

# **Exhibit 15**

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March 7, 2019

**Via Fedex** (copy via email)

Thomas Merrill, Esq.  
Appeals Officer & General Counsel  
NYC Department of Health & Mental Hygiene  
42-09 28th Street, CN-30  
Long Island City, NY 11101  
[tmerrill@health.nyc.gov](mailto:tmerrill@health.nyc.gov)

RE: FOIL Control No. 2019FR00419 - Appeal of Denial

Dear Mr. Merrill:

I represent Reclaim the Records (“RTR”), a not-for-profit organization that promotes and advocates for greater transparency and public access to genealogical, archival and vital records across the United States. On February 7, 2019, RTR submitted a Freedom of Information Law (“FOIL”) request to the New York City Department of Health & Mental Hygiene (“DOHMH”) for copies of scans that DOHMH previously made of death certificates from the years 1949 through 1968. On February 11, DOHMH denied RTR’s request. RTR hereby appeals DOHMH’s denial because DOHMH failed to meet its burden of establishing that a FOIL exception applies.

**Background**

DOHMH retains copies of all death certificates that were issued in New York City since 1949. In 2006, DOHMH imaged all of these death records, which it now stores in electronic form. These records are *not* made available to the public. As a result, for genealogical and research purposes, RTR requested “one set of the digital scans [for 1949 through 1968], in uncertified form, that DOHMH previously made of these certificates” (the “Scans”). RTR further represented that—before making the

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Scans available to the public—it would undertake to stamp or watermark the digital images as being uncertified and for genealogical purposes only.

Because the Scans are “records” held by an agency, RTR submitted a FOIL request for copies of the digital files. FOIL “is based on a presumption of access,” and as a result, DOHMH “carries the burden of demonstrating that [an] exemption applies to the FOIL request.” *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007). Generic denials are impermissible; instead DOHMH was required to “show that the requested information ‘falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.’” *Id.* at 462–63 (citations omitted).

#### DOHMH Did Not Meet its Burden of Establishing a Statutory Exemption

DOHMH alleges 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. However, this basis for denial is inconsistent with applicable law. Section 87(2)(a) of FOIL only creates an exemption for state and federal statutes; a New York City Health Code regulation is neither of those and therefore cannot prevent disclosure under FOIL. As New York’s Committee on Open Government (“COOG”) explained:

[A]n assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. . . . If there is no statute upon which an agency can rely to characterize records as ‘confidential’ or ‘exempted from disclosure,’ the records are subject to whatever rights of access exist under FOIL. . . . Moreover, it has been held by several courts, including the Court of Appeals, the state’s highest court, 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.

Advisory Opinion, N.Y. Comm. on Open Gov’t, at 2 (Mar. 4, 2019) (citations omitted).<sup>1</sup>

DOHMH is fully aware that its own health code provisions are insufficient grounds to prevent disclosure under FOIL. Only a few years ago, DOHMH itself stated in a legal memorandum that “New York City Health Code privacy provisions

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<sup>1</sup> After DOHMH’s denial of RTR’s request, RTR requested an advisory opinion from COOG. A copy of the COOG advisory opinion (the “Advisory Opinion”) is attached herein.

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standing alone do not provide an exemption under FOIL.” See Respondent’s Memo. of Law, *Berger v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 7618/2013, at 14 n.6 (Sup. Ct. Queens Co. June 12, 2013). The court in that matter explicitly agreed, holding that a provision “of the New York City Health Code is not a state or federal statute, thus this exemption in Public Officers Law § 87(2)(a) is inapplicable.” *Id.*, Order & Judgment, at 7 (Sup. Ct. Queens Co. Dec. 13, 2013) (denied on other grounds). Considering a New York State judge has previously rejected DOHMH’s purported rationale, *in a case involving DOHMH*, the agency clearly failed to meet its burden here. And despite DOHMH’s apparent representation that its decisions are excluded from FOIL based on a seven-decade-old decision that pre-dates FOIL, other New York decisions that post-date the enactment of FOIL have held that New York City regulations do not create exemptions under FOIL. See, e.g., *Morris v. Martin*, 55 N.Y.2d 1026 (1982); *Brownstone Pubs., Inc. v. N.Y.C. Dep’t of Fin.*, 150 A.D.2d 185 (1st Dep’t 1989).

