

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF
HEALTH,

Respondent.

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

Index No.

**MEMORANDUM OF LAW
IN SUPPORT OF
VERIFIED PETITION**

Petitioner Empire Center for Public Policy (“Empire Center”), for its Verified Petition against Respondent New York State Department of Health (“DoH”), states:

INTRODUCTION

COVID-19 has so far claimed the lives of more than 25,000 New Yorkers. At least 6,600 of New York’s COVID-19 deaths occurred in nursing homes and assisted living facilities, and New York has the second most nursing home deaths attributed to COVID-19 of any state in the country. However, this count omits potentially *thousands* of nursing home residents who died in hospitals after being transferred from their nursing homes.

New York is one of a few states that does not count the deaths of residents who died in a hospital after transfer from a nursing home or assisted living facility. Governor Cuomo has commented on this, saying that “if you die in the nursing home, it’s a nursing home death. If you die in the hospital, it’s called

a hospital death.” Regardless, the public has no idea how many nursing home residents died of COVID-19 in the state, whether they died in a nursing home or in a hospital after being transferred from one. Only the government does.

Empire Center submitted a FOIL request seeking this information, but DoH constructively denied the request. Apparently, it will take DoH more than three months to locate and disclose information it has readily available. And because of DoH’s conduct, a lawsuit is now required to compel the state to disclose information that should already be public in the first place. DoH’s nondisclosure of the death toll data is unjustified and runs counter to FOIL’s mandates of open, transparent government.

FACTS

Empire Center for Public Policy is a non-profit think tank that educates the public and policymakers about a number of issues, including healthcare policy.

On August 3, 2020, Empire Center sent a FOIL request to DoH for:

[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.¹

DoH acknowledged the request on the same day and informed Empire Center that they would respond within 20 business days.²

But on August 31 DoH informed Empire Center that it estimated a response would be forthcoming on November 5, 2020, more than two months later.³ DoH argues it needs this additional time because “a diligent search for

¹ Ver. Pet. Ex. A.

² Ver. Pet. Ex. B.

³ Ver. Pet. Ex. C.

responsive documents is still being conducted.”⁴ Under FOIL, an agency must provide: (1) a reason for its inability to grant a request within 20 business days from acknowledging it; and (2) a date *certain*, within a reasonable period, when the request will be granted in whole or in part or denied.⁵ DoH did neither in its August 31 correspondence⁶ and, therefore, DoH constructively denied Empire Center’s FOIL request.

Empire Center appealed DoH’s constructive denial on September 1. Empire Center argued that:

The records in question are being gathered by the department through its Health Emergency Response Data System. The state health commissioner, Dr. Howard Zucker, acknowledged that the department possesses these records during his recent testimony at hearings held by the Legislature. Locating the documents could not reasonably require more than 20 days, let alone three months.⁷

DoH has required nursing homes to file daily reports throughout the pandemic through its Daily Health Emergency Response Data System (“HERDS”). Included in those reports are counts of all nursing home residents who die from COVID-19, both within nursing home facilities and elsewhere.

Further, DoH requires nursing homes to complete a questionnaire as part of their daily HERDS reports. The questionnaire asks nursing homes to report only numbers of COVID-19 fatalities that occurred inside and outside of nursing home facilities.⁸ Questionnaire questions seek numbers, and responses do not contain any information requiring DoH review.⁹

⁴ Ver. Pet. Ex. C.

⁵ FOIL § 89(3)(a) (emphasis added).

⁶ Ver. Pet. Ex. C.

⁷ Ver. Pet. Ex. D.

⁸ Ver. Pet. Ex. E.

⁹ *Id.*

Moreover, the HERDS records are readily available. DoH relied on its HERDS data when it conducted its analysis of COVID-19 nursing home fatalities in the state.¹⁰ DoH revised this analysis on July 20, two weeks prior to Empire Center's FOIL request.¹¹ HERDS is the source for the partial count for nursing home deaths that DoH regularly posts on its website.¹² And the HERDS questionnaire responses also appear to be the source for in-facility deaths that DoH regularly posts on its website. The DoH charts match the data collected in HERDS, absent COVID-19 deaths outside the facilities.¹³

Further, a joint legislative hearing was held in early August during which New York State Health Commissioner Dr. Howard A. Zucker, testified. One of the main issues discussed was the state's failure to provide data reflecting exactly how many nursing home residents died from COVID-19 in New York. Dr. Zucker testified that the state collects the relevant data through DoH's records systems. Dr. Zucker also testified that DoH has the death toll data Empire Center seeks.

Absent deaths outside the nursing home facilities, New York compares very favorably to most other states in terms of COVID-19 nursing home fatalities. Governor Andrew Cuomo and Dr. Zucker have relied on the death toll tally absent deaths occurring outside of facilities to claim that New York's nursing home response was better than most other states.

There's no need for DoH to conduct *any* physical search for the records Empire Center requested. The data sits in the HERDS system available for immediate retrieval and disclosure. When an agency has the ability to retrieve

¹⁰ Ver. Pet. Ex. F.

¹¹ *Id.*

¹² Ver. Pet. Ex. G. The numbers displayed are a result data collected from and "*provided by facilities.*" (emphasis added).

