SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62
--X
RECLAIM THE RECORDS,

Petitioner,

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

Index No.: 153996/2019

Motion sequence #1

-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 New York City Registrar,

Respondents.
--X

J. MACHELLE SWEETING, J.:

In this article 78 petition, petitioner, Reclaim the Records (RTR), seeks to compel respondents the New York City Department of Health and Mental Hygiene (DOHMH), New York City Bureau of Vital Statistics (NYC Bureau of Vital Statistics), New York City Board of Health (Board of Health), Oxiris Barbot (Barbot), in her official capacity as New York City Commissioner of Health, Gretchen Van Wye (Van Wye), in her official capacity as New York City Registrar (NYC Registrar), and Steven P. Schwartz (Schwartz), in his official capacity as former NYC Registrar (collectively, “Respondents”), to produce information pursuant to RTR’s February 7, 2019 request made under Public Officers Law, § 84, *et seq*., also known as the Freedom of Information Law (FOIL). RTR is also seeking a judgment, pursuant to CPLR §7806, vacating and

annulling New York City Health Code §§ 207.11 and 207.21 (the "Access Rules"). In addition, RTR requests that the court issue a judgment, declaring that the Access Rules are arbitrary and capricious and were enacted ultra vires, and, as a result, should be vacated and annulled.

Respondents cross-move for an order pursuant to CPLR §7804(f) dismissing the second, third, and fourth causes of action based on objections on points of law; namely being barred by the statute of limitations and, specific to the fourth cause of action, for failing to state a cause of action. If the court denies the cross-motion, in whole or in part, respondents reserve the right, pursuant to CPLR §7804(f) to serve and file an answer to the petition. For the reasons set forth below, the cross-motion is granted in part and denied in part.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is a not-for-profit organization, described as an "activist group of genealogists, historians, researchers, teachers and journalists," that works "to identify important genealogical and historical record sets that are currently not available to the public." NYSCEF Doc. No. 1, Petition, ¶ 10.

The DOHMH has jurisdiction to supervise "matters affecting public health," including the authority to "[s]upervise and control the registration of births, fetal deaths and deaths" in the city of New York. New York City (NYC) Charter § 556 (c) (1). The NYC Bureau of Vital Statistics is a subdivision of the DOHMH. Van Wye is the current NYC Registrar. Schwartz is the former NYC Registrar, "a position he held at all relevant times in connection with the amendment process to the City Health Code." Petition, ¶ 16. Barbot is the Commissioner of DOHMH and is a member of the Board of Health.[1] The Board of Health is part of the DOHMH and has 11 members. *See*

[1] The court notes that Barbot resigned in August 2020 but was serving as Commissioner at the time the papers were filed.

NYC Charter § 553. The members are required to have certain qualifications, such as, among other things, experience in medicine, biology or a related field. § 553 (a).[2] The Board of Health, through the Health Code, regulates the manner for registering deaths, and changing death certificates, among other things. NYC Charter § 558 (c).

Pursuant to the NYC Charter § 558 (b), the Board of Health is also authorized to "add to and alter, amend or repeal any part of the health code." On March 13, 2018, the Board of Health finalized and adopted a resolution to amend Article 207 of the Health Code. This amendment, codified as Health Code § 207.21, set forth a fixed schedule for making birth and death records available to the public. It states, in pertinent part, "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."

On June 5, 2018, codified as an amendment of Health Code § 207.11, the Board of Health adopted a resolution allowing additional relatives permission to access the birth and death records prior to public release. Prior to the amendment, in relevant part, death records were only available to:

> "(1) the spouse, domestic partner, parent, child, sibling, grandparent or grandchild of the decedent; (2) the legal representative of the estate of the decedent . . . (3) a party with a property right . . . ; (4) a funeral director . . . ; or (5) persons or

[2] City Charter § 553 (a) states the following, in pertinent part:

"a. There shall be in the department a board of health, the chairperson of which shall be the commissioner. In addition to the chairperson, the board shall consist of ten members, five of whom shall be doctors of medicine who shall each have had not less than ten years experience in any or all of the following: clinical medicine, neurology or psychiatry, public health administration or college or university public health teaching. The other five members need not be physicians. However, non-physician members shall hold at least a masters degree in environmental, biological, veterinary, physical, or behavioral health or science, or rehabilitative science or in a related field, and shall have at least ten years experience in the field in which they hold such degree."

> government agencies who otherwise establish that such records are necessary or required for a judicial or other proper purpose . . ."

NYSCEF Doc. No. 35, Notice of Adoption of Amendment to Article 207 of the Health Code at 2.

Now, however, "great-great grandchildren, nephews, nieces, aunts, uncles, grandnephews, and grandnieces" may request a death certificate and "spouses, domestic partners, parents of children over the age of 18, children, siblings, nieces, nephews, aunts, uncles, grandchildren, great grandchildren, grandnieces, and grandnephews" may request the birth certificate of a deceased person. *Id.* at 4. The amended provisions of Health Code § 207.11 became effective January 1, 2019. *Id.* at 5. Health Code § 207.11 also defines the extent of a proper purpose of releasing records as follows:

> "The request to inspect vital records may be granted only if the Commissioner or the Commissioner's designee agree that the requested information is necessary for a proper purpose. Inspection of any vital records or data for the collection of information for sale or release to the public, or for other speculative purposes shall not be deemed a proper purpose."