Lastly, DOHMH’s mere unwillingness to create uncertified copies is not a FOIL exemption. No law *prevents* the creation of uncertified copies. Indeed, New York State explicitly *permits* them. See N.Y.S. Dep’t of Health, *Genealogy Records & Resources* (the NYS Dep’t of Health “provides uncertified copies of the following types of records for genealogy research purposes: . . . [d]eath certificates – if on file for at least 50 years”), [https://www.health.ny.gov/vital\\_records/genealogy.htm](https://www.health.ny.gov/vital_records/genealogy.htm).

#### DOHMH Did Not Meet its Burden of Establishing a Privacy Exemption

DOHMH’s denial based on privacy grounds is irrational and inconsistent with applicable law and policies. DOHMH provides solely one rationale: that the requested death records, all of which are over 50 years old, “include information on persons still living such as next of kin.” This statement lacks any legal support, as it fails to address any privacy considerations: first, whether the records even contain *private* information, and if so, second, whether the disclosure of that information would constitute an *unwarranted* invasion of privacy. As COOG’s Advisory Opinion explains, “courts have found that ‘speculation’ concerning the potentially harmful effect of disclosure . . . is insufficient to justify a denial of access,” further elaborating that “the possibility of harm that is ‘theoretical’ is inadequate.” Advisory Opinion, at 5 (citing *Markowitz v. Serio*, 11 N.Y.3d 43, 50 (2008) (an agency “cannot merely rest upon a speculative conclusion that disclosure might potentially cause harm”)).

First, DOHMH’s privacy defense is directly contrary to New York State’s laws and regulations, pursuant to which the public may receive uncertified death records that are over 50 years old. In any event, the only information on these 50 to

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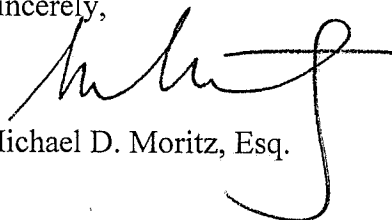
70 year-old documents regarding “next of kin” are three fields: name, relation and address (and place of birth for a parent). DOHMH provides no supporting evidence or any rationale how the disclosure of solely those fields of information is an unwarranted invasion of privacy. There is no justification for how the disclosure of a living individual’s name or place of birth alone is an invasion of privacy. Next, DOHMH fails to justify how someone’s address from a half-century ago is private.

Finally, the mere statement of a familial relationship is not private either. For instance, anyone can view publicly-available probate records, which, like death certificates, provide next of kin information and provide the public with *current* information about an individual’s name, relation and address. If the current versions of the *same categories* of information are available to the public at a surrogate’s court in New York City, then the disclosure of that information from fifty to seventy years ago surely cannot be an invasion of privacy. And DOHMH’s rationale is further belied by the policies of a fellow City agency, the City Clerk, which *provides to the public* all marriage records that are over 50 years old. These documents, exactly like death certificates, include an individual’s parents’ names and places of birth and list two witnesses (who may be the very same next of kin), along with the current address of each witness.<sup>2</sup>

Ultimately, DOHMH’s rationale—that documents of decedents must not be disclosed because they contain the name and fifty-to-seventy-year-old address of someone who may or may not be alive—would create a remarkably dangerous precedent and one that is clearly out of line with the purposes and rationale of FOIL.

We look forward to DOHMH fulfilling its FOIL disclosure obligations.

Sincerely,



Michael D. Moritz, Esq.

Enclosures

cc: Chari Anhouse (via email, [canhouse@health.nyc.gov](mailto:canhouse@health.nyc.gov))  
Svetlana Burdeynik (via email, [sburdeyn@health.nyc.gov](mailto:sburdeyn@health.nyc.gov))  
Robert Freeman (via email, [robert.freeman@dos.ny.gov](mailto:robert.freeman@dos.ny.gov))  
Brooke Schreier Ganz (via email, [info@reclaimtherecords.org](mailto:info@reclaimtherecords.org))

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<sup>2</sup> DOHMH also fails to grapple with the notion that the informant or parents on a death certificate from this period (the only entries showing next of kin) may be deceased as well.

