors.

As explained by the Court of Appeals in its decision in *Garcia*, "A regulatory agency 'is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.'" 31 N.Y.3d 601 at 608 (quoting *Acevedo*, 29 N.Y.3d at 221). Moreover, "[a]n agency can adopt regulations that go beyond the text of its enabling

legislation, provided they are not inconsistent with the statutory language or its underlying purpose." *Garcia*, 31 N.Y.3d at 609 (quoting *Matter of General Elec. Capital Corp.*, 2 N.Y.3d 249, 254 (2004)).

Here, as discussed above, authority for DOHMH's management of vital records, and for the Board of Health's authority to amend the Health Code, can be found in both the City Charter and in the Administrative Code. Specifically, section 556(c)(1) of the City Charter grants DOHMH the jurisdiction to supervise and control the registration of deaths in New York City. Pursuant to section 558(c) of the Charter, the Board of Health, through the Health Code, regulates the means of registering deaths, and of filing, maintaining, changing and altering death certificates. Sections 558(b), (c) and (g) of the City Charter specifically authorize the Board of Health to add to, alter, amend or repeal any part of the Health Code, and include the power to "embrace in the health code all matters and subjects to which the power of the department [DOHMH] extends." N.Y.C. Charter, Chapter 22, § 558(c). The Administrative Code, in turn, explicitly contemplates the promulgation of Section 207.11, the amended portion of which establishes who may have access to death records before those records become public. In pertinent part, Administrative Code § 17-169 states that a transcript of a record of death "shall be issued upon request unless it does not appear to be necessary or required for a proper purpose" and § 17-112 empowers DOHMH to establish "reasonable regulations as to the publicity" of its records. By "necessary implication" from these two provisions originating in State legislation (as demonstrated above), DOHMH must itself determine what constitutes a proper purpose. *See Garcia*, 31 N.Y.3d at 608; *see also Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018) (stating that "among the powers possessed by necessary implication, administrative agencies have flexibility in determining the best methods for pursuing objectives articulated by

the legislature").

It is thus clear that rulemaking authority has been delegated to DOHMH and the Board of Health in these circumstances.[2] To the extent that Petitioner asserts that DOHMH and the Board acted *ultra vires*, it is unclear how exactly they could have, when both sections of the Administrative Code at issue were expressly authorized by the State Legislature and explicitly grant DOHMH and the Board rulemaking authority in this limited area. Under these circumstances, the Court need not consider the "coalescing circumstances" described in *Boreali* in determining that Petitioner has failed to state a cause of action.

B. Application of the *Boreali* analysis

Even if the Court were to engage in the *Boreali* analysis, the result would weigh in Respondents' favor. The Court of Appeals has offered guidance for finding "the difficult-to-define line between administrative rule-making and legislative policy-making" by describing the following four "coalescing circumstances" that may inform the inquiry:

> whether (1) the agency did more than balance[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[.]

[2] The Citywide Administrative Procedure Act ("CAPA") provides for a public comment period before a final vote. Here, the CAPA process has functioned as intended -- the amendment was first proposed on March 19, 2018 and the Board of Health held a public hearing on June 5, 2018 on the proposed amendment. *See* Notice of Adoption of Amendment, attached as Exhibit D to the Verified Answer.

Matter of New York City C.L.A.S.H., 27 N.Y.3d at 179-80 (internal quotation marks and citations omitted); *Boreali*, 71 N.Y. 2d at 12-14.

This so-called "*Boreali* analysis" "should center on the theme that 'it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.'" *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene*, 23 N.Y.3d 681, 697 (2014) (quoting *Boreali*, 71 N.Y. 2d at 13). That is, "[t]he focus must be on whether the challenged regulation attempts to resolve difficult social problems in this manner." *New York Statewide Coalition of Hispanic Chambers of Commerce*, 23 N.Y.3d at 697.

