

Exhibit 16



NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE
Oxiris Barbot, MD
Commissioner

Thomas Merrill
General Counsel

42-09 28th Street, CN30
Long Island City, NY 11101

347-396-6116 (P)
347-396-6087 (F)
tmerrill@health.nyc.gov

March 21, 2019

Michael D. Moritz, Esquire
Skadden, Arps, Slate, Meagher & Flom, LLP
Four Times Square, 24th Floor
New York, NY 10036-6522

Re: Appeal FOIL Control No. 2019FR00409¹

Dear Mr. Moritz:

This is in response to your March 7, 2019 appeal from the Department's February 11, 2019 denial of your Freedom of Information Law (NYS Public Officers Law Article 6, "FOIL") request submitted on February 7, 2019. Your request asked 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 1949 and 1968."² The Department's Records Access Officer, Chari Anhouse, noted both statutory and privacy grounds for her denial of this request. For the reasons explained below, I am denying your appeal.

Statutory grounds

Your appeal relies heavily upon a March 4, 2019 advisory opinion issued by Robert Freeman, the Executive Director of the New York State Committee on Open Government ("COOG"). However, in that opinion, Mr. Freeman did not address the state law relevant to this denial. The key New York City Administrative Code provisions at issue derive from the Greater New York Charter (a predecessor to provisions of the present New York City Charter and Administrative Code) that were enacted by the state legislature. They represent a policy of the State Legislature, having the force of state law. See *Garcia v. New York City Department of Health and Mental Hygiene*, 31 N.Y.3d 601, 613-14, 620-621 (2018) (Administrative Code section was originally enacted by the state legislature and reflected state policy that the Board of Health regulate vaccinates in the City of New York).

Administrative Code 17-169(b) provides for a death record to be issued unless it appears that release is not "required for a proper purpose." This section, and particularly the "required for a proper purpose" language, was enacted by the state legislature in Chapter 197 of the Laws of 1937, in an amendment of section 1241-a of the Greater New York Charter. Administrative Code section 17-112, which should be

¹ Please note the corrected control number for this request.

² The scans you refer to in your record request are, in fact, scans of certified records. In your appeal, you complain that the City is unwilling "to create uncertified copies". FOIL does not require the creation of new records. Our letter today addresses the fact that redacted versions of the (existent) certified records are exempt from FOIL.

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read in tandem with 17-169, provides more generally that the Department may establish reasonable regulations regarding making records public. This law also derives from former section 1175 of the 1901 Greater New York Charter, which consisted entirely of state legislation, and was modified and added to the first Administrative Code by state law in 1937.

In accord with this authority, the NYC Health Code defines the extent of proper purpose in §§ 207.11 and 207.21. The Code states, "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." § 207.11 (emphasis added). The Department is without discretion to deem your client's intended use a proper purpose. The Code also states that "a death record in the Department's possession and control becomes a public record on January 31st of the year following 75 years after the date of death. The Department shall transfer to the City's department of records and information services all public birth records, death records, and index books." § 207.21. As in *Garcia*, the Health Code provisions at issue here further both the specific powers of the Department of Health and Mental Hygiene in relation to this subject matter, as well as broader powers of the Board of Health with respect to the Health Code (Charter § 558). Thus, these regulations are properly within the bounds of the statutory scheme authorizing them, and must be followed.

The New York State Public Health Law (PHL) also supports this denial. PHL § 4104 specifically exempts New York City from relevant provisions of § 4174. Section 4174(1)(a) requires the Commissioner of Health to issue death certificates or transcripts only when they are required for certain enumerated purposes, and it specifically exempts certified death records from disclosure under FOIL. New York City is exempt from this provision, as it is from many provisions of Article 41, as it has been longstanding state policy that the Department sets the standards for New York City. It would be illogical to infer that the state legislature, by exempting these records from FOIL for the rest of the state and also excluding New York City from § 4174, meant to establish that privacy concerns based in statutory authority would be wholly inapplicable to FOIL requests for death-related records in the City. Notably, in accord with PHL § 4104, the State Legislature has established a scheme, now codified in the City's Administrative Code, that contemplates that New York City will set appropriate standards for release of death records. The Health Code implements and completes this scheme: seventy-five years after death, records will be made available for genealogy research by the public.