# EXHIBIT 1

FOUR TIMES SQUARE  
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February 7, 2019

Via Email

Records Access Officer  
NYC Department of Health and Mental Hygiene  
Gotham Center  
42-09 28th Street, 14th Floor, CN31  
Long Island City, NY 11101  
[recordsaccess@health.nyc.gov](mailto:recordsaccess@health.nyc.gov)

RE: FOIL Request: NYC Death Certificates, 1949-1968

Dear Records Access Officer:

I represent Reclaim the Records (“RTR”), a not-for-profit organization that promotes and advocates for greater transparency and public access to genealogical, archival and vital records across the United States. Pursuant to New York’s Freedom of Information Law (“FOIL”), RTR respectfully requests 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.

Scope of FOIL Request

New York City death certificates issued between 1949 and 1968 are “records” that are held by the New York City Department of Health and Mental Hygiene (“DOHMH”), and pursuant to FOIL, DOHMH (an agency) “shall . . . make available for public inspection and copying all records,” unless there is a specific exemption preventing disclosure. FOIL § 87(2). Agency records are subject to FOIL “in any physical form whatsoever,” including in digital and electronic form. *See Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462–65 (2007); FOIL § 86(4).

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RTR specifically requests one set of the digital scans, in uncertified form, that DOHMH previously made of these certificates (the "Scans"),<sup>1</sup> to be copied onto one or more hard drive(s) and shipped to the above address. This FOIL request for the uncertified Scans is 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. To ensure that the Scans will not be used for improper purposes, RTR will undertake to stamp or watermark the digital images "UNCERTIFIED COPY – FOR GENEALOGICAL PURPOSES ONLY" (or something substantially similar) before they are made available to the public.

Please let us know the expected "actual cost" of reproduction, as defined by FOIL § 87(1)(c), before the copies are prepared.

This Request is Not Exempted by FOIL

FOIL "is based on a presumption of access to [agency] records, and an agency . . . carries the burden of demonstrating that [an] exemption applies to the FOIL request." *Data Tree*, 9 N.Y.3d at 462. Thus, "to deny disclosure, the Clerk must show that the requested information 'falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.'" *Id.* at 462–63 (emphasis added) (citations omitted).

First, no state or federal statute prohibits the disclosure of uncertified copies of death certificates that are over 50 years old. In fact, to the contrary, New York law explicitly permits disclosure of an "uncertified copy" of a death certificate for "genealogical or research purposes." Pub. Health Law § 4174(3). Meanwhile, New York City's newly imposed regulations addressing the public availability of death certificates, NYC Health Code §§ 207.11 and 207.21, do not alter DOHMH's disclosure obligations because *only state or federal statutes may create specific exemptions under FOIL; city regulations cannot.* See FOIL § 87(2)(a); *Brownstone Publishers, Inc. v. N.Y.C. Dep't of Fin.*, 150 A.D.2d 185, 186–87 (1st Dep't 1989) (a "provision [of the NYC Administrative Code] did not constitute an

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<sup>1</sup> See N.Y.C. Dep't of Health & Mental Hygiene, Bd. of Health Mtg., Sept. 12, 2017 (statement of Steven Schwartz, N.Y.C. Registrar of Vital Statistics), at 73:21-74:6 ("[I]n 2006 we imaged all of our birth and death records, about 13 million records. . . . [W]e only did the front side. . . . [I]f we simply transferred, which might be really logistically easy by just transferring the electronic records, it would only be the face of it."); Catherine Leahy Scott (N.Y.S. Inspector General), N.Y.S. Office of the Inspector General, *Investigation of the New York State Department of Health Bureau of Vital Records* 7 (June 2016) ("The New York City Department of Health, using funds obtained from a federal grant, embarked on a project in 2006 to scan and index its birth and death records using a contracted vendor working at a secure on-site facility. In less than nine months, the vendor digitized more than 13 million records.").