In cases where the Court of Appeals struck the challenged regulations, it determined that the agencies exceeded their authority by making value judgments in addressing ongoing social problems. In the seminal case, *Boreali*, the Court held that the New York State Public Health Council overstepped its regulatory authority when it adopted regulations prohibiting smoking in a wide variety of indoor areas open to the public while carving out exemptions for various food establishments. 71 N.Y.2d at 12. The purpose of the regulation was to further the goal of protecting nonsmokers from the harmful effects of passive smoking. *Id.* at 11-12. The Court found that the exceptions, which were based solely upon economic and social concerns, "demonstrate[d] the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise." *Id.* at 12.

Similarly, in the *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce*, the Court held that the Board of Health, in adopting the "Sugary Drinks Portion Cap Rule" in an effort to combat obesity among City residents, exceeded the scope of its

regulatory authority inasmuch as it chose "among competing policy goals, without any legislative delegation or guidance." 23 N.Y.3d at 690. There, to combat obesity among City residents, instead of banning sugary drinks entirety, the Board of Health restricted portions by reducing their consumption size, thereby adopting a "compromise that attempted to promote a healthy diet without significantly affecting the beverage industry." *Id.* at 698.

"[T]he promulgation of regulations necessarily involves an analysis of societal costs and benefits," and "*Boreali* should not be interpreted to prohibit an agency from attempting to balance costs and benefits." *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce*, 23 N.Y.3d at 697-98. Thus, the Court of Appeals upheld regulations that involved the balancing of certain interests where the agencies acted within their delegated powers and did not make value judgments entailing difficult and complex choices between broad policy goals to resolve social problems. For example, in *Garcia*, the Court found that the Board of Health did not violate the separation of powers doctrine by amending the Health Code to mandate that children between the ages of six months and 59 months who attend city-regulated child care or school-based programs receive annual influenza vaccinations even though the amendment allowed for exemptions based on health or religious beliefs. 31 N.Y.3d at 606. *See also Acevedo*, 29 N.Y.3d at 223, 226 (finding that the New York State Department of Motor Vehicles acted within the bounds of its authority in enacting regulations restricting the driving privileges of recidivist drunk drivers even though it "deliberated extensively regarding the most expeditious, effective and fair means of addressing the ongoing problem of drunk driving and assessed the costs and benefits associated with each proposed alternative") (internal quotation marks omitted); *Matter of LeadingAge N.Y., Inc.*, 32 N.Y.3d at 262-63 (finding that the New York State Department of Health did not exceed its authority in enacting a regulation limiting compensation

and expenditures by certain healthcare providers because the promulgation of the regulation reflected a balancing of costs and benefits according to preexisting guidelines and not a new value judgment directed at resolution of a social problem); *Matter of NYC C.L.A.S.H., Inc.*, 27 N.Y.3d at 177 (finding that the New York State Office of Parks, Recreation and Historic Preservation acted within the confines of its authority in enacting a regulation prohibiting the smoking of tobacco in certain outdoor locations under the jurisdiction or the agency).

Here, it is evident that the Board of Health did not amend Health Code § 207.11 by making value judgments in an effort to resolve a difficult, ongoing, social problem such as second-hand smoke or obesity. Rather, as discussed above, it simply carried out its responsibilities in elaborating on the "proper purpose" standard for disclosure by rule.

As discussed below, the application of the *Boreali* factors demonstrates that DOHMH did not exceed its regulatory authority in amending Health Code § 207.11.

1. First *Boreali* factor

The first *Boreali* factor – relating to whether DOHMH did more than balance costs and benefits according to preexisting guidelines and instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems, thus acting on its own idea of sound public policy – weighs in the agency's favor. The legislature has expressed a clear intention to delegate broad authority to DOHMH to "establish reasonable regulations" as to the release of vital records (N.Y.C. Amin. Code § 17-112) and to provide such records when "necessary or required for a proper purpose" (N.Y.C. Admin Code §17-169(2)(b)).

