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

RECLAIM THE RECORDS,	
Petitioner,	Index No. 153996/2019
- against -	Hon. Julio Rodriguez III
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,	Motion Seq. # 001
Respondents.	

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' CROSS-MOTION TO DISMISS, AND IN FURTHER SUPPORT OF ITS PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

Petitioner Reclaim the Records ("RTR") respectfully submits this memorandum of law in opposition to Respondents' Memorandum of Law in Support of their Cross-Motion to Dismiss the Verified Petition ("Motion"), and in further support of RTR's Petition.[1]

INTRODUCTION

This case arises from RTR's FOIL request to DOHMH for copies of Scans the City previously made of death certificates dated between 1949 and 1968, records that would be publicly available anywhere else in New York State. Pursuant to FOIL, Respondents were required to meet the heavy burden of providing clear and specific grounds for denying disclosure, and as the Petition makes clear, Respondents' bases for denial were legally inadequate. Yet in Respondents' Motion, they fail to raise a single legal argument to support their denial of RTR's FOIL request. In light of Respondents' inability to formulate any legitimate basis to dismiss the purely legal question presented by the Petition, the Scans should be produced.

Respondents' Motion raises only two grounds for dismissal—one based on the statute of limitations, and the other relating to the *ultra vires* actions of the Board of Health. Neither argument provides a basis for dismissal. First, in matters such as this, the statute of limitations begins to run upon the effective date of a regulation. Because the Access Rules' ultimate effective date was January 1, 2019, and this matter commenced in April 2019, the case is timely. Second, Respondents assert – without reference to precedent – that this Court should ignore the factors set forth in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), to assess the Board's *ultra vires* acts and simply dismiss RTR's claims. However, this Court must assess the *Boreali* factors to determine if Respondents' actions constituted improper policy-making. In this regard, RTR

[1] All capitalized terms have the same meaning as defined in RTR's Petition.

adequately stated a claim under applicable New York law, and Respondents' Motion should therefore be denied. As a result, this matter should move forward, toward a speedy production of the Scans and a holding that the Access Rules are invalid.

BACKGROUND

The facts of this case are fully set forth in the Petition of RTR, dated April 17, 2019. (Dkt. No. 1.) On February 7, 2019, RTR submitted a FOIL request to DOHMH, requesting "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." (Pet. ¶ 52.) DOHMH denied RTR's request on February 11, 2019, claiming that disclosure of the Scans was exempted by Public Officers Law §§ 87(2)(a) and 87(2)(b), asserting that New York City Health Code §§ 207.11 and 207.21 (the "Access Rules") prevent disclosure of the Scans for a period of 75 years, and that disclosure is exempted on privacy grounds. (*Id.* ¶ 54.) RTR appealed DOHMH's denial, which was affirmed by Thomas Merrill of DOHMH on March 21, 2019. (*Id.* ¶ 55.)

Having exhausted its administrative remedies, RTR filed an Article 78 Petition on April 17, 2019. In its Petition, RTR asserts that the Scans should be produced to RTR pursuant to FOIL because Respondents failed to meet their burden of establishing an exemption under FOIL: there is no federal or state statute that exempts disclosure (*id.* ¶¶ 58–67); and Respondents failed to meet their burden of establishing an exemption based on privacy (*id.* ¶¶ 68–73). Next, RTR asserts that the Access Rules, pursuant to which Respondents claimed they were exempt from producing the Scans, should be invalidated. Specifically, the newly-enacted Access Rules are arbitrary and capricious because (i) DOHMH considered no evidence of actual privacy risks in enacting the Access Rules (*id.* ¶¶ 75–76); (ii) the Board of Health ignored overwhelming public

opposition to the Access Rules (*id.* ¶¶ 77–82); and (iii) the Access Rules are stricter than those from New York State and nearly the entire country (*id.* ¶¶ 83–85). Finally, RTR asserts that the Access Rules should also be invalidated because Respondents acted *ultra vires* in enacting them by improperly making policy determinations, in violation of the factors set forth in *Boreali*. (*Id.* ¶¶ 86–96.)

Respondents filed a cross-motion to dismiss the Petition on July 8, 2019. (Dkt. No. 37.) Their Motion raises two grounds for dismissal: (1) the second through fourth causes of action are time-barred (Mot. at 2–6); and (2) RTR failed to state a claim that the Board of Health acted *ultra vires* in enacting the Access Rules (*id.* at 6–9).