On February 7, 2019, after Health Code § 207.21 was enacted and Health Code § 207.11 was amended,[3] RTR submitted a FOIL request to the Records Access Officer (RAO) at the DOHMH's office seeking "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." NYSCEF Doc. No. 15 at 1. RTR requested the death certificates "for genealogical and research purposes-so that the public may gain access to this trove of incredibly valuable historical information-and is not for any profit-making purpose." *Id.* at 2. By email dated February 11, 2019, Chari Anhouse (Anhouse), associate general counsel who was assigned as the (RAO),

[3] Provisions referred to together as the "Access Rules."

advised RTR that its FOIL request was denied for both statutory and personal privacy grounds. Regarding statutory grounds, citing POL § 87 (2)(a), Anhouse stated the following, in relevant part:

> "Administrative Code § 17-169 and Health Code §§ 3.25 and 207.11 make death records confidential and restrict access to these records beyond certain classes of specified people. There is no provision in the Health or Administrative Code for releasing "uncertified" death certificates at any point in time. Health Code § 207.21 makes death records public 75 years after death. Thus, these records are protected by the applicable law and by FOIL § 87(2)(a)."

NYSCEF Doc. No. 16 at 1.

Anhouse continued that, in addition, the requested records "seek information on persons still living such as next of kin," and that, pursuant to POL §§ 87 (2) (b) and 89 (2) (b), it would be an unwarranted invasion of privacy to release these death certificates. *Id.*

By letter dated March 7, 2019, RTR appealed the denial of its FOIL request. In pertinent part, RTR summarized the DOHMH's denial, which included the explanation that "the Scans are protected from disclosure pursuant to NYC Health Code §§ 207.11 and 207.21, which together purport to limit the public's access to death records from New York City for a period of 75 years." NYSCEF Doc. No. 17 at 2. RTR then argued that New York City regulations, such as the cited regulations from the New York City Health Code, are neither state nor federal statutes that qualify for statutory disclosure exemptions under FOIL. As a result, RTR argued that DOMHM did not meet its burden of establishing a statutory exemption to the FOIL request.

In its appeal, RTR cited a recent advisory opinion from the New York State Committee on Open Government. In that advisory opinion dated March 4, 2019, Robert Freeman ("Freeman"), Executive Director, stated the following, in relevant part, with respect to the statutory grounds for denial of RTR's FOIL request:

> "From my perspective, an 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 . . . . As such, an assertion of confidentiality without more, would not in my opinion guarantee or require confidentiality. Moreover, it has been held by several courts, including the Court of Appeals, the state's highest court, that 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. This is not to suggest that the records sought must be disclosed; rather, I am suggesting that the records may be withheld in accordance with the grounds for denial appearing in FOIL, and that any local enactment inconsistent with that statute would be void to the extent of any such inconsistency."

NYSCEF Doc. No. 19 at 2 (internal quotation marks and citations omitted).

Among other things, Freeman found that the phrase "unwarranted invasion of personal privacy," was "indefinable, for society's views regarding privacy are evolutionary and constantly changing." *Id.* at 2.

In its appeal, RTR reiterated that DOHMH's own "health code provisions are insufficient grounds to prevent disclosure under FOIL." *Id.* at 2. RTR also noted that "DOHMH's mere unwillingness to create uncertified copies is not a FOIL exemption." *Id.* at 3.

With respect to any alleged privacy concerns, RTR argued that "DOHMH's denial based on privacy grounds is irrational and inconsistent with applicable law and policies." *Id.* For example, in New York State, the public may receive uncertified death records that are over 50 years old. As another example, the New York City Clerk provides the public with all marriage records that are over 50 years old. RTR also claimed that the only information requested under "next of kin," for these 50-70-year old documents would include name, relation, address and place of birth for a parent. According to RTR, "DOHMH provides no supporting evidence or any rationale how the disclosure of solely those fields of information is an unwarranted invasion of privacy." *Id.* at 4.

By letter dated March 21, 2019, DOHMH denied petitioner's appeal. Thomas Merrill ("Merrill"), the Appeals Officer and General Counsel, explained that, although RTR "relies heavily" on Freeman's advisory opinion, the opinion does not "address state law relevant to this denial." NYSCEF Doc. No. 18 at 1. In addition, the Health Code defines what constitutes a "proper purpose" for accessing death records and the "Department is without discretion to deem your client's intended use a proper purpose." *Id.* at 2.

Merrill also stated that, pursuant to New York State Public Health Law (PHL) § 4104, New York City is specifically exempted from the relevant portions of PHL § 4174, which address the issuance of death certificates. Merrill stated that RTR's quotes from cited cases are taken out of context, and stated the following, in pertinent part:

> "It is true that any provision of the New York City Health Code, standing by itself, does not have the force of state law. The question here is whether, when that provision is construed together with authorizing provisions that do have such force, it represents and implements the policy of the State Legislature, so that records protected by the provision are exempted from disclosure pursuant to Public Officers Law § 89(2)(a) or (b), in that the Legislature has authorized appropriate City bodies to define the boundaries of personal privacy within the context of the disclosure of death-related records."

