

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

In the Matter of

Index No. 906023-20

EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

-against-

**REPLY AFFIRMATION
IN SUPPORT OF
VERIFIED PETITION**

**NEW YORK STATE DEPARTMENT OF
HEALTH,**

Respondent.

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

Cameron J. Macdonald, an attorney admitted to practice before the courts
of New York affirms as follows:

I am Litigation Director of the Government Justice Center, Inc., counsel for
Petitioner Empire Center for Public Policy in this matter.

In this capacity, I have personal knowledge of the matters set forth in this
affirmation or am aware of the facts and circumstances based on conversations,
records, and written communications.

I make this affirmation in support of the Verified Petition.

A. Introduction

DoH offers nothing in its response to Empire Center's Petition in this spe-
cial proceeding to excuse it failing to make public records relating to nursing
home and assisted living facility resident COVID-19 deaths, including those
residents who dies while physically outside of those homes and facilities. DoH's
arguments do not match with the facts. It has not justified taking more than

three months to locate and disclose information it has readily available in a database.

B. DOH violated the Freedom of Information Law

Agencies have three options when responding to a Freedom of Information Law¹ request, which must be done within five business days of receiving the request: (1) disclose the requested records; (2) deny disclosure; or, (3) acknowledge the request and provide an approximate date “reasonable under the circumstances of the request” when it will be granted or denied.²

To be clear, DOH first provided an approximate date for a response of August 31, 2020. On that date DoH followed up by giving an approximate date of November 5, 2020 to complete the process of “a diligent search for responsive documents.” Under the circumstances a response on August 31, 2020 may have been reasonable. An approximate response date more than three months after Empire Center’s request is not reasonable under the circumstances, nor does it comply with FOIL.

1. The FOIL request does not require three months for a response

Empire Center made a straightforward FOIL request for numbers. It asked for daily numbers of nursing home and assisted living facility resident deaths and the statewide total number of such deaths. DoH does not dispute that it collected that information, and continues to collect that information through daily surveys in its HERDS system. DoH finds the information important enough for responding to the pandemic that it’s been collecting it since early March. The public has a right to know the same information.

¹ Public Officers Law, Art. 6 (“FOIL”).

² FOIL § 89(3)(a).

The Legislature passed FOIL on the premise that “a free society is maintained when government is *responsive* and responsible to the public, and when the public is aware of government actions.” To that end, the default time frame for a complete FOIL response granting or denying the request is five business days—usually one calendar week. FOIL provides an exception for voluminous or complex requests that allows an agency to acknowledge the request and give an approximate date for the response that must be reasonable under the circumstances.

Here, DoH provided a same-day form response to Empire Center’s FOIL request, essentially giving itself 20 business days at the outset, before looking for the records, to get back to Empire Center with a progress report. That’s what’s supposed to happen in the first five business days, not the next 20. Regardless, by August 31st, DoH was supposed to know whether it was granting or denying the request.

If it was granting the request and could not disclose the records on that date, DoH was required to provide a date certain for disclosure. FOIL also required DoH to explain its inability to comply with FOIL’s deadline for disclosure 20 business days from acknowledging the FOIL request. Instead, DoH informed Empire Center that it hoped to be finished *looking* for the records on November 5th.

The records requested are neither voluminous nor complex. They reside in a database that DoH accesses and manipulates daily to provide the information it chooses to provide, stripped of personally identifiable information. DoH can pull field from a database, sift and sort the data into reports, and disclose the reports without any sort of intensive review. Three months for DoH

to let Empire Center know whether it's completed its search for records is not reasonable under the circumstances.

DoH concedes that information resides in the Daily Health Emergency Response Data System ("HERDS"). It admits it receives the data every day. It uses that data to generate reports on in-facility nursing home and adult care facility confirmed and presumed COVID deaths daily. In generating its reports, DoH sifts and sorts the data to eliminate all personally identifying patient information. It only publishes numbers. DoH doesn't explain how the same numbers plus numbers for deaths physically outside facilities cannot be sifted and sorted in a similar manner, because it can't.

