

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

In the Matter of Empire Center
For Public Policy,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondents.

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

**AFFIDAVIT BY
ROSEMARIE
HEWIG IN
SUPPORT OF
ANSWER AND
OPPOSITION TO
PETITION**

Index No.: 906023-20

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ROSEMARIE HEWIG, being duly sworn, deposes and says:

1. I am the Records Access Officer (“RAO”) at the New York State Department of Health (hereinafter “the Department”) and I oversee the operations within the Department’s Records Access Office, including the handling of requests for records pursuant to the Freedom of Information Law (hereinafter “FOIL”). The following is based upon my personal knowledge, discussions with Department staff as well as my review of records maintained by the Department in the regular course of the Department’s business.

2. I make this Affidavit in opposition to the Verified Petition of Tyler K. Patterson, Esq. dated September 18, 2020, which seeks an Order declaring that: (1) the Department acted unlawfully in failing to produce the records; (2) the Department must release the records within five (5) days of the date of the Order; (3) awarding attorney’s fees and costs incurred in this litigation as allowed under FOIL; and, (4) granting such other relief as the Court may deem just and proper.

3. The Petition should be dismissed in its entirety because the Department timely and properly acknowledged the request and began the process of responding to the request, as set forth more fully below.

Factual Background

4. On or about August 3, 2020, Petitioner filed a FOIL request seeking:

“records of COVID-19-related deaths of residents of nursing homes and assisted living facilities, including those who died while physically outside of the homes. The records should include, to the extent possible, (a) the total number of such deaths recorded statewide, (b) the number of such deaths recorded on each date and (c) the number of such deaths recorded in each nursing home or assisted living facility.”

A copy of this request is attached hereto as **Exhibit A**.

5. On the very same day, August 3, 2020, the Department issued an acknowledgement letter to the FOIL request stating in part:

“This will acknowledge receipt of your request for records under the Freedom of Information Law (FOIL), received by this office on August 3, 2020.

Your request has been forwarded to the appropriate Department program area(s) to identify documents that are responsive to your request and which may be made available pursuant to all applicable provisions of the Freedom of Information Law.

A determination as to whether your request is granted or denied will be reached in approximately 20 business days or we will notify you in writing if the responsible program area(s) should require additional time to locate, assemble, and review documents that may be responsive to your request.”

A copy of the Department’s acknowledgement letter is attached hereto as **Exhibit B**.

6. On August 31, 2020, the Department sent a letter to the Petitioner stating in part:

“Please be advised this Office is unable to respond to your request by the date previously given to you because a diligent search for responsive documents is still being conducted.

We estimate that this Office will complete its process by November 5, 2020.”¹

A copy of the letter is attached hereto as **Exhibit C**.

7. By email of September 1, 2020, Petitioner submitted an appeal claiming that the Department had constructively denied his FOIL request. A copy of the Appeal is attached hereto as **Exhibit D**.

8. On September 16, 2020, the Department denied Petitioner’s appeal stating, in relevant part:

“There is no provision in FOIL, that prohibits extensions, even repeated extensions, which are particularly reasonable under the circumstances at hand. Specifically, documents need to be located and then reviewed for responsiveness, accuracy, legal privileges, and applicable FOIL exemptions under the POL. Accordingly, the response time of the Department’s RAO is reasonable under the circumstances. POL § 89(3)(c); see also, Matter of Data Tree v. Romaine, 9 NY3d 454, 465; Matter of New York Times Co. v. City of NY Police Dept., 103 AD3d 405, 406-407.”

A copy of the Decision is attached hereto as **Exhibit D**.

Applicable Law

9. The Freedom of Information Law is contained in Public Officers Law (“POL”), Article 6, §§ 84-90.

10. POL § 89(3)(a) requires that:

within five business days of the receipt of a written request for a record **reasonably described**, [an

¹ The date provided in the letter is merely an estimate. The Petitioner will either receive a response to the FOIL request on or before November 5, 2020 or another letter setting forth the approximate date of the Department’s response to Petitioner’s FOIL request.

agency] shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and **a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.** (emphasis added)

Additionally:

[i]f an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

11. POL § 89(4)(a) specifies that:

...any person denied access to a record may within thirty days appeal in writing such denial...to the person therefore designated...who shall within ten business days of receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. ... Failure of an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

12. POL § 89(4)(b) specifies that:

a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of the denial pursuant to Article 78 of the Civil Practice Laws and Rules.

PETITIONER'S FOIL REQUEST: FOIL #20-08-016

13. It is my understanding from reviewing the Petition in the instant case that Petitioner is specifically challenging the Department's August 31, 2020 extension letter. More specifically, Petitioner argues that the Department did not comply with POL § 89(3)(a) by failing to set forth: (1) a reason for the Department's inability to grant a request within twenty business days (20) of acknowledging it; and (2) a date certain, within a reasonable period, when the request will be granted in whole or in part, or denied. Petitioner also asserts that the Department's letters amounted to a constructive denial.