Id. at 2.

Regarding privacy, Merrill found that "[c]ontrary to the arguments [RTR made] about whether recent death records ought to be private and protected by law, the law states that they are." *Id.* at 3. Merrill explained that the 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." *Id.* He continued that Board of Health made a rational policy choice "to apply a protective standard," to the death records.

RTR subsequently commenced this article 78 petition. In the first cause of action, RTR is seeking to compel the DOHMH to comply with the February 7, 2019 FOIL request and produce a copy of its digital scans of death certificates dating between 1949 and 1968. According to RTR, there are no state or federal statutes that bar production of the requested information. The Access Rules, cited by the DOHMH as the reason for the denial, are not state statutes and therefore cannot create a statutory exemption from disclosure under FOIL. As a result, the petition states that respondents failed to meet their burden to establish that an exemption under FOIL applies. RTR further argues that DOHMH failed to meet its burden establishing a privacy exemption. "Absent any context, explanation of basis in law, this theoretical speculation about privacy is insufficient to meet DOHMH's burden under FOIL." Petition, ¶ 68.

In the second cause of action, RTR is seeking a judgment pursuant to CPLR §7803 (3) and §7806 invalidating the Access Rules as arbitrary and capricious. The petition provides a background of how and why the Access Rules were proposed. According to RTR, the record does not support that the enactment of Health Code § 207.21 or the amendment of Health Code § 207.11 as rational. To begin, prior to the enactment of Health Code § 207.21, there was never any codification of time periods for access to records. RTR states that DOMHM was only required to transfer the vital records to the municipal records "at such times as the board of health shall determine." *Id.*, ¶ 26. However, according to RTR, the DOHMH has not transferred records over in decades. "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." *Id.*

In September 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 [Department of Records and Information Services] [and become public]." *Id.*, ¶ 27. Nonetheless, "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." *Id.*

RTR provides several reasons why it believes the access rules are arbitrary and capricious. Among other reasons, RTR claims that the Access Rules are stricter than the rest of New York State and most of the United States. For example, twenty-three states, including New York, will provide uncertified copies of death certificates for genealogical purposes fifty years after the date of death. Although the proposed policy contained in Health Code § 207.21 contrasted with the one in New York State, "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 . . . ." *Id.*, ¶ 81.

The petition sets forth that members of the public, including privacy groups and genealogists, were given an opportunity to comment on the amendment of provisions of the New York City Health Code. According to RTR, 5,026 comments opposed the proposal and two were in favor. However, according to RTR, DOHMH "ignored the unanimously negative response." *Id.*, ¶ 28. Further, "[d]espite 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." *Id.*, ¶ 105. Moreover, other than Schwartz, the other Board members allegedly had a "complete unawareness of the underlying facts of the proposal." *Id.*, ¶ 34. "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." *Id.*, ¶ 78.

Section 207.21 was adopted on March 13, 2018. In the notice of adoption of amendment to Article 207 of the New York City Health Code, DOHMH stated that New Yorkers were living longer and that the proposed time frames were based on concerns for identity theft and privacy. However, RTR alleges that DOHMH did not provide any proof of any actual privacy risks or, for instance, provide any examples of how a death certificate from more than fifty years ago had ever been used for fraudulent purposes.

Regarding Health Code § 207.11, the amendment proposed that only certain family members, including a "spouse, domestic partner, parent, child, sibling, niece, nephew, aunt, uncle, grandparent, grandchild, great grandchild, great-great grandchild, grandniece, or grandnephew of the decedent" could receive access to the death record before 75 years had passed. Petition, ¶ 37. RTR alleges that, in advance of the public hearing, DOHMH received almost 1,000 oppositions. Members of the public submitted letters also claiming that it was important for step-children, adoptees and second and third cousins to have access to these death records in order to assess family medical history, among other things. Nonetheless, "[d]espite 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." *Id.*

In addition, according to RTR, genealogists "highlighted various inaccuracies in Schwartz's responses to the Board . . . ." *Id.*, ¶ 38. For instance, pursuant to a letter dated April 21, 2018, the International Association of Jewish Genealogical Societies (IAJGS), suggested that Health Code § 207.11 should be expanded to allow step-relations, adoptees and researchers access

to birth and death records prior to the records becoming public.[4] The letter noted that, at the Board of Health meeting on March 13, 2018, Schwartz stated that New York City does not permit step-relations to have immediate access to birth and death records and that he was "not aware of any state that does." NYSCEF Doc. No. 11 at 33. IAJGS clarified that several states do permit step-parents the same immediate access, including Indiana, New Hampshire and Pennsylvania, among others. The letter further explained, citing several examples, how genealogists "have legitimate professional and life-saving reasons to have immediate access to birth and death records." *Id*. at 35. For instance, access is required to assist the Department of Defense in locating "heirs for the repatriation of remains from previous wars," and for "[t]racing and tracking inheritable medical conditions," among other reasons. *Id.* The letter addressed the possibility of identity theft, as this was one reason provided by the Board for not expanding access. It concluded, in relevant part:

> "Genealogists are not the cause of identity theft. There has been proof that identity theft occurs from large data breaches from government, finance, health care and other businesses. As the IAJGS statement submitted for the October 2017 hearing commented, there is no evidence that states with open records experience greater identity theft than those in states with more limited access. In fact, the recent report by New York State Attorney General Eric Schneiderman listed the over 1,500 data breaches reported to his office, and none were related to vital records theft."

