

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: May 23, 2024

CV-23-0669

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In the Matter of RECLAIM THE  
RECORDS,

Respondent,

v

MEMORANDUM AND ORDER

NEW YORK STATE  
DEPARTMENT OF  
HEALTH,

Appellant.

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Calendar Date: February 21, 2024

Before: Clark, J.P., Lynch, Reynolds Fitzgerald, Ceresia and Powers, JJ.

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*Letitia James, Attorney General, Albany (Kevin C. Hu of counsel), for appellant.*

*Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York City (Michael D. Moritz of counsel), for respondent.*

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Lynch, J.

Appeal from a judgment of the Supreme Court (L. Michael Mackey, J.), entered February 7, 2023 in Albany County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, to annul a determination of respondent denying petitioner's Freedom of Information Law request.

Petitioner is a not-for-profit organization that promotes public access to government records for historical and genealogical purposes. Respondent is statutorily charged with "procur[ing] the faithful registration of . . . deaths," except in the City of

New York (Public Health Law § 4100 [1] [b]), and maintaining an index of registered deaths (*see* Public Health Law § 4100 [2] [g]). In November 2021, petitioner filed a Freedom of Information Law (*see* Public Officers Law article 6 [hereinafter FOIL]) request seeking "one complete set, in digital form, of the New York State Death Index, covering all data that is already retained by [respondent] in textual or database format, for all available dates through December 31, 2017 inclusive." In response, respondent's records access officer provided the official "Death Index" for year 1971. In addition, respondent referred petitioner to its online indexes for the years 1957 through 1970. Respondent determined its remaining records were exempt from disclosure under Public Officers Law § 87 (2) (b), as an unwarranted invasion of personal privacy; and Public Officers Law § 87 (2) (a), as specifically exempted under Public Health Law § 4174 (1) (a), as implemented through 10 NYCRR 35.5 (c) (3). Respondent's appeals officer denied petitioner's appeal, except to the extent of remanding the matter back to the records access officer for a more diligent search for pre-1957 records.

Petitioner commenced this CPLR article 78 proceeding to annul respondent's determination partially denying its FOIL request. Supreme Court granted the petition and ordered respondent to produce the requested information, except to the extent of redacting Social Security numbers. Respondent appeals.

We reverse. Petitioner's FOIL request implicates three separate time frames: (1) the period predating 1957; (2) 1957 through 1972; and (3) 1973 through 2017. Relative to the period predating 1957, respondent's Director of the Bureau of Vital Records (hereinafter the Director) explained in her opposition affidavit that the records from this period had not been computerized but were instead stored on microfilm. The record demonstrates that, following the determination of respondent's records access appeals officer, respondent provided petitioner with "comma separated value (CSV) files" for this period.

For the middle period, respondent has posted online pertinent information referred to as "Death Indexes" – presently current through 1972 – which "contain[ ] an individual's first name, middle initial, last name, age, gender, date of death and residency code." These indexes, however, do not include all of the death-related information available in respondent's archives. As explained by the Director, the archives contain Social Security numbers, dates of birth and other "detailed personal information, including but not limited to data points such as employment status, military status, pregnancy status, spousal information, parental names, whether an individual is cremated/buried/donated, attending physician names, whether the death is a result of

accident/homicide/suicide, cause of death, whether the death is pending investigation, and past hospitalizations." Petitioner seeks the release of this additional information for the middle period, and through 2017.

For the third period, 1973 through 2017, respondent maintains that all the requested information is exempt from disclosure both under Public Officers Law § 87 (2) (b), as an unwarranted invasion of privacy, and as specifically exempt from disclosure pursuant to Public Health Law § 4174 (1) (a), as implemented by 10 NYCRR 35.5 (c) (3). Respondent takes the same position with respect to the additional information not released for the middle period.