DoH already has staff in place reviewing in-facility COVID-19 deaths and putting that data into a publishable form. DoH offers no evidence that the same staff cannot query the database and generate and publish a report containing the data it possesses for all deaths, including those occurring outside nursing home and assisted living facilities. The inside and outside the home death counts are adjacent questions on the HERDS daily survey questionnaire.³

The subject records are not voluminous in the sense of stacks of boxes of paper records in a warehouse. They are manageable buckets of data in a database. They can be obtained through queries that generate reports. Those reports can then be sifted and sorted in a spreadsheet program. DoH demonstrates that capability daily. It regularly, since the spring, has taken HERDS data stripped of personally identifying information and posted the data in

³ Ver. Pet., Ex. E.

reports online. DoH used the death count data to generate graphs for its nursing home deaths report in July.⁴

It can't be the case that DoH needs to manually review the data to guard against revealing personal data through "circumstantial facts such as the low number of data points for a particular nursing home or long-term care facility." That argument is not consistent with Empire Center's FOIL request or DoH's reporting of COVID nursing home deaths.

First, records of deaths by facility is only one part of Empire Center's FOIL request. The other two parts of the request seek (1) the aggregate total of nursing home and assisted living facility COVID-19-related deaths; and (2) the aggregate number of deaths recorded statewide on each date. Those parts do not require DoH to identify nursing homes or assisted living facilities. Neither request calls for data that could point to a particular death in a particular nursing home or assisted living facility.

Second, DoH already publishes reports containing low data points for particular places. The report of nursing home and adult care facility COVID-19 deaths DoH published on October 26, 2020⁵, one more reported death than the report for the day before in two different nursing homes.⁶ The October 26 report identifies at least 110 nursing homes and 53 adult care facilities with five or fewer total reported COVID deaths since the spring.

⁴ DoH does not explain how it authored a report of nursing home fatalities without the records Empire Center requests. It's not clear how such a report could be accurate without such data. And it's not conceivable that an agency charged with safeguarding public health has not accessed its own data to know what number of nursing home patients have died confirmed or presumed COVID deaths outside their facilities.

⁵ Nursing Home and ACF COVID Related Deaths Statewide Data through October 26, 2020, attached as Ex. A.

⁶ Nursing Home and ACF COVID Related Deaths Statewide Data through October 25, 2020, attached as Ex. B.

DoH did not, and cannot, establish November 5th as a date that is “reasonable under the circumstances of the request” for giving an update on its search efforts. The records are stored in a database DoH accesses at least daily to generate reports. Accessing and disclosing the full number of nursing home and assisted living facility death figures in the database is an incremental step that does not require multiple months.

2. A lack of records access personnel or resources is not an excuse

DoH claims that under normal circumstances “a three-month (3) processing time for a FOIL request is not unusual or extraordinary.”⁷ DoH, however, did not commit to disclosing the records in three months. It admits it only committed to getting back to Empire Center on or before November 5.

Again, the Legislature passed FOIL expecting that citizens would get a complete response to a records request within a week. It also recognized that under certain circumstances agencies may require additional time to figure out what records they possess. If, however, it will take more than a month to grant the request, the agency owes an explanation why. A lack of resources is not an excuse. “Meeting the public’s legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds.”⁸

As the Committee on Open Government has opined,

If it is known that the number and nature of requests for records result in ongoing, routine or repeated delays of up to ninety business days following the receipt of requests, an agency in my view would be failing to meet its responsibilities in complying with law. The circumstance associated with the delay, staff limitations, does not involve an agency’s “inability” to respond to requests

⁷ Affidavit of Rosemary Hewig, ¶15, Dkt. No. 24.

⁸ *Matter of Doolan v. Board of Coop. Educ. Servs., 2d Supervisory Dist. of Suffolk County*, 48 N.Y.2d 341, 347 (1979).

promptly, but a failure to allocate sufficient resources to enable the agency to give effect to the spirit, if not the letter, of the law.⁹

The public should not be deprived of vital public records because DoH has a history of choosing not to prioritize its transparency obligations under the law.