Id. (citation omitted).

Other letters echoed what was said in the IAJGS's letter. For example, the Records Preservation & Access Committee argued that "[g]enealogists need access to the full death record, including cause of death, for grand aunts and uncles and great-grand aunts and uncles, to determine which branch of a family carries a genetic disease," and that "[t]here is no evidence

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[4] The IAJGS "is the umbrella organization of 78 genealogical societies and Jewish historical societies worldwide whose approximately 9,000 members are actively researching their Jewish roots." *Id.* at 37.

that the states with open public records experience any greater occurrence of identity theft than states with more limited access." *Id.* at 38.

There was a second public hearing held on April 23, 2018, where many opposed the amendment of Health Code § 207.11 as too restrictive, According to RTR, Schwartz's proposal "purported to 'expand access,' but in reality maintain a remarkably closed-access regime . . . ." Petition, ¶ 43. "Fifteen people testified at the April 23 hearing, and the speakers explained that the proposed amendments were insufficient." *Id.*, ¶ 44. Despite the opposition, the proposal was adopted on June 5, 2018 and became effective on January 1, 2019. Citing the transcript from the Board meeting adopting the proposal, RTR claims that "[t]he discussions from that Board meeting highlight just how arbitrary and capricious the privacy limitations are." *Id.*, ¶ 46. For instance, "[n]o one asked about uncertified copies or genealogical access." *Id.*, ¶ 50. Furthermore, "[t]he Board's adoption notice provided no information about what privacy concerns were in fact at stake." *Id.*, ¶ 50.

In the third cause of action, RTR states that administrative agencies such as DOHMH, cannot create rules beyond the scope of their authority. Here, however, "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." *Id.*, ¶ 109. Given the background above, RTR argues that the Board of Health purportedly made decisions without considering the opinions of experts in the field. As a result, RTR claims that the Access Rules were enacted *ultra vires* and that, pursuant to CPLR §7806, it is entitled to a judgment vacating and annulling them. The petition delineated the factors set forth in *Boreali v Axelrod* (71 NY2d 1 [1987]), and alleged

that the "Board, in enacting Schwartz's proposal, acted in excess of its regulatory authority and therefore violated the doctrine of separation of powers." *Id.*, ¶ 86.

In the fourth cause of action, in light of above, RTR is seeking a declaratory judgment declaring that the Access Rules are arbitrary and capricious and were enacted *ultra vires*.

RTR submits several affidavits in support of the petition. As an example, Megan Smolenyak ("Smolenyak"), a professional genealogist, states that the Access Rules "are overly and unfairly burdensome." NYSCEF Doc. No. 24, Smolenyak aff, ¶ 14. Smolenyak explained that she serves as a consultant to the U.S. Army, trying to "locate family members of almost 1,400 soldiers that are still unaccounted for from World War I, World War II, Korea and Vietnam. *Id.*, ¶ 4. She often searches for vital records in New York City and the new restrictions "hinder [her] ability to trace and locate relatives." *Id.*, ¶ 9. Although Smolenyak submitted her concerns to the Board of Health, she does not believe that the Board considered them prior to amending the Health Code. Smolenyak sets forth the following, in relevant part:

> "Death certificates are a crucial component of this, as a death certificate often includes a next of kin, address, and parents, including the mother's maiden name, which is often critical to locating relatives who share a soldier's mitochondrial DNA. These are key indicators to help locate other family members so that I can help unite the soldier's remains with his family.
>
> "Because I am not a direct descendant or one of the narrow categories of individuals specified by DOHMH, I am unable to receive copies of the records at issue. Further, unlike countless other states that permit the public to gain access to uncertified copies of records, DOHMH will not even let me view records of deaths for 75 years and of births for 125 years. Therefore, at times, I can be completely blocked from learning the most pertinent information. New York City's restrictions on access to vital records is overly burdensome, and has real consequences."

Id., ¶ ¶ 10, 11.

Respondents' Cross Motion

Respondents cross-move to dismiss the second through fourth causes of action, claiming they are barred by the statute of limitations. In a footnote, respondents maintain that they are not addressing the first cause of action and "its defense may depend on the outcome of this cross motion." NYSCEF Doc. No. 37, respondents' memorandum of law at 2 n 1. They claim that these causes of action are subject to the article 78 statute of limitations, which is four months. Here, Health Code § 207.21 was published and "made known" on March 13, 2018[5] and Health Code § 207.11 was included and made final in the City Record on June 12, 2018. As the Board of Health's determination allegedly became final and binding on June 12, 2018, RTR had four months from that date to file a timely petition. However, as the petition was filed on April 17, 2019, it is untimely.

