

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of the Application of

EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

Index No. 906023-20

-against-

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

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

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**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S  
ANSWER TO THE VERIFIED PETITION**

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Respondent New York State Department of Health (“DOH”), by its attorney, Letitia James, Attorney General of the State of New York, submits this memorandum of law, together with the accompanying Affidavit of Rosemarie Hewig, Records Access Officer for DOH, dated October 26, 2020 (“Hewig Aff.”), and exhibits thereto, in support of its cross-motion to dismiss the Verified Petition (“Pet.”) pursuant to CPLR § 3211(a)(1), § 3211(a)(2), § 7801(1) and § 7804(f).

### **PRELIMINARY STATEMENT**

On August 3, 2020, Petitioner Empire Center for Public Policy (“Petitioner”) submitted a Freedom of Information Law (“FOIL”) request to the New York State Department of Health (“DOH”), seeking the number of COVID-19 related deaths of residents in nursing homes and assisted living facilities, “including those who died physically outside the homes.” Initially, DOH advised it would respond to Petitioner’s request within 20 business days. However, given the voluminous nature of the documents that had to be located and reviewed by staff already burdened with addressing the COVID-19 pandemic, DOH recognized its preliminary estimate was not feasible. By letter dated August 31, 2020, DOH notified Petitioner that it was unable to comply with the initial projected timeframe and advised that it expected to respond by November 5, 2020. Petitioner “appealed” DOH’s assertion that it needed more time to respond to Petitioner’s request. By letter dated September 16, 2020, DOH denied the appeal on grounds that the November 5, 2020 date was reasonable because the records had to be located and reviewed for responsiveness, legal privilege, and exemptions under FOIL.

Petitioner commenced this CPLR Article 78 proceeding to challenge DOH’s adjustment to its estimated time frame to respond to Petitioner’s FOIL request. Petitioner claims that the records sought have already been compiled by DOH through its Health Electronic Response Data System

(“HERDS”) and are available for immediate disclosure. Petitioner further claims that DOH did not provide a “date certain” when it would grant or deny the FOIL request or the reason for its inability to produce the records within 20 days from acknowledging its request. Petitioner asserts that DOH’s noncompliance in this regard constitutes a constructive denial of its FOIL request and seeks an order from the Court compelling DOH’s disclosure and awarding attorneys’ fees and costs.

DOH was within its authority under Public Officers Law (“POL”) § 89(3) to advise the Petitioner of an approximate date to respond to Petitioner’s FOIL request. The additional time to process Petitioner’s FOIL request is reasonable given the voluminous nature of the record request that will require an extensive review by limited staff, who are operating under considerable constraints resulting from the COVID-19 emergency. DOH complied with all applicable provisions under FOIL, including notifying Petitioner that it was unable to respond to its FOIL request and providing Petitioner with a date on which it expects to produce records. As Petitioner commenced this proceeding well before November 5, 2020, and DOH has not had the opportunity to grant or deny its request, Petitioner failed to exhaust its administrative remedies. The Petition must be dismissed.

### **STATEMENT OF FACTS**

On August 3, 2020, Petitioner submitted a FOIL request to DOH seeking records detailing the number of COVID-19 related deaths of residents in nursing homes and assisted living facilities.

Hewig Aff. Ex. A; see also, Pet. Ex. A. Specifically, Petitioner’s FOIL request sought:

[R]ecords 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.

See id.

By letter dated August 3, 2020, DOH acknowledged Petitioner's FOIL request. Hewig Aff. Ex. B; see also, Pet. Ex. B. DOH informed Petitioner that it would respond within approximately 20 business days (by August 31, 2020) and that it would either reach a determination as to whether Petitioner's request was granted or whether it required additional time to locate, assemble, and review responsive documents. Id.

By letter dated August 31, 2020, DOH advised Petitioner that it was unable to respond to its FOIL request within 20 business days and would advise Petitioner if responsive records were available by November 5, 2020. Hewig Aff. Ex. C; see also Pet. Ex. C. Specifically, DOH stated in its August 31, 2020 letter:

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. The Department will notify you in writing when/if the responsive materials are available for release or if the time needed to complete your request extends beyond the above date.

Id.