ARGUMENT

I. THE SECOND, THIRD AND FOURTH CAUSES OF ACTION ARE TIMELY

Respondents claim that the second, third and fourth causes of action are untimely because they were filed more than four months after June 12, 2018, the date Respondents allege when the Board of Health's determinations regarding the changes to the City's Health Code became "final and binding." (Mot. at 3–5.) Respondents, however, wrongly apply New York law, as the statute of limitations did not lapse.

Respondents do not cite the complete standard for assessing the commencement of the statute of limitations period for Article 78 proceedings. Respondents state that the limitations period begins to run after an administrative decision becomes "final and binding," which purportedly occurs after (1) the agency "reached a definitive position," and (2) "the injury inflicted by the agency may not be significantly ameliorated by further administrative action." (Mot. at 3.) This, however, is not the entirety of the standard. As New York's highest court has explained, in order for a decision to be deemed final and binding, the agency's decision must not

only be a "definitive position," but that position must also "*inflict[] actual, concrete injury*." *Walton v. N.Y. State Dep't of Correctional Servs.*, 8 N.Y.3d 186, 194 (2007) (emphasis added). Thus, when assessing legislative (as opposed to adjudicatory) decisions of agencies, a new regulation must be effective before the statute of limitations begins to run. As the Second Department succinctly explained: "[W]here a determination is made on one date to become effective at a later date, the determination does not become 'final and binding' for purposes of the Statute of Limitations until the date it becomes effective." *Wininger v. Williamson*, 46 A.D.2d 689, 689 (2d Dep't 1974); *see also* 6 N.Y. Jur. 2d *Article 78* § 186 ("Where a determination by its terms does not take effect until a later date, the determination does not become final and binding until such effective date.").

Respondents' argument has been rejected on several occasions by courts in New York. For instance, in *General Building Contractors of New York State, Inc. v. New York State Education Department*, the Department of Education argued that an Article 78 petition was untimely because the four-month statute of limitations began to run on the date of the agency's publication of a notice of adoption of its new rule. 175 Misc. 2d 922, 923 (Sup. Ct. Albany Cty. 1997). The court, however, disagreed, finding that the proceeding was timely commenced:

> The Court does not find, as respondents argue, that [the new rule] became "final and binding" by publication of the notice of adoption in the New York Register . . . . Rather, it is the Court's opinion that [the rule] became "final and binding" for the purposes of the Statute of Limitations on . . . the date on which it became effective.

Id. at 923–24. Similarly, in *Hospital Association of New York State v. Axelrod*, the Third Department rejected the agency's argument that its new rules were "final and binding" as of the notice of adoption date and instead concluded that the action was timely because "the regulations in question, although enacted earlier, became effective" at a later date, from which the petitioners

were within the four months limitations period. 164 A.D.2d 518, 523–24 (3d Dep't 1990). Thus, because when "a determination is made on one date to become effective at a later date, the determination does not become 'final and binding' for purposes of the Statute of Limitations until the date it becomes effective,'" the proceeding was deemed timely commenced as to those causes of action. *Id.* at 524 (quoting *Wininger*, 46 A.D.2d at 689).

Here, as with the state agencies and their arguments rejected in the two cases described above, Respondents merely cite to the dates when the Board of Health "finalized and adopted changes to both Access Rules" and were "included and made final in the City Record." (Mot. at 5.) But Respondents ignore the effective date of the regulations. The comprehensive change of the Health Code – at which time both Access Rules were effective – was January 1, 2019.[2] The Department of Health's Notice of Adoption stated in plain terms that "[t]he Board is making these amendments effective January 1, 2019," and that it was "RESOLVED FURTHER, that the foregoing amendment to section 207.11 of the Health Code, set forth in Title 24 of the Rules of the City of New York, shall be effective January 1, 2019."[3] Because (1) New York law is clear that the statute of limitations for an Article 78 proceeding challenging an agency's rule change commences four months from the *effective date* of the regulation, (2) the ultimate effective date

[2] The necessity of the statute of limitations running from the effective date is highlighted by Respondents' arguments here. Specifically, they contend that the four-month limitations period would have expired on October 14, 2019 (Mot. at 5), which is *before* one of the Access Rules even came into effect. Considering the Court of Appeals' mandate that a "final and binding" decision must be able to "inflict[] actual, concrete injury," *Walton*, 8 N.Y.3d at 194, it is unclear how Respondents could have invoked the Access Rules as bases to deny access *before* they were even effective.