In promulgating the amendment to Health Code § 207.11, the Board of Health was not attempting to resolve matters of social or public policy reserved to legislative bodies. Rather, it was acting pursuant to its authority under the Administrative Code to carry out its administrative duties by establishing who may have access to death records before those records

become public, and acted squarely within the confines of that authority.

Moreover, even before the recent amendment to Health Code § 207.11 was promulgated, the existing § 207.11(b) had already set forth a list of authorized individuals (who were all relatives) who could request death certificates. In enacting the recent amendment, the Board of Health simply expanded the list to include additional relatives in order to provide greater access to additional family members. To the extent the Board of Health chose among competing ends in enacting the amendment, those choices were not very difficult or complex. The Board of Health inevitably had to consider which categories of individuals would be given access, and in making that determination, balanced the privacy and historical interests at stake. *See* Notice of Adoption of Amendment to Article 207, annexed as Exhibit D to the Verified Answer at 3.

This matter is analogous to the Court of Appeal's most recent decision concerning a challenge to an agency's regulation: *Matter of Juarez v. New York State Off. of Victim Servs.*, 2021 N.Y. LEXIS 101, 2021 N.Y. Slip Op. 01091 (Feb. 18, 2021). In that case, petitioners challenged the New York State Office of Victim Services' amendment to a regulation limiting attorneys' fee awards. In upholding the regulation, the Court reasoned, in part, that the agency was granted statutory authority to determine whether attorneys' fees are "reasonable," and that where the statute itself was silent with regard to the parameters of what is reasonable, the legislature necessarily granted the agency the authority to determine the scope of that term, leaving the definition to its discretion. *Matter of Juarez*, 2021 N.Y. LEXIS 101, *10-12. Here, the legislature defined the standard for disclosure as "necessary or required for a proper purpose," and granted DOHMH authority to "establish reasonable regulations as to the publicity of" the records at issue. *See* N.Y.C. Admin. Code §§ 17-169, 17-112. Because the legislature

authorized DOHMH to determine what constitutes a "proper purpose," and nothing in the statutory scheme prohibits the agency from deeming disclosure to certain groups of people unreasonable, the regulation does not conflict with the statute.

Accordingly, because DOHMH "has been empowered to regulate the matter in question and has not usurped the legislative prerogative, the separation of powers inquiry [should be] at an end." *LeadingAge N.Y., Inc.*, 32 N.Y. 3d at 261. The role of the Court "in this regard is not to question the efficacy or wisdom of the means chosen by the agency to accomplish the ends identified by the legislature," but to "determine only whether the agency acted within the scope of its authority." *Id.*

For these reasons, DOHMH did not exceed its authority in amending Health Code § 207.11.

2. Second *Boreali* factor

The second *Boreali* factor, whether the agency created its own comprehensive set of rules without benefit of legislative guidance, also weighs in Respondents' favor. As the Court of Appeals observed in *Garcia,* "the legislature has delegated significant power to the Board [of Health] to promulgate regulations in the field of public health." 31 N.Y.3d at 613. Thus, "there can be no serious claim that, in enacting [an amendment to § 207.11] . . . , the Board wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." *Id.* at 614 (internal quotation marks and citations omitted). In addition, the Board's decision not to include professionals such as genealogists among the groups of people who may obtain death records of New York City residents has support in State law, as PHL § 4174(a)(1) specifically exempts death records from disclosure to the public under FOIL, including genealogists. Accordingly, the second *Boreali* factor strongly supports the Board's position.

3. Third *Boreali* factor

With respect to the third *Boreali* factor – which concerns whether the challenged rule governs an area in which the legislature has repeatedly tried to reach agreement in the face of substantial public debate and vigorous lobbying by interested factions – there is no indication that the legislature has tried but been unable to reach agreement concerning access to death records. Indeed, as discussed above, mindful of the privacy concerns implicated by disclosure of such records, the State has shielded them from disclosure to the public, and there is no evidence that the City Council has sought to reach agreement on this matter at the local level. Accordingly, this third factor weighs in Respondents' favor.

