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

RECLAIM THE RECORDS, Petitioner, - against - NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, NEW YORK CITY BUREAU OF VITAL STATISTICS, NEW YORK CITY BOARD OF HEALTH, OXIRIS BARBOT, in her official capacity as New York City Commissioner of Health, GRETCHEN VAN WYE, in her official capacity as New York City Registrar, and STEVEN P. SCHWARTZ, in his official capacity as former New York City Registrar, Respondents.	Index No. 153996/2019 Hon. J. Machelle Sweeting

PETITIONER RECLAIM THE RECORDS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS VERIFIED ARTICLE 78 PETITION

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Petitioner Reclaim the Records ("RTR") respectfully submits this Reply Memorandum of Law in further support of its Article 78 Verified Petition (the "Petition").[1] The facts of this case are thoroughly addressed in the Petition and this Court's Decision and Order (Dkt. No. 52, hereinafter "*RTR I*").[2] For the following reasons, as well as those in the Petition (Dkt. No. 1), RTR respectfully requests that the Petition be granted in its entirety.

INTRODUCTION

Respondents' refusal in this case to disclose historical records ultimately comes down to a purported concern about privacy, but they have failed to meet their burden to establish that legitimate privacy concerns are even at issue. Respondents claim New Yorkers' privacy rights are being threatened here; but what gets lost in their Answer (Dkt. No. 58) and supporting Memorandum of Law (Dkt. No. 64, hereinafter "Opposition" or "Opp.") is that this case does not actually regard the lives of those living in New York today, nor does it regard any attempts to steal the identities of New Yorkers. Instead, RTR is petitioning for records regarding individuals who, on average, were born in the 19th century, all of whom died *more than half a century ago*.

There is no overwhelming privacy concern here—indeed, despite Respondents' attempts to conflate the issues, anyone can actually request the exact types of records at issue here for any individual who died in any county in New York other than the five boroughs. A death certificate for someone who died in Yonkers in 1965 is public, but according to Respondents, if a person lived ten minutes away in the Bronx, the details of *that* person's death should instead be private. Such an illogical assertion should be supported by some purported evidence; Respondents,

[1] All capitalized terms have the same definition as in the Petition. Accompanying this Memorandum is the Affidavit of Brooke Schreier Ganz, which was filed concurrently with this Memorandum. Any exhibits referenced herein are attached thereto unless otherwise identified.

[2] *Reclaim the Records v. N.Y. City Dep't of Health & Mental Hygiene*, No. 153996/2019, 2020 WL 7405643 (Trial Order) (Sup. Ct. N.Y. Cty. Dec. 16, 2020).

though, have provided none. For such a sweeping attempt at over-protection, one might have expected Respondents (health officials, not data breach specialists) to submit affidavits of privacy experts documenting how there is some supposed legitimate concern with disclosing these ancient records. Instead, Respondents have not filed a single factual declaration to support their position.[3] Lacking all support – both on the facts and the law – Respondents have failed to meet their burden on all counts, and the Petition should be granted in its entirety without the need for any further proceedings.

ARGUMENT

I. RESPONDENTS FAIL TO MEET THEIR BURDEN IN ESTABLISHING THAT DISCLOSURE WOULD BE AN UNWARRANTED INVASION OF PRIVACY

Respondents' arguments that purport to justify non-disclosure of the requested Scans on privacy grounds (Opp. at 14-16) all fail to meet New York's heightened burden on Respondents to "articulate particularized and specific justification for not disclosing requested documents." *RTR I*, 2020 WL 7405643, at *13 (citation omitted); (*see* Pet. ¶¶ 68-73.) *First*, Respondents still have not provided any evidence of *actual* identity theft or any threats to anyone's privacy interests by the disclosure of documents about people who died over 50 years ago. Indeed, Respondents did not file any affidavits to support their position, *nor do they even quote the administrative record*. (*Cf.*, *e.g.*, Pet. ¶ 30.) Instead, Respondents resort to hypothetical generalizations, with arguments such as: "records pertaining to the deceased *may implicate* privacy interests," information from death records "*could* easily invade the privacy interests of the next of kin and be abused," and a decedent's next of kin's "privacy rights *may be violated*." (Opp. at 14-15 (emphasis added).) These hypothetical theories of potential theft are precisely the