14. In the letter dated August 31, 2020, the Department advised Petitioner that the estimated response date is November 5, 2020. Likewise, in compliance with the requirements of POL § 89(3)(a), this letter was sent within twenty (20) **business** days of the original acknowledgement letter sent from the Department to the Petitioner (August 3, 2020). The August 31, 2020 letter cited the specific reason for the delay stating that additional time was needed because a diligent search for the responsive documents is still being conducted. FOIL does not prohibit extensions, even repeated extensions, which are particularly reasonable under the circumstances at hand.

15. The Records Access Office receives approximately 400-500 FOIL requests per month. Under normal circumstances, a three-month (3) processing time for a FOIL request is not unusual or extraordinary. Upon receipt of the FOIL request, the matter must be administratively processed and then I personally assign the request to a Department staff member. I also initially determine the appropriate Program area or areas that may possess records responsive to the request.

16. Gathering records in response to a FOIL request is not always a matter of simply identifying the responsive document or documents, hitting a print button and capturing the requested information. It is not always possible to simply query a

search for the requested information. The request must be evaluated line by line to determine the records being requested. Responding to the more complicated FOIL requests, such as Petitioner's, is not merely a matter of producing documents. Each potentially responsive document must be reviewed, page by page and line by line. In addition to gathering records responsive to FOIL requests, Program staff must perform their regularly assigned duties as well as their newly assigned COVID-19 responsibilities.

17. Since March 9, 2020, the HERDS system, where much of this data is located, has continued to produce volumes of raw data every day. The HERDS, or Hospital Emergency Response Data System, provides the Department with more than just the data requested; it is a repository of much of the State's emergency data, including available hospital beds, medical supplies, personnel, and the numbers, status, and immediate care needs of ill or injured persons, along with other urgent information to facilitate a rapid and effective emergency responses. Through this system, the Department receives data points from approximately 1000 providers twenty-four (24) hours a day, seven (7) days a week. The raw data and any requested information requires a constant reconciliation process even before the records are provided to the Records Access Office for further review before release.

18. As is the customary practice of the Records Access Office, once the potentially responsive records are received, a Records Access Office staff member must review the documents for responsiveness, accuracy, and legal privileges as well as identify material and content to be redacted and/or withheld in accordance with the applicable FOIL exceptions under the POL.

19. Petitioner responded to the Department's August 31, 2020 extension letter with an appeal contending that the Department had constructively denied Petitioner's access to the requested records. However, the Department did not deny the request, either constructively or otherwise. Rather, the Department

requested additional time to compile, review, and produce said records. To date, the Department has not denied Petitioner access to the requested documents.

20. Petitioner's claim that the records are easily produced from the HERDS system is simply incorrect. In addition to the sheer amount of raw data contained in the system, the records Petitioner requested contain information that requires review for exemptions (e.g. protected health information which, if disclosed, would constitute an unwarranted invasion of personal privacy pursuant to POL § 87[2][b]), and most importantly, redaction of any information that would violate the Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) -- which requires the State to protect sensitive patient health information from being disclosed without the patient's consent or knowledge. This process can be time consuming as it requires Records Access Office staff to review each record and redact information or determine to withhold the record in accordance with POL § 87(2). In addition, a HIPPA violation can occur even if an individual patient's name or personal information is not disclosed, but if such information can be surmised because of circumstantial facts such as the low number of data points for a particular nursing home or long-term care facility. Given the voluminous and sensitive nature of the information requested, the limited time and resources of the agency and burden imposed upon staff in light of dealing with various COVID-19 issues, the review will take considerable time.

21. As the Petitioner is well aware, the State, and in particular the Department and the team within the Department responsible for protecting the health of vulnerable individuals, including in nursing homes and long-term care facilities, has been subject to an unprecedented level of work. The level of commitment these individuals have shown in responding to this global pandemic has been unprecedented with most staff working well above and beyond their regular workdays. With a request such as this, the very program area responsible for responding to the request is on the front lines in the Department's COVID-19 response. The pandemic has also fueled an increase in demand on the HERDS

and an increase in FOIL requests, making data collection in response to Petitioner's request more challenging than under normal circumstances.

22. Despite this extreme situation, the Department continues diligently working on compiling and reviewing the requested information. The Department's revised projected date to respond to petitioner's FOIL request is eminently reasonable and necessary to properly respond the request. Therefore, the Petition should be denied.

Rosemarie Hewig

ROSEMARIE HEWIG

(Columbia County)

Sworn to before me this
26th day of October, 2020

Jessica Hall

Notary Public

(Rensselaer County)

(Notarization made pursuant to E.O. 202.7)

JESSICA HALL
Notary Public, State of New York
No. 02HA6108048
Certified in Rensselaer County
My Commission Expires 04/12/2021