4. Fourth *Boreali* factor

With respect to the fourth *Boreali* factor, relating to whether special expertise or technical competence was involved in the development of the amendment to Health Code § 207.11, this factor is not relevant to the analysis, as special expertise was not necessary to the determination of the scope of the expansion of access to records provided in § 207.11(b). Accordingly, this factor does not weight against Respondents.

Based on the foregoing, the Court should dismiss the third and fourth causes of action for failure to state a claim under CPLR 3211(a)(7).

POINT III

PETITIONER FAILS TO STATE A CLAIM AS TO ITS ASSERTION THAT IN AMENDING SECTION 207.11 OF THE HEALTH CODE THE BOARD OF HEALTH'S ACTIONS WERE ARBITRARY AND CAPRICIOUS

Petitioner contends in the second and fourth causes of action that the Board of Health's amendment to Health Code § 207.11 is arbitrary and capricious. "'The standard for judicial review of an administrative regulation is whether the regulation has a rational basis and

is not unreasonable, arbitrary or capricious.'" *Acevedo*, 29 N.Y.3d at 226 (quoting *Matter of Consolation Nursing Home v. Commissioner of N.Y. State Dept. of Health*, 85 N.Y.2d 326, 331 (1995)). To meet this standard, Petitioner must show that the challenged amendment is "so lacking in reason that [it is] essentially arbitrary." *Acevedo*, 29 N.Y.3d at 226-27 (internal quotation marks and citation omitted). "Where the legislature has left to an agency's discretion the determination of what specific standards and procedures are most suitable to accomplish the legislative goals, the agency's rulemaking, if reasonably designed to further the regulatory scheme, . . . cannot be disturbed by the courts unless it is arbitrary, illegal or runs afoul of the enabling legislation or constitutional limits – regardless of [the Court's] assessment of the wisdom of the agency's approach." *Matter of Juarez*, 2021 N.Y. LEXIS at *10.

Here, DOHMH explained that the purpose of the amendment to Health Code § 207.11 was to expand the group of family members who can access birth and death records prior to their public release. *See* Verified Answer, Ex. D at 2 (Notice of Adoption of Amendment to Article 207). The new provisions were intended to "allow family members to access information while protecting the confidentiality of vital records for appropriate periods of time." *Id.* While comments elicited from the public revealed that some individuals requested additional categories of individuals who could access birth and death records while others suggested that professional researchers with no family connection should have broad access to such records, the Board of Health was required to draw a line that would balance the privacy and historical interests at stake. In doing so, the Board expanded access to both birth and death records to additional family members, but did not expand access to all the requested groups of people. Moreover, although Petitioner challenges the Board's decision to not include step-children or step-parents among the family members who can obtain death records, (*see* Verified Petition,

¶ 39), Petitioner unquestionably lacks standing to object to the amendment on this basis as none of its members are alleged to have been injured by the decision to exclude these familiar relations.

Under these circumstances, the Board of Health's amendment to Health Code § 207.11 was not so lacking in reason that it was essentially arbitrary. Moreover, if the Court were to annul the amendment to section 207.11, the result would be to deprive access to death and birth records to certain relatives of the deceased. This removal of access would serve no benefit to Petitioner, and instead would affect the rights of many relatives – who are not parties to this proceeding – eliminating access rights granted by the amendment. The imposition of such resulting harm to the newly-added relatives in section 207.11 simply because Petitioner's members were not included in the amendment is inconceivable.

CONCLUSION

For the reasons set forth above and in the Verified Answer, Respondents respectfully request that this Court deny the relief sought by Petitioner, dismiss the Petition in its entirety, and award them such other and further relief as the Court deems just and proper.

Dated: New York, New York
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