[3] *Cf.* CPLR 7804(e) ("The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact.").

type of mere "conclusory assertions" that have been outright rejected by courts. *See Baez v. Brown*, 124 A.D.3d 881, 883 (2d Dep't 2015).[4]

Second, Respondents' assertion that the State utilizes a purportedly *stricter* access regime is meritless. Respondents argue that the State Legislature "understood" privacy interests were at stake in disclosing death records, and that requiring disclosure "would deprive New York City residents of privacy rights that are currently held by all other residents of this State." (Opp. at 16.) Respondents overlook what RTR actually requested, though: RTR is requesting *uncertified copies*, which *are permitted everywhere in New York State except New York City*. Consequently, it is *Respondents* who are insisting on a rule that puts an extra burden on the *City* (not the other way around), as one can acquire an uncertified record of death from anywhere else in the State for the years involved. (*See* Ganz Aff. ¶¶ 5-6.) Further, while Respondents repeatedly cite Public Health Law § 4174(1)(a) and reference its legislative history (*see* Opp. at 11-12, 16), they ignore subsection (3) of section 4174, which addresses "any search of the files and records conducted for authorized genealogical or research purposes." For *these* searches, an "uncertified copy" may be disclosed, and such will be made publicly available after the record has been on file for 50 years. *See id.*; 10 NYCRR 35.5; (*see also* Ganz Aff. ¶ 5.) Thus, that which the State allows is precisely what RTR has requested. (*See* Pet. Ex. 13.)[5] The same shortcoming again applies to Respondents' reference to an official bill jacket from 1988 (Dkt. No. 68): it likewise

[4] Instead of alleging relevant facts, Respondents provide generic citations to the federal Freedom of Information Act ("FOIA") (*see* Opp. at 13-14), but those do not override Respondents' burden here to identify facts *with specificity* that would trigger an unwarranted invasion of privacy. In any event, the references to FOIA are inapposite, as under FOIL, there is no need to describe one's purpose for the request. *See Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463 (2007) ("FOIL does not require the party requesting the information to show any particular need or purpose.").

[5] There is no rule, though, that 50 years must pass for records to be deemed *not* private; indeed, many states have restrictions far shorter than 50 years for the public release of death records, including *zero years*. (*See* Pet. ¶ 23; Pet. Ex. 2; Ganz Aff. ¶ 15 & n.6.)

references the section on certified copies and not uncertified copies. The only amendment being made to § 4174(3) – which addresses uncertified copies – was to "authorize the state to charge a fee for a certificate that records requested ***for genealogical or research purposes*** were not found to compensate the state for the cost of providing these services." (Dkt. No. 68 at 14 (emphasis added).)

Third, Respondents assert a privacy defense based on letters from the State Department of Health and the National Association for Public Health Statistics and Information Systems ("NAPHSIS"), which they claim "emphasized the confidential nature of information contained in such records, which implicates privacy concerns as well as the possibility of identity theft if such information were released." (Opp. at 15.) Once again, Respondents ignore that the State *discloses* the types of records at issue here, for the precise years at issue here. Additionally, no one has ever presented an example of a 50 to 70 year old death certificate of someone who was likely born in the 19th century being used to steal someone's identity. Indeed, this *lack of threat* is now even accepted by NAPHSIS's own Executive Director, author of the letter upon which Respondents rely, who in 2019 conceded: "[T]here's really no data that supports privacy issues and/or fraud is inhibited more in a state that has closed records or huge embargo dates than in states that have open records, or in countries that have open records." (*See* Ganz Aff. ¶¶ 14-16; Ex. 4.) Further, as detailed in the Ganz Affidavit, these letters should also carry no weight because they were actually solicited and largely drafted *by Respondents*. (*See* Ganz Aff. ¶¶ 11-13; Ex. 1-3). In any event, Respondents provide no rationale for why a Department of *Health* should be the authoritative figure on matters of identity theft.