[3] Pet. Ex. 12, Notice of Adoption of Amendment to Article 207 of the New York City Health Code, N.Y.C. Dep't of Health & Mental Hygiene, Bd. of Health, at 3, 5 (2018).

of the current death record access regime was January 1, 2019, and (3) this matter was filed on April 17, 2019, all claims are therefore timely.[4]

II. THE PETITION ADEQUATELY STATES A CLAIM THAT THE BOARD OF HEALTH ACTED *ULTRA VIRES* AND IN VIOLATION OF *BOREALI*

Respondents allege that the third cause of action should be dismissed for failure to state a claim.[5] "In assessing a motion under CPLR 3211(a)(7), . . . 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) (citation omitted). Additionally, courts "must accept the facts alleged in the pleading as true and accord the opponent of the motion . . . 'the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory.'" *Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 104 A.D.3d 401, 403 (1st Dep't 2013) (citation omitted). Therefore, Respondents' motion "must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any

[4] This Court should consider the January 1, 2019 effective date for the statute of limitations of *both* Access Rules because – if treated otherwise – the result could lead to an illogical conclusion. First, the two Access Rules were being amended through an interrelated process that took place in two stages. As Board of Health member Dr. Bassett said at the March 13, 2018 Board Meeting, for instance, "I thought it was appropriate to discuss these [amendments] together because they are linked." (Pet. Ex. 6, 2d Bd. Mt'g (Mar. 13, 2018) Tr. 47:25-48:2.) Indeed, even before the effective date of the first Access Rule, DOHMH already published its Notice of Opportunity to Comment on the second Access Rule. (Pet. ¶ 37.) While the Board discussed the second Access Rule at the March 13, 2018 Board Meeting, the members put off voting on it and allowed a second set of public comments to play out. Respondents likewise combine the considerations of the Access Rules, noting that the Board of Health's "definitive position on the issue of public access to death records" was the time when the Board "finalized and adopted changes to *both* Access Rules." (Mot. at 5 (emphasis added).) The ultimate change in the regulations, effectuating both *when* records could be accessed and *by whom*, was effective as of January 1, 2019. If this Court were to only consider the latter revision, though, it could lead to a result anticipated by no one—leaving time bars in place, but without any regulation as to who could access records in the meantime. *See Boreali*, 71 N.Y.2d at 14 ("It would be pragmatically impossible, as well as jurisprudentially unsound, for us to attempt to identify and exercise particular provisions while leaving the remainder of the PHC's antismoking code intact, since the product of such an effort would be a regulatory scheme that neither the Legislature nor the PHC intended.").

[5] Respondents argue that the fourth cause of action fails to state a claim, but their analysis regards *ultra vires* actions and the *Boreali* factors, which was Petitioners' third cause of action. To the extent Respondents intended to include the fourth cause of action, that cause of action should not be dismissed for the same reasons discussed herein.

cause of action cognizable at law.'" *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (citation omitted).

The Court of Appeals' decision in *Boreali* "set[] out four 'coalescing circumstances' present in that case that convinced the Court 'that the difficult-to-define line between administrative rule-making and legislative policy-making ha[d] been transgressed.'" *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 696 (2014) (citation omitted). Instead of assessing whether the Board of Health's rule-making extended beyond its authority into improper policy-making based on the *Boreali* factors, Respondents simply assert – without citation – that "not every rule needs to be evaluated under *Boreali*'s 'coalescing circumstances' standard," further alleging that the Board's "regulatory authority is clear," and "the rules promulgated by the agency fall within that authority." (Mot. at 6) In making these assertions, Respondents merely quote a decision by the Court of Appeals, in which the court commented that *Boreali* should not be used as "an escape hatch" for displeased litigants. (*Id.*) That case, however, actually applied and assessed the litigants' challenge under the four *Boreali* factors. *See Acevedo v. N.Y. State Dep't of Motor Vehicles*, 29 N.Y.3d 202, 222–26 (2017) (assessing agency's actions pursuant to the *Boreali* factors before concluding that regulations were valid). Next, Respondents cite to another Court of Appeals decision for the proposition that regulatory agencies may act as they please pursuant to authorizing statutes (Mot. at 6); but that case *also* applied and assessed the *Boreali* factors to the agency's actions. *See Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 611–17 (2018) (same). Respondents thus provide absolutely no support for this Court to disregard the *Boreali* factors in considering the *ultra vires* actions of the Board of Health.

