

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

NYS DEPARTMENT OF HEALTH,

Respondent.

VERIFIED ANSWER

Index No. 906023-20

Respondent, the New York State Department of Health, by its attorney, Letitia James, Attorney General of the State of New York, Melissa A. Latino, Esq., of counsel, answer the Verified Petition (“petition”) as follows:

1. Denies each and every allegation contained in the petition that alleges or tends to allege that the challenged action was in any way contrary to constitutional, statutory, regulatory or case law.

2. As to the allegations contained in paragraphs 36 and 38 of the petition, asserts that they are jurisdiction and/or venue statements, and as such, no response is required, but denies the allegations in those paragraphs to the extent they allege or imply that Respondent acted contrary to constitutional, statutory, regulatory or case law.

3. As to the allegations contained in paragraphs 9, 10, 11, 18, and 30 of the petition, refers the Court to the document or exhibit cited therein as the best evidence and most accurate version of its contents and denies any allegation inconsistent therewith, and denies that it

committed any action that was in any way contrary to constitutional, statutory, regulatory or case law.

4. As to the allegations contained in paragraphs 34 and 35 of the petition, asserts that they constitute a description of the parties, and as such, no response is required, but to the extent a response remains required, admits that the New York State Department of Health is an agency within the State of New York subject to the New York Freedom of Information Law (Pub. Off. L. §§ 84-90).

5. As to the allegations contained in paragraphs 13 and 29 of the petition, respectfully refers the Court to the legal authority cited therein, and denies the allegations to the extent they are inconsistent with the authority.

6. As to the allegations contained in paragraph 12 of the petition, admits to the limited extent that DOH stated in its August 31, 2020 letter (Exh. C) that it was “unable to respond to [Petitioner’s FOIL request] by the date previously given ... because a diligent search for responsive documents [was] being conducted,” but respectfully refers the Court to the document or exhibit cited therein as the best evidence and most accurate version of its contents and denies any allegations inconsistent therewith.

7. As to the allegations contained in paragraph 16 of the petition, denies it constructively denied Petitioner’s FOIL request, but respectfully refers the Court to the document or exhibit cited therein as the best evidence and most accurate version of its contents and denies any allegation inconsistent therewith, and denies that it committed any action that was in any way contrary to constitutional, statutory, regulatory or case law.

8. As to the allegations in paragraph 17 of the petition, admits to the limited extent that DOH has required nursing homes to file daily reports throughout the pandemic through its

Daily Health Electronic Response Data System (“HERDS”), but denies sufficient knowledge and information to form a belief as to the truthfulness or accurateness of any and all remaining allegations.

9. Denies the allegations in paragraphs 4, 14, 15, 19, 20, 22, 23, 28, 31, 33, 40, 41, 42, and 43 of the petition.

10. As to the allegations in paragraph 21 of the petition, admits to the limited extent that DOH uses HERDS data for certain analyses of COVID -19, but respectfully refers the Court to the document or exhibit cited therein as the best evidence and most accurate version of its contents and denies any allegation inconsistent therewith.

11. Denies sufficient knowledge and information to formulate a belief as to whether the allegations in paragraph 24 of the petition are true and accurate, but respectfully refers the Court to the exhibit or document cited therein as the best evidence and most accurate version of its contents, and denies the allegations to the extent they are inconsistent with the exhibit or document.

12. Denies sufficient knowledge and information to formulate a belief as to whether the allegations in paragraphs 1, 2, 3, 5, 6, 7, 8, 25, 26, 27, 32, 39 and 44 of the petition are true and accurate.

13. As to the allegations contained in paragraph 37 of the petition, restates and re-alleges all previous responses.

14. Denies each and every allegation of the petition not specifically responded to in this Answer.

15. Denies the allegations in the “Wherefore” clause and denies that Petitioner is entitled to any declaratory, mandamus or such other relief.

AFFIRMATIVE DEFENSES

16. Respondent's decision was made in accordance with all applicable statutes and regulations.

OBJECTIONS IN POINT OF LAW

17. Petitioner failed to exhaust its administrative remedies. CPLR §7801(1); CPLR §3211(a)(5).

18. The petition fails to state a cause of action. CPLR §3211(a)(7).

RECORD BEFORE THE AGENCY BELOW

Respondent refers the Court to the Affidavit of its Records Access Officer Rosemarie Hewig and the supporting exhibits attached thereto, which include the following:

1. Exh. A (Petitioner's FOIL request, dated August 3, 2020).
2. Exh. B (Respondent's Acknowledgement of Receipt of Petitioner's FOIL Request Letter, dated August 3, 2020).
3. Exh. C (Respondent's August 31, 2020 letter setting an approximate date for a response to the FOIL request).
4. Exh. D (Petitioner's s administrative appeal of the August 31, 2020 letter, dated September 1, 2020).
5. Exh. E (Respondent's letter denying Petitioner's administrative FOIL appeal, dated September 16, 2020).

WHEREFORE, Respondent respectfully requests that the relief requested in the petition be denied, that the petition and this action be dismissed, and that Respondent be awarded costs and disbursements or, in the event the Court grants the petition, that the Court remand the matter

so that the matters complained of by the Petitioner may be remedied, together with such other relief as may be rights and just.

Dated: Albany, New York
October 26, 2020

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondent
New York State Department of Health
The Capitol
Albany, New York 12224-0341

By: **S / Melissa A. Latino**
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Verification

Melissa A. Latino, Esq., being a duly licensed attorney in the State of New York and an Assistant Attorney General of counsel in this matter to Letitia James, Attorney General of the State of New York, affirms the following under penalties of perjury pursuant to CPLR 2106:

I have been assigned to defend the within proceeding and I am acquainted with the facts. I have personally examined the exhibits annexed to and or itemized in the foregoing Answer and records of the New York State Department of Health relating to this case.

I have read the foregoing Answer. The same is true to my knowledge, except as to those matters alleged on information and belief, and as to those matters, I believe them to be true.

This verification is made by me, pursuant to CPLR Section 3020(d)(2), because Respondent, the New York State Department of Health, is an agency of the State of New York, and I am acquainted with the facts of this proceeding.

S/ Melissa A. Latino

Melissa A. Latino, Esq.
Registration No. 4151429