According to respondents, RTR failed to state a claim that the Board of Health acted *ultra vires* and in violation of *Boreali v. Axelrod, supra*. They cite to various provisions of the Administrative Code of the City of New York and the City Charter that authorize the DOHMH to supervise and control the registration of deaths in New York City. Furthermore, Administrative Code of the City of New York § 17-169 (b) provides for access to death records when "necessary or required for a proper purpose. By necessary implication, DOHMH must itself determine what a proper purpose is." NYSCEF Doc. No. 37, respondents' memorandum of law at 8 (citation omitted). Respondents continue that, as the DOHMH and the Board of Health have been delegated with rulemaking power with respect to death records, they could not have acted *ultra vires* and criteria in *Boreali v. Axelrod* need not be addressed. Respondents note that they are "unable to

[5] Pursuant to a letter dated December 12, 2019, respondents informed the court that Health Code § 207.21 became effective on April 17, 2018. *See* NYSCEF Doc. No. 45.

undertake a full Boreali analysis without giving a detailed recounting of the facts in a Verified Answer. As the Board-as a matter of law-was within its rights to promulgate the regulations, such a factual analysis should not be required here." NYSCEF Doc. No. 44, respondents' memorandum in reply at 8 n 3.

RTR's Opposition to the Cross Motion

According to RTR, the petition sets forth the reasons why respondents' denial of the FOIL request was legally inadequate. As respondents failed to raise any legal arguments in response, they must produce the requested documents.

RTR continues that the statute of limitations for a rule does not commence when the rule is adopted, but when it becomes effective. For example, respondents would not be able to invoke the Access Rules as the reason for the FOIL denial prior to the Access Rules' effective date. RTR continues that both rules should be considered together because together they were "amended through an interrelated process that took place in two stages," and ultimately, the Access Rules together decided when the records could be accessed and by whom. NYSCEF Doc. No. 39, RTR's memorandum of law in opposition at 6 n 4. "The comprehensive change of the Health Code- at which time both Access Rules were effective – was January 1, 2019." *Id.* at 5. RTR reiterates that, it would be illogical for a rule's statute of limitations to commence prior to the effective date of the rule, as no injuries could have been inflicted.

RTR argues that the *Boreali* factors must be applied because, even if an agency is granted authority to promulgate certain regulations, this does not mean that "such regulatory authority is unfettered, or that the agency is free to enact irrational and burdensome rules." *Id*. at 8. According to RTR, under the *Boreali* analysis, "the Board of Health acted far beyond its area of expertise,

did not consider public or expert opinions, and made a purely arbitrary determination without any support." *Id*. at 9.

DISCUSSION

Article 7804 (f)

An article 78 proceeding is a special proceeding which may be summarily determined "upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised." CPLR §409 (b); *see also* CPLR §7804 (a) and (f). Pursuant to CPLR §7804 (f), "[t]he respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just . . . ."

"In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR §3211(a)(7) and §7804(f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference." *Matter of Eastern Oaks Dev., LLC v. Town of Clinton*, 76 AD3d 676, 678 (2d Dept 2010). Only where "it is clear that no dispute as to the facts exists and no prejudice will result" may a court, upon a respondent's motion to dismiss, decide the petition on the merits. *Matter of Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educ. Servs. of Nassau County,* 63 NY2d 100, 102 (1984); *see also Chestnut Ridge Assoc., LLC v. 30 Sephar Lane, Inc.*, 129 AD3d 885, 887 (2d Dept 2015) (internal quotation marks and citations omitted) ("Where the dispositive facts and the positions of the parties are fully set forth in the record, thereby making it clear that no dispute as to the facts exists and [that] no prejudice will result from the failure to require an answer, the court may reach the merits of the petition . . . .").

Statute of Limitations

"[W]here a quasi-legislative act by an administrative agency . . . is challenged on the ground that it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, a proceeding in the form prescribed by article 78 can be maintained." *Terence Cardinal Cooke Health Ctr. v. Commissioner of Health of the State of N.Y.,* 175 AD3d 435, 436 (1st Dept 2019) (internal quotation marks and citations omitted). Pursuant to CPLR §217 (1) an article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner."

Here, RTR is challenging the validity of the Access Rules and is seeking a judgment declaring that the Access Rules are arbitrary and capricious and that they were enacted *ultra vires*. As a result, these causes of action, including the one for declaratory judgment, are properly maintained in an article 78 proceeding and are subject to a four-month statute of limitations. *See e.g. Terence Cardinal Cooke Health Ctr. v Commissioner of Health of the State of N.Y.,* 175 AD3d at 436 (internal citations omitted) ("In alleging violations of lawful procedures under the Public Health Law and Mental Hygiene Law, plaintiff is challenging a quasi-legislative act by defendants. . . . Thus, this declaratory judgment action was correctly converted to an article 78 proceeding").

Respondents cross-move to dismiss the second, third and fourth causes of action on the grounds that they are time barred.[6] "[A]n agency determination becomes final and binding when two events have occurred. First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury. And second, the petitioner must have received notice of that determination." *Matter of Clair v. City of New York*, 144 AD3d 98, 108 (1st Dept 2016) (internal

[6] Although the challenge to the FOIL denial was alleged in the first cause of action, this will be addressed last, as it is dependent on the remaining causes of action.

quotation marks and citations omitted). Courts have found that article 78 claims challenging the validity of regulations "accrue[] when the regulations became effective. . . ." *Matter of Dry Harbor Nursing Home v. Zucker*, 182 AD3d 847, 848 (3d Dept 2020); *see also Naftal v. Brookhaven*, 173 AD2d 799, 800 (2d Dept 1991) (internal quotation marks and citations omitted) ("Where a determination is made on one date to become effective at a later date, the determination does not become final for purposes of the Statute of Limitations until the date it becomes effective").