Records Access Officer, DOHMH  
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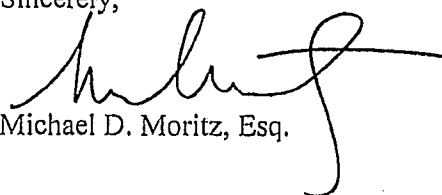
exemption from FOIL disclosure because it was not a state or federal statute”); *N.Y. Times Co. v. N.Y.S. Dep’t of Health*, 173 Misc.2d 310, 319 (Sup. Ct. Albany Cty. 1997) (“[E]xemptions from FOIL may only be created by State or Federal statute, not by administrative regulation. To the extent . . . regulations purport to create a personal privacy exemption which does not exist under the Public Officers Law, the Court concludes they are not enforceable.” (citations omitted)).

Second, there are no legitimate privacy concerns that prevent disclosure of the Scans. Deceased individuals do not have a right to privacy under New York law. *See, e.g., Jones v. Town of Kent*, 46 Misc.3d 1227(A), at \*3 (Sup. Ct. Putnam Cty. 2015) (“The Court has been unable to locate any authority holding that a right of privacy extends to those person[s] no longer living. In fact, the holdings are to the contrary.”). Additionally, the Scans—copies of records that are *more than 50 years old*—are inherently not private, and other New York agencies plainly acknowledge this fact. Throughout the rest of the State, uncertified copies of death certificates “may be provided [to anyone] for genealogical research purposes” as long as the “record of death . . . has been on file for at least 50 years.” 10 NYCRR § 35.5(c)(3). And New York City’s Office of the City Clerk further recognizes that marriage licenses (which contain largely the same factual information as death certificates) are public after 50 years, stating on its website that “[a] *Marriage Record older than 50 years from today’s date is considered a historic record and is available to the general public.*”<sup>2</sup>

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

We look forward to working with DOHMH in fulfilling this request.

Sincerely,



Michael D. Moritz, Esq.

cc: Brooke Schreier Ganz ([info@reclaimtherecords.org](mailto:info@reclaimtherecords.org))

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<sup>2</sup> See Office of the City Clerk, *Marriage Records*, <https://www.cityclerk.nyc.gov/html/marriage/records.shtml> (last visited Feb. 7, 2019).

# EXHIBIT 2

**Moritz, Michael D (NYC)**

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**From:** Chari Anhouse <canhouse@health.nyc.gov>  
**Sent:** Monday, February 11, 2019 4:53 PM  
**To:** Moritz, Michael D (NYC)  
**Cc:** Svetlana Burdeynik  
**Subject:** [Ext] FOIL Control No. 2019FR00419 Response

Dear Mr. Moritz:

Please be advised that your Freedom of Information Law (NYS Public Officers Law Article 6, "FOIL") request for "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" has been denied based on statutory as well as personal privacy grounds.

Statutory Grounds

New York State Public Health Law § 4104 exempts New York City from State law with regard to vital records with very few exceptions, none of which apply here. It has been settled for many years that the New City York Health Code, based on the New York City Charter and State law and regulation, is the controlling law on vital records matters in the City. *See, e.g., In re Bakers Mutual Ins. Co. of New York*, 301 N.Y. 21 (1950). Section 558(c) of the City Charter requires the New York City Board of Health to include in the Health Code provisions related to maintaining a registry of births and deaths, as well as the manner in which birth and death certificates may be issued and otherwise examined. Pursuant to New York City Charter § 556(c) and NYC Administrative Code § 17-166, the NYC Department of Health and Mental Hygiene is responsible for supervising and controlling the registration of births and deaths that occur in the City of New York. 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).

Privacy Grounds

The records you seek include information on persons still living such as next of kin. Pursuant to the privacy provisions of FOIL §§ 87(2)(b) and 89(2)(b), it would therefore be an unwarranted invasion of these person's privacy to release these death certificates.

You may file a written appeal of this denial within 30 days of the date of this message. The appeal should be addressed to:

Thomas Merrill, Esquire  
Appeals Officer & General Counsel  
42-09 28th Street, CN-30  
Long Island City, NY 11101

The notice of appeal should include the request control number, the date of this denial message, a description of the records that were the subject of the request, the specific legal grounds for your appeal, and the full name and address of the original requester.

Thank you,

**Chari Anhouse**

Associate General Counsel/Records Access Officer  
NYC Department of Health & Mental Hygiene  
General Counsel's Office

42-09 28<sup>th</sup> Street, CN-31  
Long Island City, NY 11101  
347-396-6419



Please consider the environment before printing this email.