Even though DOH did not deny the FOIL request, Petitioner appealed DOH's response as set forth in the August 31 letter, claiming that DOH constructively denied its FOIL request because it provided an estimated date rather than a "date certain" when the records would be made available. Hewig Aff. Ex. D; see also, Pet. Ex. D. By letter dated September 16, 2020, DOH denied the appeal on grounds that the November 5, 2020 date was reasonable because the records had to be located and reviewed for responsiveness, legal privilege, and exemptions under FOIL. Hewig Aff. Ex. E; see also, Pet. Ex. E.

DOH has not denied Petitioner's FOIL request, nor has it ignored the request. Rather it provided Petitioner with a reasonable timeframe within which it believes it can respond to the request. Despite the fact that the projected response time is not expired, Petitioner commenced this Article 78 proceeding. Petitioner submitted its FOIL request just over two months ago. Because DOH receives approximately 400-500 FOIL requests a month, a three-month processing time is neither unusual or extraordinary. Hewig Aff. ¶ 15.

The records Petitioner seeks are health information that DOH has been collecting in response to the COVID-19 pandemic through HERDS. Hewig Aff. ¶ 17. The information collected is comprehensive and includes data such as 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 rapid and effective emergency responses. Id. Since March 9, 2020, DOH has received information through HERDS from approximately 1000 providers twenty-four hours a day, seven days a week. Id.

Petitioner's claim that the HERDS data can easily be compiled and produced is inaccurate and ignores the reality of providing this information in response to a FOIL request. Hewig Aff. at ¶ 20. The raw data and any requested information requires reconciliation before the records are provided to the Records Access Office for further review before release. Id. Furthermore, the records Petitioner requested contain information that requires review for exemptions under FOIL, e.g. protected health information. Hewig Aff. at ¶ 20. Given the enormous amount of requested information and its sensitive nature, DOH needed additional time beyond August 31, 2020 to review the information for privilege and exemptions and to redact or determine to withhold the records in accordance with POL § 87(2). Hewig Aff. ¶¶ 15-21.

In light of the foregoing, and as set forth below, DOH's initial response to the Petitioner's FOIL request was proper, and the Petition must be dismissed.

## ARGUMENT

### POINT I

#### **DOH'S RESPONSE TO PETITIONER'S FOIL REQUEST WAS REASONABLE AND MADE IN ACCORDANCE WITH ALL APPLICABLE PROVISIONS UNDER FOIL**

Petitioner claims that DOH did not comply with the requirements of POL § 89(3) are baseless. Public Officers Law § 89(3)(a) requires that:

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

Public Officers Law § 89(3) and its implementing regulations expressly permit an agency to extend or adjust the time frame to respond to a FOIL request for a "reasonable period" when "circumstances prevent disclosure." POL § 89(3)(a); 21 NYCRR §§ 1401.5(c), (d). The statute does not prescribe any specific time-period in which an agency must grant (or deny) a FOIL request or restrict the amount of time of an extension. Rather, it requires the agency to notify the requester of an "approximate" date by which it can reasonably produce the records.

POL § 89(3)(a). Of further significance, POL § 87(1)(b) provides that an agency may establish the “time and place” records may be made available.

The Court of Appeals has held that there is no specific time period to grant or deny a FOIL request and extensions are therefore permissible under FOIL. Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 465 (2007). All that the FOIL requires is that the requester be provided with an approximate date by which the request will be granted or denied. Id. As the Court stated in Data Tree, “there is no specific time period in which the agency must grant access to the records. Indeed, the time needed to comply with the request may be dependent on a number of factors, including the volume of the request and the retrieval methods.” Id.

The First Department reached a similar conclusion in New York Times Company, et al. v. City of New York Police Dept., holding

Public Officers Law § 89 (3) does not require either a grant or a denial of a FOIL request within 20 days of the five-day ‘acknowledgment’ notice. . . . Indeed, Public Officers Law § 89 (3) mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute (see e.g. Matter of Legal Aid Socy. v New York City Police Dept., 274 AD2d 207, 215 . . . [1st Dept 2000], lv dismissed in part, denied in part 95 NY2d 956 . . . [2000]).

103 A.D.3d 405, 406-07 (1st Dept. 2013). See also Legal Aid Society, et al. v. New York City Police Department, 274 A.D.2d 207, 215 (1st Dept. 2000) (New York City FOIL rules improperly imposed time limits on agency responses).

In assessing whether an agency has provided a reasonable estimate for the time of production, the voluminous nature of the request is often considered. See Data Tree, LLC v. Romaine, 9 N.Y.3d at 465 (holding that the voluminous nature of records may be considered in determining the reasonableness of time to respond to a FOIL request); see also, Matter of Linz v.