As a result, RTR was aggrieved on the dates that Access Rules became effective; on April 17, 2018 for Health Code § 207.21 and on January 1, 2019 for Health Code § 207.11. Prior to these dates the impact of the [regulations] on the petitioners could [not] be "accurately assessed." *New York Carting Co. v. Sexton*, 201 AD2d 651, 652 (2d Dept 1994); *see also Matter of Clair v. City of New York*, 144 AD3d at 108 (although petitioners received notice of TLC's conversion program, "implementation of the TLC's conversion program had not yet 'inflict[ed] actual, concrete injury' on petitioners, as the program did not commence until January 1, 2016").

Accordingly, as the petition was filed on April 19, 2019, more than four months after the effective date of Health Code § 207.21, any challenge to Health Code § 207.21 is dismissed as time-barred. However, challenges to Health Code § 207.11 are timely.

RTR argues that January 1, 2019 should be considered the statute of limitations date for both Access Rules because they were part of an intertwined and ongoing process. However, the court declines to adopt RTR's interpretation that the Access Rules should be considered together for statute of limitations purposes. The record indicates that the first Access Rule promulgated by the Board of Health, Section 207.21, was a new rule and became effective on April 17, 2018. It stated, in relevant part, that a death record becomes a public record 75 years after the decedent's date of death. Prior to its codification there were no fixed schedules for public access to birth and

death records. The second Access Rule, Health Code § 207.11, merely modified the existing Health Code § 207.11 and broadened the scope of access to birth and death records for additional family members such as nieces and nephews. So, between April 17, 2018, after the new time frames were implemented for public access, and January 1, 2019, the effective date of Health Code § 207.11, there were still clear guidelines in place setting forth who qualified to access birth and death records before they became public.

RTR also claims that people asked questions related to the time frame for access, the subject of Health Code § 207.21, during the meeting discussing the proposed amendment to Health Code § 207.11. According to RTR, this created an "ambiguity" as to when the decision became final and binding. NYSCEF Doc. No. 46, citing *Matter of City of New York v. DeCosta*, 289 AD2d 144, 144-145 (1st Dept 2001). However, the record does not indicate that there was any ambiguity or impression of nonfinality with respect to the first Access Rule. The Board voted and approved the first Access Rule to create an initial schedule. They did not hold off on voting until the second Access Rule was adopted. The notice provision itself informed the public that the Board of Health adopted Health Code § 207.21 after its meeting held on March 13, 2018, and that there were no changes. The provision then set forth that the DOHMH "is, however, separately proposing to the Board, in response to comments received, amendments to the Health Code to expand the categories of qualified applicants who may access birth and death records before the records are transferred to . . . and become public." NYSCEF Doc. No. 34 at 1.

Ultra Vires

RTR argues that, in promulgating the Access Rules, the Board of Health exceeded its rulemaking authority and engaged in improper policy making. It maintains that the framework set forth in *Boreali v. Axelrod*, *supra*, the seminal case in this area, must be applied to the Board of Health's actions. Respondents oppose the application, arguing that a full factual *Boreali v. Axelrod* analysis is not required.

"[T]he legislature has delegated significant power to the [Board of Health] to promulgate regulations in the field of public health." *Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 613 (2018); *see also* City Charter §558 (c) ("The board of health may embrace in the health code all matters and subjects to which the power and authority of the [DOHMH] extends"). Respondents argue that, as the Board of Health has been authorized to make regulations pertaining to the public release of death records, no separation of powers analysis is required. However, contrary to respondents' contentions, this claim cannot be resolved without undertaking an analysis of the *Boreali* factors. Courts have held that even when an administrative agency has broad discretionary authority in a particular area, the agency is not permitted to "use its enabling statute as a basis for drafting a code embodying its own assessment of what public policy ought to be." *Matter of Acevedo v. New York State Dept. of Motor Vehs*., 29 NY3d 202, 222 (2017) (internal quotation marks and citation omitted). In addition, "legislature cannot cede its fundamental policy-making responsibility to an administrative agency." *Id.* (internal quotation marks and citation omitted).

In *Boreali v. Axelrod*, the Court of Appeals identified four "coalescing circumstances" to consider whether "the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed." *Id.* at 11. Factoring in *Boreali* and subsequent cases, the Court of Appeals has recently set forth the circumstances as follows:

> "[W]hether (1) the regulatory agency balanc[ed] costs and benefits according to preexisting guidelines, or 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 had unsuccessfully attempted to enact laws pertaining to the issue; and (4) the agency used special technical expertise in the applicable field."

Garcia v. New York City Dept. of Health & Mental Hygiene, 31 NY3d at 608 (internal quotation marks and citations omitted).