We recognize that "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 492 [1994] [internal quotation marks and citations omitted]). However, under the circumstances presented, we conclude that the outstanding information was properly withheld from disclosure. Pursuant to Public Officers Law § 89 (2) (b), an agency may deny access to records where disclosure would constitute "[a]n unwarranted invasion of personal privacy" defined by a nonexclusive list of examples (*see* Public Officers Law § 89 [2] [b] [i]-[viii]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]). Where, as here, the requested information does not fall squarely within the listed categories, "we must decide whether any invasion of privacy here is 'unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information" (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]; *see Matter of Hepps v New York State Dept. of Health*, 183 AD3d 283, 287-288 [3d Dept 2020], *lv dismissed & denied* 37 NY3d 1001 [2021]). In that regard, the Court of Appeals has determined that the "surviving relatives have an interest protected by FOIL in keeping private the affairs of [a deceased family member]" (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d at 485).

While petitioner's interest in seeking information to assist in genealogical research promotes a legitimate public interest, such a request does not "further the policies of FOIL, which are to assist the public in formulating intelligent, informed choices with respect to both the direction and scope of governmental activities" (*Matter of New York State United Teachers v Brighter Choice Charter School*, 15 NY3d 560, 564 [2010] [internal quotation marks and citation omitted]; *see Matter of Hepps v New York State Dept. of Health*, 183 AD3d at 288). As for privacy concerns, the Director explained that the agency has a legitimate interest in protecting a decedent's survivors against the

prospect of identity theft and fraud if the information was released. Beyond that, the withheld archival information includes sensitive personal information impacting a surviving family member's privacy interests (*see Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d at 484-485), including health information otherwise shielded from disclosure under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) for 50 years following the death of an individual (*see* 45 CFR 164.502 [f]). Not to be overlooked here is that respondent is statutorily charged with preparing and maintaining "a complete . . . index of all . . . deaths registered; said index to be arranged, in the case of deaths, by the names of decedents" (Public Health Law § 4100 [2] [g]). Apart from providing for the arrangement by name, the statute remains silent as to what fields of information need to be included in the index – a directive that leaves that decision to the discretion of respondent. On balance, it is our view that respondent has met its burden of demonstrating that the privacy exemption applies in this case.

Pursuant to Public Officers Law § 87 (2) (a), an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute." We agree with respondent's contention that Public Health Law § 4174 (1) (a) provides an exemption authorizing the withholding of the requested information. That statute allows respondent to release "either a certified copy or a certified transcript of the record of any death" to seven specific categories of applicants. The provision concludes with a qualifier that "no certified copy or certified transcript of a death record shall be subject to disclosure under [FOIL]" (Public Health Law § 4174 [1] [a]). The term certified transcript is broadly defined as "a computer generated or other reproduction of information abstracted from the original state or local record the elements of which shall be as determined by the commissioner and certified by the commissioner . . . as being an accurate abstract of information contained in the original record" (Public Health Law § 4100-a [2]). We recognize that petitioners are not requesting copies of death certificates or any "certified" records. Even so, in our view, the import of the statute is to limit the disclosure of these records to applicants who fall within the defined categories, whose needs require that the records be certified. The express qualifier precludes a FOIL request otherwise made by a nonqualifying member of the general public. In this context, the statutory focus is not on the certification component but on maintaining the confidentiality of the underlying information (*see generally Matter of Kosmider v Whitney*, 34 NY3d 48, 54 [2019] [holding that, although the electronic ballot images the petitioners requested under FOIL were not expressly exempted by statute, Election Law § 3-222, denying access to "voted ballots" – i.e., paper ballots voted at the polls – evinced a legislative intent to preserve confidentiality and the images were thus shielded from disclosure under Public Officers Law § 87 (2) (a)]). The corresponding regulation at 10

NYCRR 35.5 (c) (3) serves as a counterpart to the statute by addressing the disclosure of "an uncertified copy or abstract" (10 NYCRR 35.5 [a]) for genealogical research purposes (*see* Public Health Law § 4173 [3]). The regulation does not – nor could it – create a stand-alone exemption. That the regulation precludes the release of uncertified information "from a record of death . . . for at least 50 years" (10 NYCRR 35.5 [c] [3]) comports with the statutory insulation of such records – when certified – from a FOIL request.