Next, Respondents point to assorted New York regulations that purportedly permit the Board of Health to regulate in certain regards, including as to death certificates, alleging that this list establishes the Board's "authority to promulgate the Access Rules." (Mot. at 6–8.) But simply because an agency may be granted *authority* to regulate in a certain field (the only consideration raised by Respondents, *see, e.g.*, *id.* at 7 n.2) does not mean that such regulatory authority is unfettered, or that the agency is free to enact irrational and burdensome rules. Agencies must act in a manner that is rational and consistent with the expectations of those who delegated authority; despite Respondents' representations to the contrary, in *Acevedo*, upon which Respondents rely, the Court of Appeals explained that regardless of legislative grants of authority, agencies cannot overstep their authority into improper policy-making:

> [N]o matter how facially broad, the legislature's grant of authority "must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits." We have made clear that the legislature "cannot cede its fundamental policy-making responsibility to an administrative agency." Nor may an agency use its enabling statute "as a basis for drafting a code embodying its own assessment of what public policy ought to be." To be sure, "it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends."

Acevedo, 29 N.Y.3d at 222 (quoting *Boreali*, 71 N.Y.2d at 9, 13). With that framework in mind, the Court of Appeals in *Acevedo* thus turned to the *Boreali* factors to assess the propriety of the agency's actions. *See Acevedo*, 29 N.Y.3d at 222–26; *see also N.Y. Statewide Coal.*, 23 N.Y.3d at 699 ("By choosing between public policy ends . . . , the Board of Health engaged in law-making beyond its regulatory authority . . . ."). While Respondents seek dismissal by enumerating a variety of regulations pursuant to which they purportedly have "authority" and "power to promulgate," according to which they alone "must . . . determine what a proper purpose is" (Mot. at 8), that is simply not the law. *Boreali* and its progeny make clear that an

agency must act in a rational manner and not in a way that crosses the line into policy-making. Indeed, in *Garcia*, upon which Respondents also rely, the Court of Appeals only found that the Board of Health's adoption of certain rules fit within its regulatory authority *after* considering each of the *Boreali* factors. *Garcia*, 31 N.Y.3d at 616; *cf. N.Y. Statewide Coal.*, 23 N.Y.3d at 698 (finding board's regulation was a "value judgment[]" that "entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch").

Here, as an analysis under the *Boreali* framework makes clear, 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. (Pet. ¶¶ 86–96.) Such improper policy-making cannot simply be rubber-stamped, as Respondents claim. In any event, latitude given to the Board of Health should not be equal in areas outside its purview, such as considerations of privacy, *not* health. While the Board's opinions on matters relating to causes of death, autopsies and life expectancy may be entitled to higher deference, in this situation, Respondents had no basis to adequately formulate opinions as to the appropriateness of purported privacy regulations with wide-ranging negative effects and consequences. (*See id.* ¶¶ 88–95.) Ultimately, a claim for relief has clearly been asserted, and this claim cannot merely be resolved as a matter of law without first considering the *Boreali* factors. The third cause of action raises issues for which relief *could* be granted, and "every possible favorable inference" must be made in favor of RTR. *Siegmund Strauss*, 104 A.D. 3d at 403. Accordingly, Respondents' motion to dismiss should be denied.

III. THE PETITION SHOULD BE GRANTED IN ITS ENTIRETY

A. The Scans Should Be Produced Pursuant To FOIL

RTR's first cause of action seeks production of the Scans pursuant to FOIL. In DOHMH's denials to RTR, DOHMH claimed two bases for withholding production: (1) disclosure is barred by a state or federal statute, pursuant to FOIL § 87(2)(a); and (2) disclosure is barred by FOIL's privacy exemption, FOIL § 87(2)(b). Following RTR's Petition, which highlights why neither exception applies, Respondents' Motion raises *no legal grounds* to dismiss RTR's FOIL request. Having failed to provide any legal basis to deny disclosure, Respondents should now be compelled to comply with FOIL and produce the Scans to RTR.[6]