Courts have held that the *Boreali* factors "are not to be applied rigidly, [and] . . . . "need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power." *Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, 180 (2016) (internal quotation marks and citations omitted). As set forth below, giving RTR "the benefit of every possible favorable inference," RTR has adequately pled that at least two factors weigh against respondents in finding that respondents acted in excess of their authority in promulgating Health Code § 207.11. *Mendelovitz v. Cohen*, 37 AD3d 670, 671 (2d Dept 2007).

In assessing the first factor, RTR has adequately pled that respondents "made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems." *Id.* RTR states that "[f]amily health history is promoted by nearly every medical and health organization in the county." Petition, ¶ 89. However, despite the multitude of letters from the public and testimony from experts about the need for requesting expanded access to death

records based on the need to assess family medical histories, the Board of Health did not discuss the health implications of the amendment to Health Code § 207.11. Instead, the Board of Health purportedly focused on other implications, such as privacy concerns.[7] As a result, RTR has adequately pled that, under the *Boreali* principles, the Board of Health "overstepped the boundaries of its lawfully delegated authority," and that the Board of Health "did not act solely with a view towards public health considerations but engaged in policy making when it adopted [Health Code 207.11]." *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 692 (2014) (internal quotation marks and citation omitted).

Furthermore, at the March 13, 2018 meeting, the Board of Health discussed privacy concerns. Other Board members acknowledged the presentations from "various credible societies," that "identity theft [using birth and death records] is more - especially now in the age of the internet and cyber issues - likely to get information about people that lends itself to identity theft." NYSCEF Doc. No. 8, tr at 40-41. The Board member asked Schwartz, "[i]s that something that – is your sense of information accurate?" *Id*. at 41. Schwartz did not answer the question but responded, "I remember reading that too. And many people in the comments and in the public hearing" wanted all of the records to be public. *Id*. Schwartz then continued, "[w]ell, I don't 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. As a result, at this time, it is unclear if the Board of Health's proposal of limiting access to death records was based on validated and

[7] The notice of adoption of amendment provision itself stated that the DOHMH "believes that the amendment appropriately balances the privacy and historical interests at stake," and that it was not making any additional changes to the amendment. NYSCEF Doc. No. 35 at 3.

documented privacy concerns or ones based on Schwartz's subjective opinion. *See e.g. Boreali v. Axelrod*, 71 NY2d at 12 (internal quotation marks and citation omitted) ("to the extent that the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector, it was acting solely on [its] own ideas of sound public policy and was therefore operating outside of its proper sphere of authority").

RTR has also sufficiently pled that the fourth factor, whether "the agency used special technical expertise in the applicable field," militates against respondents. During the Board of Health meeting held on March 13, 2018, Schwartz advised the other members that he was unaware of any other state that allowed step-family members immediate access to death records. However, the letter by IAJGS pointed out how a quick search indicated that several states do permit step-parents with immediate access. This discrepancy was not addressed prior to the Board of Health's adoption of Health Code § 207.11.

As another example, the IAJGS letter written after the March 13, 2018 Board meeting advised the Board of Health that out of the 1,500 recent data breaches reported to the Attorney General, none were related to vital records theft. Nonetheless, in proposing Health Code § 207.11 to the Board of Health, Schwartz stated, without explanation, that there were issues of privacy in releasing death records to nonfamily members, such as researchers, and that the Board of Health is "looking to balance the concerns of privacy and also increasing access to the extent that we feel is reasonable." NYSCEF Doc. No. 13 at 25. While the Board of Health has "jurisdiction to regulate all matters affecting health in the city of New York," (*Garcia v. New York City Dept. of Health & Mental Hygiene* 31 NY3d at 610) it is unclear if it has specialized knowledge and

expertise on the matter of privacy, or whether it considered any.[8] *See e.g. Matter of Ahmed v. City of New York*, 129 AD3d 435, 439 (1st Dept 2015) ("Finally, as to the fourth *Boreali* factor, the 'special expertise' employed by the agency in promulgating the regulation, the court found, in effect, that the TLC did not have any special expertise in the field of taxi driver health care issues").

"Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co*., 5 NY3d 11, 19 (2005). Accordingly, at this motion to dismiss stage only, RTR has adequately pled that the Board acted *ultra vires* in promulgating Health Code § 207.11.

Article 78 Claim – Whether Health Code § 207.11 is Arbitrary and Capricious

In the context of an article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v. New York State Liq. Auth.*, 32 AD3d 363, 363 (1st Dept 2006); *see also* CPLR §7803 (3). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. *Matter of Aponte v. Olatoye*, 30 NY3d 693, 698 (2018) (internal quotation marks and citation omitted).

Health Code § 207.11 defines what a proper purpose is for accessing records prior to their release to the public. Genealogical research is not considered a proper purpose. In making that determination, the Board of Health cited privacy concerns, such as identity theft. "It is not the

[8] As set forth in NYC Charter § 553 (a), the Board members themselves are required to have an expertise in a health field. In addition, "the language in section 558 (c) of the Charter—describing the Board's purview as comprising 'all matters and subjects' within the authority of the Department of Health and Mental Hygiene—was included in 1979 to preclude the Board from attempting to regulate areas not related to health." *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene*, 23 NY3d at 694-695.

judicial function to address, and we do not consider, the 'policy considerations underlying the standard' applied on review." *New York State Assn. of Counties v. Axelrod*, 78 NY2d 158, 167 (1991) (citation omitted). However, as noted above, RTR has alleged that there was no evidence provided to support this determination and that the Board members were not provided with accurate information prior to making a determination, such as being advised that no other state allows immediate access for step-relatives.