Finally, Public Officers Law § 89 (3) (a) provides that "[n]othing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity." It follows that "[a]n agency is not required to create records in order to comply with a FOIL request" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d at 464). In her opposition affidavit, the Director explained that "[t]he remainder of the death-related records that the Department maintains outside of the Death Index are maintained in a multitude of formats and storage mediums depending on year . . . and not all are digitized, and are not consistent in terms of the formatting or fields presented." As such, to provide the additional information petitioner seeks, the Director averred – without contradiction – that the response "would have to be custom built using data from the database and an entirely new Death Index containing this additional data must be created. [Respondent] would require assistance from a technological team to accomplish this and it would take significant time to complete." In our view, the statute imposes no such obligation upon an agency.

For all of the reasons stated, the petition should be denied in its entirety.

Clark, J.P. and Ceresia, J., concur.

Powers, J. (dissenting).

It is well settled that the Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]) "is liberally construed and its exemptions narrowly interpreted to achieve its legislative purpose of maximizing public access to government records" (*Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, 40 NY3d 547, 551 [2023] [internal quotation marks and citations omitted]). For this reason, the agency "carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst*

*Corp. v Burns*, 67 NY2d 562, 566 [1986]; accord *Matter of Hearst Corp. v New York State Police*, 109 AD3d 32, 34 [3d Dept 2013]; see *Matter of Getting the Word Out, Inc. v New York State Olympic Regional Dev. Auth.*, 214 AD3d 1158, 1159 [3d Dept 2023]). As we believe respondent has failed to satisfy this high burden, we respectfully dissent.

"[W]e evaluate whether disclosure would constitute an unwarranted invasion of personal privacy by balancing the privacy interests at stake against the public interest in disclosure of the information" (*Matter of New York State Corr. Officers & Police Benevolent Assn., Inc. v New York State Dept. of Corr. & Community Supervision*, 224 AD3d 974, 976 [3d Dept 2024] [internal quotation marks and citations omitted]). "[A]n unwarranted invasion of personal privacy has been characterized as that which would be offensive and objectionable to a reasonable person of ordinary sensibilities" (*Matter of Spence v New York State Dept. of Civ. Serv.*, 223 AD3d 1019, 1020 [3d Dept 2024] [internal quotation marks and citations omitted]).

Petitioner seeks disclosure of "the New York State Death Index, covering all data that is already retained by [respondent] in textual or database format, for all available dates through December 31, 2017." Although disclosure would not serve the purposes of FOIL as it would not "promote transparency in governmental operations" (*Matter of Suhr v New York State Dept. of Civ. Serv.*, 193 AD3d 129, 135 [3d Dept 2021] [internal quotation marks and citations omitted], *lv denied* 37 NY3d 907 [2021]), petitioner's purpose in obtaining the information promotes a legitimate public interest as petitioner seeks to use the information to assist in genealogical research. Weighing this public interest against the privacy interest at stake, we agree with the majority's position that certain data contained within the death index relates to medical information or contains sensitive personal information. As such, disclosure of this information is impermissible pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 USC § 1320 *et seq.*) (see *Matter of Getting the Word Out, Inc. v New York State Olympic Regional Dev. Auth.*, 214 AD3d at 1161) or would constitute an unwarranted invasion of personal privacy (see Public Officers Law § 89 [2] [b]; *Matter of Hepps v New York State Dept. of Health*, 183 AD3d 283, 287 [3d Dept 2020], *lv dismissed & denied* 37 NY3d 1001 [2021]).