Respondents' remaining privacy arguments are likewise meritless. Respondents assert that disclosure of these historical records would "reveal[] sensitive details about the life and

death of individuals whose children or grandchildren are alive today and who are entitled to keep sensitive family matters private" (Opp. at 15-16); and they express concern about "*neighbors and prospective employers*" somehow maliciously getting ahold of "sensitive details about the death of a family member." (*Id.* at 16 (emphasis added.)) Respondents again ignore the temporal nature of RTR's request. To the extent one's neighbors from 50 to 70 years ago are still alive, it is highly improbable that they are still searching for details regarding their long-lost former neighbor; it is similarly unlikely that employers would dig through archival records to locate controversial ancestors of a potential job applicant (nor has evidence been provided of such having ever been done).

Further, Respondents assert that family members are "entitled" to keep death certificates private (*id.* at 15-16), but the theory that descendants could, in perpetuity, claim privacy rights over their deceased ancestors is unsurprisingly absent any support.[6] The mere facts that a person died, was buried, and had parents are not private in and of themselves; and they certainly are not from over a half-century ago. Indeed, based on Respondents' farfetched logic, they might next take issue with cemeteries for "unlawfully" opening their gates to the public, thus permitting anyone to be able to see unrelated individuals' birth and death dates on their *tombstones*.[7]

The only case cited by Respondents regarding rights of the deceased and next of kin – *N.Y. Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477 (2005) (*see* Opp. at 14) – is starkly different from here. In *N.Y. Times*, a reporter requested from the New York City Fire

[6] By implication, Respondents' logic could even permit, for example, a descendant of Alexander Hamilton to petition this Court to demand that the details of Secretary Hamilton's controversial life and death be stricken from Broadway's stage based on a "privacy interest."

[7] *Cf.* N.Y. Comm. on Open Gov't ("COOG"), FOIL-AO-17923 (Dec. 10, 2009) ("Assuming that you would not seek burial permits for 'commercial, promotional or profit- making purposes,' we believe that the permit, or that portion of the permit indicating the location of graves, must be made available. . . . In our view, it is unlikely that items considered to be intimate or personal appear in records about the fact or location of the burials.").

Department a mere four months after September 11, 2001, tapes and transcripts of interviews, and all radio communications with FDNY personnel from 9/11; and an Article 78 proceeding followed to compel disclosure. *See id.* at 482. While there was a public interest to hear the tapes, the Court (ultimately writing less than four years after 9/11) noted the very unique, distressing, and "compelling" privacy interests for the families of the deceased in those circumstances, emphasizing that the 911 calls would contain "the words of people confronted, without warning, with the prospect of imminent death," likely revealing "expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them." *Id.* at 485. Given those remarkably unique facts, the Court concluded that the public interest was "outweighed by the interest in privacy of those family members and callers who prefer that those words remain private." *Id.* at 487.

This case, meanwhile, exclusively pertains to singular documents identifying the fact of an individual's death between 50 and 72 years ago, and is thus far more similar to the facts in *Harbatkin v. New York City Department of Records & Information Services*, 19 N.Y.3d 373 (2012). In that case, a historian brought a FOIL petition to disclose in unredacted form records relating to an investigation of potential Communist educators that had taken place over 50 years prior to the FOIL request. In granting unredacted disclosure of the records naming potentially Communist educators,[8] the Court of Appeals emphasized that privacy rights diminish with time, especially with historical requests:

> [A] court "must decide whether any invasion of privacy . . . is 'unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information." . . . We conclude that today, more than half a century after the interviews took place, the disclosure of the deleted information would not be an unwarranted invasion of personal privacy. Certainly, this was not always true. At

[8] The Court solely permitted redaction of the names of confidential informants who had been promised by law enforcement authorities that their identities would remain confidential. *Id.* at 380.