Police Dept., Index No.117729/01 (Sup Ct. N.Y. Cty. Dec. 27, 2011) (“whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure”) (copy attached).

Here, DOH provided a reasonable estimate to respond to Petitioner’s FOIL request, which was within its authority under FOIL. As it was unable to produce the requested records within 20 business days from receipt of Petitioner’s FOIL request, DOH provided Petitioner with an approximate date on which it expected to produce the responsive records. Thus, DOH has complied with all applicable provisions under FOIL.

Petitioner challenges the remoteness of the approximate date for a response provided by DOH (i.e. a little more than two months from August 31). It claims that each nursing home or assisted living facility in this State must submit daily reports to DOH through its HERDS system which includes the number of COVID-19 deaths of residents inside or outside the home, making the requested information easily retrievable by DOH. Pet. ¶¶17-18. In making these claims, Petitioner fails to consider that the data requested is voluminous and requires extensive review and redaction for exemptions by limited staff who are operating under significant time constraints. See Hewig Aff. ¶¶ 15-21. The HERDS system, which has been in place since March 2020, receives raw data from approximately 1000 providers on a daily basis. Id. This information must be carefully reviewed for exemptions and privilege, such as protected health information which, if disclosed, would constitute an unwarranted invasion of personal privacy pursuant to POL § 87[2][b] and a violation of the Health Insurance Portability and Accountability Act of 1996 [HIPAA]). Id.

Petitioner fails to demonstrate that the two-month projected response to its FOIL request is so unreasonable as to constitute a constructive denial of that request. Insofar as Petitioner speculates that DOH may extend the date for production beyond November 5, courts have found that under the particular circumstances adjustments in the response date is permitted. See Matter of Gannett Satellite Info. Network, LLC., 181 A.D.3d 1072 (3d Dept. 2020) (finding for the agency where the agency had “adjusted its anticipated response date several times” over a nine-month period by writing to petitioner before the expiration of the previously set anticipated response date).

## POINT II

### PETITIONER FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES

It is well-established that prior to commencing an Article 78 proceeding, a petitioner must exhaust its administrative remedies. Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y.2d 52, 57 (1978); Town of Oyster Bay v. Kirkland, 19 N.Y.3d 1035, 1038 (2012) (same) (citing Watergate II Apartments). This ruling is consistent with the plain language of CPLR §7801 which prohibits article 78 proceedings to challenge a determination “which is not final.” CPLR § 7801(1). “The focus of the ‘exhaustion’ requirement ... is not on the challenged action itself, but on whether administrative procedures are available to review that action and whether those procedures have been exhausted.” Walton v. N.Y.S. Dep’t of Corr. Servs., 8 N.Y.3d 186, 195 (2007) (citations omitted). “If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered ‘definitive’ or the injury ‘actual’ or ‘concrete.’ Essex County v. Zagata, 91 N.Y.2d 447, 454 (1998).

Petitioner attempts to evade the exhaustion requirement by asserting that its request was constructively denied pursuant to POL § 89(3)(a). Pet. ¶¶ 13-15. Petitioner’s argument relies upon

an erroneous reading of the cited statute. Specifically, Petitioner misquotes the statute by asserting that DOH was required to provide Petitioner with a “date certain, within a reasonable period, when the request will be granted in whole or in part or denied.” *Id.* at ¶ 13. However, the portion of the statute cited only addresses instances in which an agency determines that it will grant a request. POL § 89(3)(a). Here, DOH has not determined if it will grant Petitioner’s request, either in whole or in part. Where an agency has not made a determination that it will grant a request, in whole or in part, it need only provide “a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied . . . .”

DOH’s August 31, 2020 letter provided Petitioner with an approximate date when DOH would be able respond to its request. Under the circumstances as described above, the date is reasonable. Petitioner’s request was not constructively denied and it failed to exhaust its administrative remedies. The Petition should be dismissed. Empire Center for Pub. Policy, Inc. v. NYC Office of Payroll Admin., 158 A.D.3d 529, 530 (1st Dept. 2018) (finding no constructive denial where administrative appeal was filed prematurely and dismissing for failure to exhaust).

**CONCLUSION**

For the foregoing reasons, the Petition should be dismissed.

Dated: October 26, 2020  
Albany, New York

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