However, we would find that the release of limited biographical information – specifically, each decedent's name, date of birth, date of death, place of birth and place of death – would not constitute an unwarranted invasion of personal privacy. Although "surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead," the release of the foregoing information would not "injure that interest"

(*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). Importantly, this is not the type of information that relates to the "intimate moments in the life of one's deceased . . . relative," which if disclosed and publicly available may cause surviving relatives anguish (*id.*; compare *Herald Co. v Murray*, 136 AD2d 954, 955 [4th Dept 1988]).<sup>1</sup> Instead, this information constitutes simple biographical data of which surviving relatives are aware (*cf. Matter of Harbatkin v New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 380 [2012]). Moreover, while respondent has repeatedly asserted that the release of this information would facilitate identity theft, we disagree. Rather, disclosure of the limited information specified above would provide public access to a more updated death index making it more easily ascertainable whether a deceased individual's information has been improperly utilized.<sup>2</sup>

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<sup>1</sup> There is a sharp distinction in the nature of the documents sought in this proceeding and those sought in *Matter of New York Times Co. v City of N.Y. Fire Dept.* That proceeding related to the disclosure of transcripts of interviews with New York City Fire Department members regarding the September 11, 2001 terrorist attacks, as well as the recordings of radio communications made that day (*see Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d at 482). Therein the Court of Appeals held that "the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private" (*id.* at 487). In rendering such decision, the Court of Appeals relied upon the Supreme Court of the United States decision in *National Archives and Records Admin. v Favish* (541 US 157, 161 [2004]) seeking disclosure of images of a deceased government official taken in the investigation of his death. This too draws a sharp distinction from the request here (*see also Katz v National Archives & Records Admin.*, 862 F Supp 476, 485 [D DC 1994] [finding that disclosure of the autopsy materials of President John F. Kennedy would "cause additional anguish" to surviving family members], *affd* 68 F3d 1438 [DC Cir 1995]; *New York Times Co. v National Aeronautics & Space Admin.*, 782 F Supp 628, 633 [D DC 1991] [surviving relatives of astronauts who had died in the Challenger space shuttle "ha[d] a substantial privacy interest in non-disclosure of the tape" recording of the explosion]).

<sup>2</sup> Analogous to this, to ensure the accuracy of voter registration lists, respondent must report monthly to the Board of Elections "the names of all persons of voting age for whom death certificates were issued" (Public Health Law § 4140 [3]; *see* St Board of Elections Mem in Support, Bill Jacket, L 2002, ch 476 at 5).

Based upon the foregoing, we would find that respondent has failed to establish that the disclosure of the limited biographical information outlined above would be offensive or objectionable to a reasonable person of ordinary sensibilities so as to constitute an unwarranted invasion of personal privacy (*compare Matter of Spence v New York State Dept. of Civ. Serv.*, 223 AD3d at 1021; *Matter of Gruber v Suffolk County Bd. of Elections*, 218 AD3d 682, 685 [2d Dept 2023], *lv denied* 41 NY3d 902 [2024]; *Matter of Suhr v New York State Dept. of Civ. Serv.*, 193 AD3d at 137; *Matter of Hepps v New York State Dept. of Health*, 183 AD3d at 290; *Matter of Gannett Satellite Info. Network, Inc. v County of Putnam*, 142 AD3d 1012, 1018 [2d Dept 2016]; *Matter of Massaro v New York State Thruway Auth.*, 111 AD3d 1001, 1003 [3d Dept 2013]). Balancing the nominal privacy interest presented by the disclosure of this information against the public interest in disclosure, we find that respondent has not demonstrated that compelling privacy interests are implicated (*see Matter of Tatko v Village of Granville*, 207 AD3d 975, 977-978 [3d Dept 2022]; *Matter of Laveck v Village Bd. of Trustees of the Vil. of Lansing*, 145 AD3d 1168, 1170 [3d Dept 2016]).