Accordingly, in opposition to respondents' motion to dismiss, RTR has adequately pled that the Board of Health's amendment to Health Code §207.11 was arbitrary and capricious. *See e.g. Matter of Ahmed v. City of New York*, 129 AD3d at 441 (internal citation omitted) ("The Health Care Rules also lack a rational foundation and are arbitrary and capricious. The record demonstrates that the six-cent-per-trip charge was carefully calibrated to generate a projected $10 million per year for use . . . . However, the record fails to show how the $10 million figure was determined or how the money is to be spent").

Declaratory Judgment

In general, "[a] motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration." *Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 AD3d 1148, 1150 (2d Dept 2011) (internal quotation marks and citations omitted). Under certain circumstances, courts may "reach[] the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where no questions of fact are presented [by the controversy]." *Id.* (internal quotation marks and citations omitted).

Applying these standards to the case at hand, questions of fact remain as to whether the Board of Health acted *ultra vires* in promulgating Health Code § 207.11, and RTR has sufficiently set forth a cause of action seeking declaratory relief. *See Id.* at 1151.

FOIL

The policy underlying FOIL "is to promote open government and public accountability by imposing upon governmental agencies a broad duty to make their records available to the public." *Matter of Johnson v. New York City Police Dept*., 257 AD2d 343, 346 (1st Dept 1999); *see also matter of Abdur-Rashid v. New York City Police Dept*., 31 NY3d 217, 224-225 (2018) (internal quotation marks and citation omitted) ("The statute is based on the policy that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government").

Government records are presumed to be open to the public, unless they fall under one of the statutory exemptions listed in POL § 87 (2). *Matter of Thomas v. New York City Dept. of Educ*., 103 AD3d 495, 496 (1st Dept 2013). When a FOIL request is denied, the standard of review is not whether the decision was arbitrary and capricious, but whether or not the determination was affected by an error of law. *Matter of Thomas v. Condon*, 128 AD3d 528, 529 (1st Dept 2015); *See* CPLR §7803 (3). The exemptions are to be "narrowly construed" and the agency has the burden "to demonstrate that the requested material indeed qualifies for exemption." *Matter of Thomas v. New York City Dept. of Educ*., 103 AD3d at 496 (internal quotation marks and citation omitted). "[B]lanket exemptions for particular types of documents are inimical to FOIL's policy of open government. Instead, to invoke one of the exemptions of section 87 (2), the agency must articulate particularized and specific justification for not disclosing requested documents. *Matter*

of Gould v. New York City Police Dept., 89 NY2d 267, 275 (1996) (internal quotation marks and citations omitted).

RTR's FOIL request included "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." NYSCEF Doc. No. 15 at 1. RTR had advised that it requested the death certificates "for genealogical and research purposes." In opposing disclosure of the requested information, respondents partially relied upon the FOIL exemption set forth under POL § 87(2)(a), which "provides that an agency may deny access to records that are specifically exempted from disclosure by state or federal statute." *Matter of New York Civ. Liberties Union v. New York City Police Dept*., 32 NY3d 556, 563 (2018) (internal quotation marks omitted). Specifically, respondents partially relied on Health Code §207.11 for restricting access, as it sets forth that inspection of vital records or data for release to the public is not a proper purpose. Genealogists and researchers, among others, were not included in the expanded list of people who had access under the amended Health Code §207.11.

Here, respondents cross-moved pursuant to CPLR §7804 (f). In opposition to respondents' cross motion, RTR has adequately pled three causes of action challenging Health Code § 207.11 as, among other things, being enacted *ultra vires* and as being arbitrary and capricious. A determination of these causes of action is necessary prior to considering the first cause of action. Accordingly, upon denial of their cross motion, respondents shall be permitted to answer. *See e.g. Matter of Kickertz v. New York Univ*., 25 NY3d 942, 944 (2015) (internal quotation marks and citations omitted) (As the "motion papers . . . clearly did not establish that there were no triable issues of fact," pursuant to procedures set forth in CPLR §7804(f), respondents should be permitted to answer the petition.

CONCLUSION

Accordingly, it is hereby

ORDERED that the cross motion is granted as to the dismissal of RTR's challenge to Health Code § 207.21, and the cross motion is otherwise denied in its entirety; and it is further

ADJUDGED that the petition is denied, severed and dismissed with respect to RTR's challenge to Health Code §207.21 as set forth in the second, third and fourth causes of action; and it is further

ORDERED that pursuant to §7804(f), respondents may answer the petition within 20 days from receipt of a copy of this Decision and Order.

Dated: December 16, 2020

ENTER:

Hon. J. MACHELLE SWEETING, J.S.C.

Note to clerks from law secretary B. Liu:
Regarding this motion sequence, it is closed by this decision.
Regarding the petition, it is denied, severed and dismissed with regard to the 2nd, 3rd and 4th causes of action; and respondents were given leave to answer the remaining parts of the petition within 20 days from receipt of a copy of the decision.
This is a final disposition.