> the time of the investigations, and for some years thereafter, public knowledge that people were named as present or former Communists would have subjected them to enormous embarrassment, or worse. But that embarrassment would be much diminished today—both because the activity of which they were accused took place so long ago, and because the label "Communist" carries far less emotional power than it did in the 1950s.
>
> We do not say that disclosure will be completely harmless to those named in the documents, if they are still alive, or to members of their families who care about their memories. But the diminished claims of privacy must be weighed against the claims of history. The story of the Anti-Communist Investigations, like any other that is a significant part of our past, should be told as fully and as accurately as possible, and historians are better equipped to do so when they can work from uncensored records.

Id. at 380 (citations omitted). The similarities are evident: records that are older than 50 years old do not have such a privacy interest attached to them; and while the subjects of the records at issue in *Harbatkin* were quite controversial and implicated many potential privacy considerations, here, the mere disclosure of historical death certificates is far more mundane.

Additionally, as explained in the Petition and its accompanying four affidavits (none of which Respondents attempted to refute or rebut), the public's interest in the records at issue here is *substantial*. These records help individuals, among other things, assist the U.S. Department of Defense to locate heirs for repatriating deceased American soldiers; assist county coroners and attorneys to identify unidentified persons and locate missing and unknown heirs; trace inheritable medical conditions; and help individuals connect with relatives and learn about their family heritage. (Pet. ¶ 40; Dkt. Nos. 23-26.) Respondents do not rebut these significant public interests, and they meanwhile provide no support to justify their claim that disclosure of the Scans would be an unwarranted invasion of privacy that exceeds the public interest.

II. RESPONDENTS FAIL TO ESTABLISH THAT ANY STATE STATUTE BARS DISCLOSURE OF THE SCANS

Respondents do not contest that the actual regulations cited to prevent disclosure of the Scans are *not state statutes*. (*See* Pet. Ex. 16, at 2 ("It is true that any provision of the New York City Health Code, standing by itself, does not have the force of state law.").)[9] Instead, they argue that the Access Rules should be treated *like* state statutes, based on a meandering stream of association from the Access Rules being enacted by the Board of Health to the City's Administrative Code to the Greater New York Charter to the State Legislature, all of which together purportedly represents "policy of the Legislature" that has the "force and effect of law." (Opp. at 9) But that is not what FOIL dictates. Instead, there must be a "specific[] exempt[ion] from disclosure by state or federal statute." Pub. Off. Law § 87(2)(a). Here, there is none. Meanwhile, if Respondents' delegation theory were upheld, then there is no stopping *subsequent* delegations. If the Board of Health delegated its authority to a single individual completely unaffiliated with DOHMH, according to Respondents' never-ending delegation theory, that private citizen could then have the authority to promulgate rules that have the "force and effect of law" and single-handedly change New York law. Surely that is not what the Legislature envisioned or intended.

Respondents additionally ignore the applicable caselaw cited in the Petition, other than vague references to *Morris v. Martin*, 55 N.Y.2d 1026 (1982), a binding decision of the Court of Appeals that is explicitly on point, which holds that derivation from the City's Administrative Code *cannot* trigger treatment as a "statute" for FOIL purposes; a second binding case that also

[9] Respondents yet again assert that the amendments to Health Code § 207.11 "became effective August 12, 2018" (Opp. at 5; Answer ¶ 84), completely ignoring this Court's holding that "RTR was aggrieved on the dates that Access Rules became effective," which was "on January 1, 2019 for Health Code § 207.11." *RTR I*, 2020 WL 7405643, at *9.

addressed the Administrative Code and likewise rejected its function as a derivation of a "statute" for FOIL purposes was meanwhile ignored by Respondents, *see Brownstone Pubs., Inc. v. N.Y.C. Dep't of Fin.*, 150 A.D.2d 185 (1st Dep't 1989); (*see* Pet. ¶¶ 60-64.) Respondents instead rely on a case that did not even mention FOIL, let alone address which regulations are deemed "statutes" for FOIL purposes; as described in the Petition, that case is irrelevant and has no application here. (*See* Pet. ¶ 65.) Ignoring caselaw in the Petition and COOG's Advisory Opinion,[10] Respondents have failed to meet their burden.