¹³ *Id.*

or extract records or data maintained in a computer storage system with reasonable effort, it is required to do so.¹⁴

Nonetheless, DoH denied Empire Center's appeal on September 16 and argued that its extension:

“[Is] 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...”¹⁵

There is no reason why DoH cannot disclose the requested records well in advance of November 5. In fact, there is no reason why DoH hasn't *already* disclosed the requested information. DoH is hiding it without justification. New Yorkers have a right to know exactly how many nursing home residents died from COVID-19, whether the death occurred inside or outside of a nursing home facility. A lawsuit should not be required for the public to obtain this information.

ARGUMENT

The New York Legislature enacted FOIL recognizing that “a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.”¹⁶ “Government is the public's business and *** the public *** should have access to the records of government in accordance with the provisions of [FOIL].”¹⁷

The number of nursing home residents that have died from COVID-19 in New York, whether they were in a nursing home facility at the time of death

¹⁴ FOIL § 89(3)(a).

¹⁵ Ver. Pet. Ex. H.

¹⁶ Public Officers Law (“FOIL”) § 84.

¹⁷ *Id.*

or not, is the public's business. A lawsuit should not be necessary for the public to know this. Yet, here we are, and only because DoH refuses to be open and transparent. DoH has the data readily available and it should have been disclosed already. A potential disclosure date of November 5 is unreasonable under the circumstances of Empire Center's FOIL request.

I. DoH Has the Death Toll Data. A Diligent Search for it is Unnecessary.

DoH already has the data available for immediate disclosure, it just refuses to disclose it. Dr. Zucker testified under oath that the state has been collecting the relevant data through DoH's daily Health Emergency Response Data System ("HERDS").¹⁸ DoH has required nursing homes to file *daily* reports through HERDS.¹⁹ Included in those reports are counts of all nursing home residents who die from COVID-19, both within the facilities and elsewhere.²⁰ And DoH relied on its HERDS data in graphs tracking daily nursing home deaths when it analyzed COVID-19 nursing home fatalities in the state.²¹ DoH updated its analysis on July 20, two weeks prior to Empire Center's FOIL request.²²

There is no reason why DoH hasn't already produced the records. DoH has the data, has used it in its own reports, yet refuses to disclose it. No search of physical files is necessary. Disclosure requires a simple data report that does not take more than two months. Therefore, DoH's constructive denial of Empire Center's FOIL request is unjustified, and nondisclosure runs counter to FOIL's mandate of open, transparent government.

¹⁸ Ver. Pet. ¶ 25.

¹⁹ Ver. Pet. ¶ 18; Ver. Pet. Ex. E.

²⁰ Ver. Pet. ¶ 19.

²¹ *Id.*

²² Ver. Pet. ¶ 22; Ver. Pet. Ex. F.

II. The Response Date Provided by DoH is Unreasonable Under the Circumstances.

Despite all this, DoH informed Empire Center that it *might* be able to provide the COVID-19 nursing home death toll data in early November, more than *three months* after Empire Center submitted its request.²³ DoH claims to be conducting a “diligent” search for responsive documents.²⁴ But this cannot be true. DoH only needs to look in HERDS for the data, like it did in its July report. Such a query shouldn’t take long, and it certainly shouldn’t take more than three months.

Agencies have three options when responding to a FOIL request, which must be done within five business days of receipt of a 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.²⁵ Under the circumstances an approximate response date more than three months after Empire Center’s request is decidedly not reasonable.

The determination of 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 a FOIL exception applies.²⁶

Each factor weighs heavily against DoH. Empire Center’s request isn’t voluminous. It’s simple; it’s numbers from a database. DoH has demonstrated it can access HERDS data when it put that data in a report in July. Responding to a FOIL request is no different. And Empire Center seeks only the recorded

²³ Ver. Pet. Ex. C.

²⁴ *Id.*

²⁵ FOIL § 89(3)(a).

²⁶ *Matter of Linz v. The Police Department of the City of New York*, (Supreme Court, New York County, NYLJ, December 17, 2001).

numbers. DoH has nothing to review for accuracy or redact. Therefore, DoH failed to provide Empire Center a reasonable response date and violated FOIL.

III. Empire Center is Entitled to Attorney's Fees and Costs.

FOIL § 89(4)(c) permits this Court to assess attorney's fees and litigation costs against an agency when a requestor substantially prevails, and the agency has no reasonable basis for denying access, or the agency fails to respond to a request or appeal within the statutory time.²⁷ Here, DoH has no reasonable (or any) basis to deny access to the records.

The legislature enacted FOIL § 89(4)(c) "to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL."²⁸ Awarding fees and costs is appropriate where disclosure only occurs through a petitioner needing to use judicial process and a respondent showing a clear disregard of the public's right to open government.²⁹

DoH has demonstrated a clear disregard of its responsibility to be open and transparent. Litigation should not be required to compel disclosure of data indicating how many New York nursing home residents died at the hands of COVID-19 in the state. Therefore, this Court should award Empire Center reasonable attorney's fees and litigation costs.

CONCLUSION

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

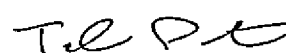
²⁷ FOIL § 89(4)(c).

²⁸ Senate Introducer's Mem. in Support, Bill Jacket, L. 2006, ch. 492, at 5.

²⁹ *Matter of New York Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 339 (3d Dept. 2011).

Dated: Albany, New York
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Respectfully submitted,



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