You cite, out of context, a portion of the papers in *Berger v. N.Y.C. Dep't of Health & Mental Hygiene*, Index No. 007618/2013 (Sup. Ct. Queens Co, June 12, 2013) to support your incorrect argument that there is no state law here. Statements that you quote from the papers and lower court decision in that litigation are literally true and ultimately irrelevant. 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. In that context, it should be noted that in *Berger*, DOHMH prevailed on the personal privacy argument, and the appellate court denied any attorney's fees to the reporter. *Matter of Berger v. NYCDOHMH*, 137 A.D.3d 904 (2d Dep't 2016), *lv. To app. den.*, 27 N.Y.3d 910 (2016).

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Contrary to the implication of your appeal letter, FOIL, enacted in 1974 and amended in 1977, does not overrule all prior laws protecting against the release of records.³ The state has not disturbed the statutory scheme pursuant to which New York City established reasonable standards for release of death-related records, despite ample opportunity to do so in amendments of PHL §§ 4104 and 4174 over recent decades. In fact, as the Court of Appeals stated in *Garcia*: "When codifying the Administrative Code in 1937, in fact, the state legislature specifically provided that no law enacted thereafter should be construed to implicitly repeal any provision of the Code, and the Code still so states (see former Administrative Code § 982-6.0 as enacted by L 1937, ch 929 § 1; Administrative Code § 1-110)." 33 N.Y.3d 601, at 621.

Invasion of personal privacy grounds

Contrary to the arguments you make about whether recent death records *ought* to be private and protected by law, the law states that they are. When it established a fixed release schedule through the City Administrative Procedure Act (CAPA) rulemaking process in 2018, the Board of Health made a rational policy choice, in accord with the authority granted by the state, to apply a protective standard to these death records, given the risks of abuse. These recent records contain various personally identifying information about multiple parties, some of which is still subject to correction, and all of which could be abused if made public. New York City death certificates (which are particular to New York City and not issued by the State Department of Health) may include information such as: usual residence, marital status, age, occupation, social security number, country of origin, maiden name, names of father and mother, name of hospital, place of death, precise time of death, whether death was caused by accident, suicide, acute or chronic poisoning, or in any suspicious manner, or by natural causes, and the name and business address of the funeral director.

Ultimately, it is the place of the State Legislature, and the Board of Health implementing its statutory delegation, to draw precise lines to protect personal privacy of vital records. Your various public policy arguments would be more properly posed in the course of the legislative and rulemaking processes.

Should you wish to further contest this determination under FOIL, you may commence a proceeding in a court of competent jurisdiction pursuant to Article 78 of the NYS Civil Practice Law and Rules.

Sincerely,



Thomas Merrill
Appeals Officer & General Counsel

Attachments (electronic)

³ Statutory exemption, for the purposes of FOIL, may be found in the New York City Charter. *Huston v. Turkel*, 653 N.Y.S.2d 584 (1st Dep't 1997) (autopsy reports exempt from disclosure under FOIL pursuant to New York City Charter § 557(g)), appeal denied, 90 N.Y.2d 809, (1997); *Mitchell v. Borakove*, 639 N.Y.S.2d 791 (1st Dept, 1996) (denying access to autopsy worksheets pursuant to § 557(g) of the New York City Charter), appeal denied, 88 N.Y.2d 919 (1996); and *Mullady v. Bogard*, 583 N.Y.S.2d 744 (Sup. Ct. 1992) ("The documents requested by petitioner of OCME and respondent are specifically exempt from disclosure by such parties under section 557 (g) of the New York City Charter which has the authority of State law...").

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cc: Robert Lopez
Chari Anhouse
NYC Committee on Open Government (via email to coog@dos.nyc.gov)