III. THE CURRENT ACCESS RULES SHOULD BE DISCARDED

Respondents do not meet their burden of establishing that the Access Rules were enacted in an appropriate manner. Once again, Respondents have provided zero factual evidence to support their argument – indeed, without any citations to the administrative record – and their argument fails as a result.

A. Respondents Fail to Establish That They Satisfied *Boreali*

Respondents were required to establish that their decision was not *ultra vires*, but they have failed to do so.[11] Respondents barely attempt to justify the Board's actions, conclusively asserting that it is "evident" that the Board did not amend the Access Rules "by making value judgments in an effort to resolve a difficult, ongoing, social problem," but instead "simply carried out its responsibilities." (Opp. at 22.) They yet again ignore the fact that just because one is given authority to act does not mean one cannot *overstep* that authority. *See Acevedo v. N.Y. State Dep't of Motor Vehicles*, 29 N.Y.3d 202, 222 (2017).

[10] *See* Pet. Ex. 17. While COOG advisory opinions are not binding authority, they "may be considered to be persuasive based on the strength of their reasoning and analysis." *Thomas v. N.Y. City Dep't of Educ.*, 103 A.D.3d 495, 498 (1st Dep't 2013).

[11] Respondents spend nearly three pages arguing that a *Boreali* analysis "is not warranted" (Opp. at 17-19), but this Court already ruled to the contrary. *See RTR I*, 2020 WL 7405643, at *10-12.

In terms of the first *Boreali* factor, Respondents provide circular logic, asserting that they were not attempting to resolve public policy because they acted pursuant to authority, and therefore their conduct was proper. (Opp. at 22-24.) Respondents provide no factual support; there is no insight into the thinking of any Board member, nor their intent or rationale, let alone any "foundation in considerations of public health." *Boreali v. Axelrod,* 71 N.Y.2d 1, 11-12 (1987); (*see* Pet. ¶¶ 88-90.) Consequently, Respondents have added nothing to alter this Court's prior conclusion that the first factor had been adequately pleaded, and they surely have not ameliorated the Court's concern as to whether "the Board of Health's proposal of limiting access to death records was based on validated and documented privacy concerns or ones based on Schwartz's subjective opinion." *RTR I*, 2020 WL 7405643, at *11.[12]

As to the second and third factors, Respondents again have it backwards on state law, asserting that Public Health Law § 4174(a)(1) exempts death records from disclosure to the public under FOIL (including to genealogists); they again ignore the actual provisions at play, which *do* permit disclosure of uncertified genealogical copies, as was made clear in the administrative record, which Respondents fail to address. (*See* Pet. ¶¶ 91-92.) Respondents also assert that "the State has shielded [the records] from disclosure to the public." (Opp. at 25.) Again, that is false with regard to uncertified copies.

Finally, as to the fourth factor – whether special expertise was involved – despite this Court having concluded that this factor was adequately pleaded, *see RTR I*, 2020 WL 7405643,

[12] Respondents claim that this matter is "analogous" to *Juarez v. New York State Office of Victim Services*, 2021 N.Y. Slip Op. 01091, 2021 WL 624316 (N.Y. Feb. 18, 2021), premised on Respondents' assertion that they had free rein to determine what was and was not reasonable for disclosure. (Opp. at 23.) But that case has a crucial difference; as the Court of Appeals explained in *Juarez*: "[I]t cannot be said that the agency 'use[d] its enabling statute as a basis for drafting a code embodying its own assessment of what public policy ought to be' or contradicted the public policy embodied in the statutory scheme." *Juarez*, 2021 WL 624316, at *5 (citation omitted). Here, instead, that is precisely what Respondents did, creating their own definition of "privacy," ignoring public opinion, and mandating a policy stricter than the rest of New York State, without any rational basis.

