

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of

Index No.

EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

-against-

**VERIFIED PETITION**

NEW YORK STATE DEPARTMENT OF  
HEALTH,

Respondent.

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

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Petitioner Empire Center for Public Policy (“Empire Center”), for its Veri-  
fied Petition against Respondent New York State Department of Health  
(“DoH”), alleges as follows:

**Background**

***COVID-19 Deaths in New York Nursing Homes.***

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

5. New York is one of the 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.

6. 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.”

7. 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’s FOIL Request to DoH.*

8. 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.

9. 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. Exhibit A.

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

11. 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. Exhibit C.

12. DoH argues it needs this additional time because “a diligent search for responsive documents is still being conducted.” Exhibit C.

13. 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. FOIL § 89(3)(a) (emphasis added).

14. DoH did neither in its August 31 correspondence. Exhibit C.

15. Therefore, DoH constructively denied Empire Center's FOIL request.

16. 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. Exhibit D.

17. 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.

18. Nursing homes are required to complete a questionnaire as part of their daily HERDS reports. These questionnaires instruct nursing homes to report on COVID-19 fatalities that have occurred outside of nursing home facilities. Exhibit E.

19. The questionnaire does not request any information that could require review. Exhibit E.

20. DoH has been collecting the data in exactly the same manner as Empire Center requested it.

21. And DoH relied on its HERDS data when it conducted its analysis of COVID-19 nursing home fatalities in the state. Exhibit F.

22. DoH revised this analysis on July 20, two weeks prior to Empire Center's FOIL request. Exhibit F.

23. 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.

24. 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. Exhibit G.

25. Further, a joint legislative hearing was held in early August during which New York State Health Commissioner Dr. Howard A. Zucker, testified.

26. 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.

27. 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.

28. Therefore, there's no need for DoH to conduct *any* search, diligent or otherwise, for the information Empire Center requested. The information is already in the HERDS system and available for immediate disclosure.

29. When an agency has the ability to retrieve or extract records or data maintained in a computer storage system with reasonable effort, it is required to do so. FOIL § 89(3)(a).

30. 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..." Exhibit H.

31. 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.

32. 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.

33. A lawsuit should not be required for the public to obtain this information.

### **Parties**

34. Petitioner Empire Center is a domestic non-profit corporation based in Albany, New York, and is qualified as tax exempt under 26 U.S.C. § 501(c)(3).

35. Respondent New York State Department of Health is an "agency" within the meaning of FOIL § 86(3).

### **Jurisdiction and Venue**

36. This Court has jurisdiction under CPLR 7804(b) and CPLR 506(b) because all actions at issue in this case took place within Albany County and because Respondent has its main office in Albany County.

**Cause of Action:  
Wrongful Denial of FOIL Request**

37. Empire Center repeats and re-alleges paragraphs 1 through 34 as if fully set forth in this paragraph.

38. Article 78 is the appropriate method of review of agency FOIL request denials.

39. Empire Center has a right to the records at issue under FOIL.

40. DoH has not provided Empire Center with an approximate date which is reasonable under the circumstances on which it will respond to the FOIL Request.

41. DoH has constructively denied disclosure of the data.

42. DoH's failure to produce the records under the circumstances of the requests is not justified under FOIL.

43. Empire Center has exhausted its administrative remedies and has no other remedy at law.

44. Empire Center has not made any prior application for the relief requested here.

**Relief Requested**

45. Empire Center respectfully requests that this Court issue an order:
- a. Declaring that: (i) DoH acted unlawfully in failing to produce the records; and that (ii) DoH must release the records within five days of the date of the order;
  - b. Awarding attorneys' fees and costs incurred in this litigation as allowed under FOIL; and

c. Granting such other and further relief as this Court may deem just and proper.

Dated: Albany, New York  
September 18, 2020

Respectfully submitted,



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*Counsel for Petitioner*

VERIFICATION


STATE OF NEW YORK )  
 )  
COUNTY OF ALBANY )

I, Mark Walsh, being duly sworn, deposes and says:

I am Director of Operations for the Empire Center for Public Policy, Inc.,  
Petitioner in the above-captioned matter. I have reviewed the foregoing Veri-  
fied Petition and know its contents to be true to my knowledge, except as to the  
matters therein stated to be alleged upon information and belief, and that as  
to those matters I believe them to be true.

  
\_\_\_\_\_  
Mark Walsh

Sworn to and subscribed before me  
this 18<sup>th</sup> day of September, 2020

  
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Notary Public