The first FOIL exception Respondents invoked was FOIL § 87(2)(a), which states that agencies "**shall** . . . make available for public inspection and copying all records," unless the records "are specifically exempted from disclosure by state or federal statute." Pub. Off. Law § 87(2)(a) (emphasis added). This is a pure question of law. RTR's Petition explains that there is no state or federal statute that prevents disclosure of the requested Scans: (1) DOHMH conceded in its FOIL Appeal Denial that no provision of the City Health Code has the force of state law (Pet. ¶ 59); (2) *Morris v. Martin* expressly bars Respondents' argument that the "key New York City Administrative Code provisions . . . represent a policy of the State Legislature, having the force of state law" (*id.* (citing FOIL Appeal Denial, at 1)), as it held that the Administrative Code does not qualify as a FOIL exemption (Pet. ¶¶ 60–63 (citing *Morris*, 55

[6] In their Motion, Respondents merely write in a footnote that as to the first cause of action, it "is not addressed here, and its defense may depend on the outcome of this cross-motion." (Mot. at 2 n.1.) But its outcome *cannot* depend on the Motion. The Motion only raises two arguments that have nothing to do with FOIL and an agency's responsibilities thereunder. Whether an administrative agency's actions were *ultra vires* and improper policy-making has no logical or legal correlation to whether Respondents failed to meet their burden under FOIL to provide an exemption for disclosure of the Scans. Because Respondents have presented no legal grounds pursuant to which the first cause of action could be dismissed (*see infra* at 10–12), the Scans should be produced.

N.Y.2d 1026, 1028 (1982)); and (3) the New York State Department of Health, pursuant to the New York Public Health Law and its regulations, explicitly permits the disclosure of uncertified copies of death records after fifty years, precisely what RTR is requesting here (Pet. ¶ 66). These arguments plainly highlight that neither New York law nor federal law prevents the disclosure of the records.

Respondents provide no legal argument that would support the dismissal of this purely legal question on which *they carry the burden*; this Court therefore should rule that there is no FOIL exemption under § 87(2)(a). (*See also* Pet. Ex. 17, COOG Advisory Op., at 2 (Mar 4, 2019) ("[A]n assertion or claim of confidentially, 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.").)

This Court should similarly rule that the City failed to meet its burden in establishing a privacy exemption under FOIL § 87(2)(b). In their denials, Respondents asserted—absent any proof or support—that the requested Scans "***could*** be abused if made public." (FOIL Appeal Denial, at 3 (emphasis added)); *cf.* Pub. Off. Law § 87(2)(b). But as countless New York courts have explained, "[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed." *Baez v. Brown*, 124 A.D.3d 881, 883 (2d Dep't 2015) (citation omitted); (*see* Pet. ¶ 69). It is evident from the record that Respondents never provided any tangible support for their denial. Because Respondents were required to "show that the requested information 'falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access'" – which they never did – production is necessary here. *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462–63 (2007) (citation omitted).

Additionally, any subsequent Answer by Respondents cannot remedy their shortcomings, as this Court is limited to the administrative record. "It has . . . long been the rule that judicial review of an administrative determination is limited to the grounds presented by the agency at the time of its determination." *Scanlan v. Buffalo Pub. Sch. Sys.*, 90 N.Y.2d 662, 678 (1997). In *Scanlan*, the Court of Appeals explained that it was confined to the "only ground" offered by the agency at the time of its determination, and the court *could not* "consider [new] additional grounds in evaluating the rationality of the administrative determination because respondent did not rely on them at the time" of its determination. *Id.*; *see also Weill v. N.Y.C. Dep't of Educ.*, 61 A.D.3d 407, 408 (1st Dep't 2009) ("[W]e can only review the grounds presented by the agency at the time of its determination."). The Respondents are thus limited to the record already before this Court as to privacy. Their justifications were legally inadequate. (*See* Pet. ¶¶ 68–73.) Given that these shortcomings cannot be remedied by a subsequent pleading, and Respondents presented no legal ground for dismissal, Respondent cannot meet their heavy burden of justifying the denial of disclosure. The Scans should therefore be produced.

B. <u>The Access Rules Should Be Invalidated</u>

The second through fourth causes of action ask this Court to conclude that the Access Rules are invalid. Respondents' Motion presents no substantive legal basis to deny such relief, instead asserting that the statute of limitations has run (which it has not, *see supra* at 3–6), and that this Court should not consider the *Boreali* factors (which is incorrect, *see supra* at 6–9). For the reasons stated in the Petition, as well as those addressed above, the Access Rules are arbitrary and capricious, and they were enacted beyond Respondents' delegated powers. Therefore, this Court should invalidate the Access Rules.

CONCLUSION

Respondents' motion to dismiss the Petition should be denied, and the Petition should be granted.

Dated: New York, New York
July 22, 2019

Respectfully submitted,

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