at *12, Respondents now simply assert that this is "not relevant," as "special expertise was not necessary." (Opp. at 25.) That response ignores the fact that *Respondents specifically solicited privacy experts* to testify regarding the proposed 75-year restrictions.[13] However, no such experts came, and decisions on privacy were instead made by Schwartz and health professionals not attuned to the considerations at play. *See Boreali*, 71 N.Y.2d at 13-14; *N.Y. Statewide Coal. of Hispanic Chambers of Com. v. N.Y. City Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 701 (2014); (*see also* Pet. ¶¶ 94-95.)[14] Respondents thus did not ameliorate the Court's concern regarding whether the Board of Health "has specialized knowledge and expertise on the matter of privacy, or whether it considered any." *RTR I*, 2020 WL 7405643, at *12.

B. Respondents Fail to Establish That the Access Rules are *Not* Arbitrary and Capricious

Respondents ignore the allegations in the Petition and do not convey the law regarding arbitrary and capricious rulemaking. "Absent a predicate in the proof to be found in the record, [an] unsupported determination . . . must . . . be set aside as without rational basis and wholly arbitrary." *Metro. Taxicab Bd. of Trade v. N.Y City Taxi & Limousine Comm'n*, 18 N.Y.3d 329, 334 (2011) (citation omitted). Indeed, Petitioners have not once referenced the record here, further diminishing their claims. *See Ahmed v. City of N.Y.*, 44 Misc. 3d 228, 236-37 (Sup. Ct. N.Y. Cty. 2014).

[13] In Respondents' proposal for the first Access Rule (which Respondent Schwartz proposed), Respondents stated: "[T]he Department is very interested in receiving comments about the appropriateness of these time periods, in particular both from privacy groups and genealogists, and about adopting a 50-year confidentiality period for death records rather than the 75-year period proposed here." (Pet. Ex. 4, at 3.)

[14] Respondents assert that certain cases in which regulations were upheld support their position, but those matters actually support RTR instead. The cases cited by Respondents include the following agencies and topics of regulation: (1) Board of Health and influenza vaccinations (health-related); (2) Department of Motor Vehicles and driving privileges for drunk drivers (motor vehicle-related); (3) Department of Health and healthcare providers (health-related); and (4) Office of Parks, Recreation and Historic Preservation and "certain outdoor locations" (park-related). (*See* Opp. at 21-22.) Here, instead, there is zero correlation: the Department of *Health*, and *privacy*.

Respondents also do not attempt to defend Schwartz's statements to the Board, nor the Board's vote. Ultimately, the bare assertion that the Board simply had to draw *some line* is a far cry from the proper amount of diligence required in administrative rulemaking; nor can Respondents shirk their responsibilities merely by claiming a purported lack of standing to challenge step-relations and adopted children rules. (Opp. at 26-27.)[15] Finally, Respondents never explained why they needed to restrict access for *75 years* to the public, without access to step-relations, adopted children, cousins, and genealogists, nor why uncertified copies are not permitted, even though the rest of the State is willing to disclose these records to any requester after 50 years have passed. *See RTR I*, 2020 WL 7405643, at *12; (*see also* Pet. ¶¶ 74-85.)

CONCLUSION

Respondents respectfully request that the Petition be granted in its entirety and that the Court grant any other and further relief as it deems appropriate.

Dated: New York, New York
March 19, 2021

Respectfully submitted,

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[15] While Respondents claim that overturning amendments to the Access Rules would "deprive access" to certain individuals (Opp. at 26-27), RTR obviously expects Respondents to quickly work with experts in the field this time and create new rules that are more amenable to everyone.

ATTORNEY CERTIFICATION PURSUANT TO SECTION 202.8-b

I, Michael D. Moritz, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Reply Memorandum of Law complies with the word count limit set forth in Section 202.8-b of the Uniform Rules for New York State Trial Courts because it contains 4,182 words, excluding the parts of the document that are exempted by that section. In preparing this certification, I have relied on the word count of the word-processing system used to prepare the document.

Dated: March 19, 2021

/s/ Michael D. Moritz
Michael D. Moritz