Sent from the New York City Department of Health & Mental Hygiene. This email and any files transmitted with it may contain confidential information and are intended solely for the use of the individual or entity to whom they are addressed. This footnote also confirms that this email message has been swept for the presence of computer viruses.

# EXHIBIT 3

**COMMITTEE ON OPEN GOVERNMENT**

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STEPHEN B. WATERS  
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FRANKLIN H. STONE

**EXECUTIVE DIRECTOR**

ROBERT J. FREEMAN

March 4, 2019

Michael D. Moritz, Esq.  
Four Times Square, 24<sup>th</sup> Floor  
New York, New York 10036-6522

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. Moritz:

I have received your letter in which you requested an advisory opinion on behalf of Reclaim the Records (RTR), a not-for-profit entity that “advocates for greater transparency and access to archival, genealogical and vital records.”

On February 7, RTR submitted a request to the New York City Department of Health and Mental Hygiene (DOHMH) for “one complete set of the digital scans that DOHMH previously made of all New York City Death certificates issued between and including 1949 and 1968.” On February 11, DOHMH denied the request based on §§87(2)(a) and 89(2)(b) of the Freedom of Information Law (FOIL).

The response to the request denying access cited various provisions of the New York City Health Code. Specifically, it is asserted that:

“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)” [emphasis in original].

It was also asserted that:

“The records you seek include information on persons still living such as next of kin. Pursuant to the privacy provisions of FOIL §§ 87(2)(b) and 89(2)(b), it would therefore be an unwarranted invasion of these person’s privacy to release these death certificates.”

In this regard, I offer the following comments.



Department  
of State

Mr. Moritz

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As a general matter, FOIL is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (m) of the Law.

From my perspective, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of FOIL, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". 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 [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. 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" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Therefore, a local enactment, such as a municipal code, cannot confer, require or promise confidentiality. This 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.

I note, too, that in a decision involving a claim of confidentiality based on a section of the New York City Health Code, it was determined that the provision at issue "is not a state or federal statute, thus this exemption in Public Officers Law §87(2)(a) is inapplicable" [Berger v. New York City Department of Health and Mental Hygiene, Supreme Court, Queens County, December 13, 2013).

Second, the extent to which the records must be disclosed is dependent on their content and the effects of disclosure. As suggested in the response, §§87(2)(b) and 89(2)(b) are pertinent. Both indicate that records may be withheld insofar as disclosure would constitute "an unwarranted invasion of personal privacy". The quoted phrase is, in my opinion, indefinable, for society's views regarding privacy are evolutionary and constantly changing. There are generational distinctions concerning privacy, and two equally reasonable people may differ concerning the nature of personally identifiable information that should or should not be disclosed.

The Court of Appeals dealt with issues involving the privacy of the deceased and their surviving family members for the first time in New York Times Company v. City of New York Fire Department [4 NY3d 477 (2005)]. The records in question involved 911 tape recordings of persons who died during the attack on the World Trade Center on September 11, 2001, and the decision states that:

"We first reject the argument, advanced by the parties seeking disclosure here, that no privacy interest exists in the feelings and experiences of people no longer

living. The privacy exception, it is argued, does not protect the dead, and their survivors cannot claim 'privacy' for experiences and feelings that are not their own. We think this argument contradicts the common understanding of the word 'privacy'."

"Almost everyone, surely, wants to keep from public view some aspects not only of his or her own life, but of the lives of loved ones who have died. It is normal to be appalled if intimate moments in the life of one's deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private affairs of the dead (cf. Nat'l Archives and Records Admin. V. Favish, 541 US 157 [2004])" (id., 305).

Based on the foregoing, it is clear that there may be an interest in protecting privacy in consideration of the deceased, as well as family members. Nevertheless, the ensuing question involves the content of records, and whether the information is so intimate or personal that disclosure would result in an "unwarranted" invasion of privacy. As stated by the Court:

"The recognition that surviving relatives have a legally protected privacy interest, however, is only the beginning of the inquiry. We must decide whether disclosure of the tapes and transcripts of the 911 calls would injure that interest, or the comparable interest of people who called 911 and survived, and whether the injury to privacy would be 'unwarranted' within the meaning of FOIL's exception" (id., 306).