We also disagree with the majority's conclusion that disclosure of the records in question is barred by statute. As the majority indicated, respondent may not refuse disclosure under the guise of the 50-year ban set forth in 10 NYCRR 35.5, as this has not been codified in state or federal statute (*see* Public Officers Law § 87 [2] [a]; *Matter of Whitfield v FOIL Appeals Officer, Dept. of Corr. & Community Supervision*, 221 AD3d 1341, 1343 n 1 [3d Dept 2023]; *compare Matter of Reclaim the Records v New York City Dept. of Health & Mental Hygiene*, 216 AD3d 440, 442 [1st Dept 2023], *lv denied* 40 NY3d 909 [2023]). Public Health Law § 4174 (1) (a) precludes disclosure of a "certified copy or certified transcript of a death record." Similarly, Public Health Law § 4172 (2) specifies that "copies of original [death] certificates . . . [are] confidential records." However, petitioner requests the death index for the pertinent years and not the original death certificates, certified copies or certified transcripts of death records, rendering these provisions inapplicable. Also, we do not find that these provisions limit disclosure of all records related to death "to applicants who fall within the[se] defined categories" by implication (majority op at 4; *compare Herald Co. v Murray*, 136 AD2d at 955). Notably, the Legislature has specified that while "[t]he death certificate, burial permit or any other record of death . . . shall not be sold or offered for sale," it has provided for the specific exclusion of "newspapers or newsletters providing general information to the public" (Public Health law § 4147), demonstrating that confidentiality is considered in conjunction with public access to information. Accordingly, we would find that the records sought here do not fit squarely within an exemption and disclosure is not prohibited (*see Matter of Aron Law PLLC v Sullivan County*, 214 AD3d 1186, 1188 [3d



Dept 2023]; *Matter of Empire Ch. of the Associated Bldrs. & Contrs., Inc. v New York State Dept. of Transp.*, 211 AD3d 1155, 1157 [3d Dept 2022]).

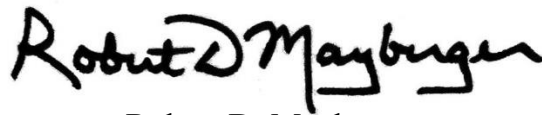
Finally, the "simple manipulation of the computer necessary to transfer existing records should not, if it does not involve significant time or expense, be treated as creation of a new document" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 465 [2007]; see Public Officers Law § 89 [3] [a]; *Matter of McGee v Putnam County Assistant Dist. Attorney David M. Bishop*, 192 AD3d 1446, 1450 [3d Dept 2021]). Respondent's Director of the Bureau of Vital Records (hereinafter the Director), specified that respondent maintains "death-related records . . . in a multitude of formats" and – while ostensibly confirming that it maintains a "database" – averred that the database does not include the additional data that petitioner has requested. According to the Director, altering the database to comply with petitioner's request would require technological assistance and take "significant time." This conclusory assertion does not suffice to establish that reasonable efforts cannot be made to transfer the records into another electronic medium or that complying with the request would require the creation of a new record (see Public Officers Law § 89 [3] [a]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d at 465-466; *Matter of Goldstein v Incorporated Vil. of Mamaroneck*, 221 AD3d 111, 121 [2d Dept 2023]; *Matter of Laveck v Village Bd. of Trustees of the Vil. of Lansing*, 145 AD3d at 1169; *Matter of Weslowski v Vanderhoef*, 98 AD3d 1123, 1131 [2d Dept 2012], *lv dismissed* 20 NY3d 995 [2013]). As opposed to the majority's indication, petitioner did take issue with the Director's assertion in this respect by arguing that respondent had "the obligation under FOIL to extract information from [its] computer databases, even if it requires programming, which is expressly not deemed the creation of new content" (emphasis omitted). If this Court believed that there was a question as to whether the records could be altered, it is empowered to remit the matter to Supreme Court for an in camera review of the records in question to determine this issue, though we do not think it necessary in light of the Director's concessions (see *Matter of Data Tree, LLC v Romaine*, 9 NY3d at 464; *Matter of Lane v Port Wash. Police Dist.*, 221 AD3d 698, 707 [2d Dept 2023]; see also *Matter of Whitehead v Warren County Bd. of Supervisors*, 165 AD3d 1452, 1454 [3d Dept 2018]).

Accordingly, we would modify Supreme Court's order to compel disclosure of the death indexes to include only each decedent's name, date of birth, date of death, place of birth and place of death, with any remaining information that may be in respondent's possession redacted pursuant to Public Officers Law § 89 (2) (a).

Reynolds Fitzgerald, J., concurs.

ORDERED that the judgment is reversed, on the law, without costs, and petition dismissed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court