But this is not a resources issue. DoH does not explain how the pandemic is keeping the same personnel who electronically mine the HERDS data for in-facility nursing home and adult care facility deaths for regular electronically published reports from doing the same for total deaths. Instead, DoH tries to paint a picture of thousands of pages of documents that need to be painstaking read, line by line, and then carefully redacted.

Yet those are not the records Empire Center requested. Empire Center only requested numbers, not names nor other details on the daily COVID surveys submitted in HERDS. DoH has not met its burden to prove its inability to disclose the records within the Legislature's FOIL timeframe.

2. DoH constructively denied the FOIL request

There's no dispute that courts have held that agencies are not required to disclose records by an absolute deadline.¹⁰ It's also true that courts have held that the time to reply may be dependent on a number of factors, including the volume of the request and the records retrieval methods.¹¹ But that's not Empire Center's position.

And DoH does not provide any authority supporting the idea that extensions of the approximate date for deciding to grant or deny a request are permitted under FOIL. Indeed, DoH's regulations permit no such thing: "If access to records is neither granted nor denied within 10 business days after the date

⁹ Comm. on Open Govt. FOIL-AO-19671 (2018).

¹⁰ *Matter of New York Times Co. v. City of N.Y. Police Dept.*, 103 A.D.3d 405, 406-07 (1st Dept. 2013).

¹¹ *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 465 (2007).

of acknowledgment of receipt of request, the request may be construed as a denial of access that may be appealed.”¹²

While an agency may not have an absolute deadline to respond to a FOIL request, the time it requires to respond is subject to a court’s determination of its reasonableness.¹³ Any failure to comply with FOIL § 89(3) is a denial that can be appealed.¹⁴ FOIL § 89(3)(a) provides that any approximate date for a response must be reasonable under the circumstances of the request. Further, an agency that unable to disclose records 20 business days after acknowledging a request must explain its inability and provide a date certain that is reasonable under the circumstances for granting the request.¹⁵

There’s no argument DoH did not provide a date certain to respond to Empire Center’s FOIL request. And there’s no question DoH’s approximate date to provide an update on its search is not reasonable under the circumstances. DoH did not meet its burden to establish that its delay either to make a decision on the request or to disclose the records was reasonable.

The Records Appeals Access Officer gave a boilerplate response, including that DoH may still be searching for results from a database query that would need to be reviewed for responsiveness, legal privileges, and any other unnamed exceptions to disclosure under FOIL. Nothing specific. And nothing to excuse not disclosing the records already, let alone within three months of the request.

¹² 10 NYCCR 50-1.7(c).

¹³ *Data Tree*, 9 N.Y.3d at 465.

¹⁴ FOIL § 89(4)(a).

¹⁵ *Binghamton Precast & Supply Corp. v. New York State Thruway Auth.*, 64 Misc. 3d 1237(A), 2019 NY Slip Op 51438(U), 2019 WL 4265930, *4 (Sup. Ct., Albany County 2019).

C. Empire Center exhausted its administrative remedies

Empire Center's only remedy when DoH failed to conform to the provisions of FOIL § 89(3)(a) was filing an administrative appeal under FOIL § 89(4)(a). It did so, appealing on the basis that DoH failed to give a date that was either reasonable or certain for disclosing records more than 20 days after acknowledging Empire Center's request. Empire Center has no other administrative remedy relating to DoH's failure to comply with FOIL § 89(3)(a). And the decision is final. The DoH Records Access Appeal Officer agrees. He wrote, "For the reasons stated above, your appeal is denied in its entirety. Judicial review of this decision may be obtained pursuant to CPLR Article 78."¹⁶

D. Conclusion

Empire Center respectfully requests an order granting the relief sought in its Verified Petition.

Dated: Albany, New York
October 29, 2020

Respectfully submitted,



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¹⁶ Ver. Pet., Ex. H.