In its focus on the nature of the calls, it was found that:

"The privacy interests in this case are compelling. The 911 calls at issue undoubtedly contain, in many cases, the words of people confronted, without warning, with the prospect of imminent death. Those words are likely to include expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them. The grieving family of such a caller – or the caller, if he or she survived – might reasonably be deeply offended at the idea that these words could be heard on television or read in the New York Times.

"We do not imply that there is a privacy interest of comparable strength in all tapes and transcripts of calls made to 911. Two factors make the September 11 911 calls different.

"First, while some other 911 callers may be in as desperate straits as those who called on September 11, many are not. Secondly, the September 11 callers were part of an event that has received and will continue to receive enormous - - perhaps literally unequalled - - public attention. Many millions of people have reacted, and will react, to the callers' fate with horrified fascination. Thus it is highly likely in this case - - more than in almost any other imaginable - - that, if the tapes and transcripts are made public, they will be replayed and republished endlessly, and that in some cases they will be exploited by media seeking to



deliver sensational fare to their audience. This is the sort of invasion that the privacy exception exists to prevent” (id.).

Based on the guidance offered by the Court of Appeals, the extent to which the contents of records are indeed intimate and personal is the key factor in ascertaining whether disclosure would result in an unwarranted invasion of personal privacy. From our perspective, the fact of a death is itself not intimate. However, to the extent that the records include information that “would ordinarily and reasonably be regarded as intimate, private information”, it has been held that disclosure would constitute an unwarranted invasion of personal privacy [see Hanig v. Department of Motor Vehicles, 79 NY2d 106, 112 (1992)].

The fact of a death is generally not a secret. We read obituaries announcing deaths, and often those notices include information concerning the life of the deceased, as well as names of family and friends. Frequently, too, they refer to the cause of death. In consideration of those realities, the question involves whether or the extent to which the records at issue may properly be withheld.

When an agency denies access to records, and the denial is challenged via the initiation of an Article 78 proceeding, unlike other such proceedings in which the petitioner has the burden of proving that the agency acted unreasonably or failed to carry out a legal duty, the agency has the burden of proof when the proceeding involves a denial of access under FOIL. The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

“To ensure maximum access to government records, the ‘exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption’ (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, ‘[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld’ (Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)” [89 NY2d 267, 275(1996)].

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

“...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 Fink v. Lefkowitz, *supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., *supra*, 62 N.Y.2d, a83, 476 N.Y.S.2d 69, 464 N.E.2d 437)” (id.).

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In Daily News v. City of New York Office of Payroll Administration [9 AD 3d 308 (2004)], one of the issues involved portions of records that included the ages of public employees. In short, both the Supreme Court and the Appellate Division determined that the agency did not meet the burden of proof and could not demonstrate to the courts' satisfaction how and why disclosure would result in an unwarranted invasion of personal privacy. In contrast is the decision rendered in Hearst Corporation v. Office of the State Comptroller [882 NYS2d 862 (2009)], which dealt in part with the disclosure of public employees' dates of birth. The court found that disclosure that item, unlike disclosure of their ages, would constitute an unwarranted invasion of privacy. A name coupled with a date of birth, which is akin to a unique identifier, i.e., a social security number, might be used as a link to obtain a variety of other items pertaining to an individual, some of which may be intimate or private.

I note that the courts have found that "speculation" concerning the potentially harmful effect of disclosure sought to be avoided via the assertion of an exception to rights of access is insufficient to justify a denial of access. In Markowitz v. Serio [11 NY3d 43 (2008)], the Court of Appeals determined that the possibility of harm that is "theoretical" is inadequate, and that an agency "cannot merely rest upon a speculative conclusion that disclosure might potentially cause harm" (*id.*, 50).

Here, the possibility that disclosure includes the names of living persons, such as next of kin, is real. However, whether disclosure of those names would, in the opinion of a court in every instance rise to the level of an *unwarranted* invasion of personal privacy is unknown. I could only conjecture regarding the outcome that could be reached by a court, and I choose not to do so.

Notwithstanding the foregoing, I hope that I have been of assistance.

Sincerely,



Robert J. Freeman  
Executive Director

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