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COURT OF APPEALS

STATE OF NEW YORK

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IN THE MATTER OF:

RECLAIM THE RECORDS,

Appellant,

NO. 49

-against-

NYSDOH,

Respondent.

-----

20 Eagle Street  
Albany, New York  
April 9, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE ~~JUDGE~~ JUSTICE MANUEL MENDEZ

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Last case on today's  
2 calendar is matter of Reclaim The Records v. New York State  
3 Department of Health. And we are joined and delighted to  
4 be joined by our colleague, Justice Manuel Mendez from the  
5 First Department.

6 JUDGE MENDEZ: Thank you.

7 MR. MORITZ: May it please the please the court.  
8 Michael Moritz on behalf of Reclaim The Records. I'd like  
9 to reserve three minutes.

10 CHIEF JUDGE WILSON: Yes.

11 MR. MORITZ: Your Honor, Reclaim The Records is  
12 looking for basic biographical - - -

13 JUDGE GARCIA: Counsel, could you clarify for me  
14 exactly, at this stage, what you're looking for? So if we  
15 look at the three groups of records. Right? So say pre-  
16 '57, '57, '72, '72 basically to the present. Accurate that  
17 pre-'57 we're not concerned with in this appeal?

18 MR. MORITZ: Pre-'57 we're only concerned to the  
19 extent that the Department of Health has other records that  
20 they haven't yet produced. Because their only argument  
21 pre-'57 to withhold records, is saying that we've given you  
22 "the index". But the whole concept here is what they're  
23 claiming is the index is not actually what their own  
24 catalogue - - -

25 JUDGE GARCIA: Well, what did you ask for?



1 MR. MORITZ: We ~~we~~ asked for all indexed  
2 records, finding aids, their database; we used varying  
3 different terms. And so - - -

4 JUDGE GARCIA: So let's say if you want cause of  
5 death, for example, pre-'57. And they have that, I would  
6 assume, because they have two million death certificates  
7 that have - - - you get that?

8 MR. MORITZ: So it's unlikely that pre-'57 cause  
9 of death was indexed. These are generally on microfilm or  
10 microfiche. It kind of looks like a table. And normally  
11 it's just first name, last name, date of death. If they  
12 had - - -

13 JUDGE GARCIA: So would you be entitled to have  
14 that if they have that information on two million various  
15 death certificates?

16 MR. MORITZ: Yeah. So pre-'57 certainly we would  
17 be entitled to it, because anyone can actually - - -

18 JUDGE GARCIA: So they would have to go through  
19 on microfiche every death certificate they have and put  
20 that information onto an index for you?

21 MR. MORITZ: No. No, Your Honor. We're asking  
22 only for the indexes they have - - - they already have. So  
23 they're obligated by state statute to have it.

24 JUDGE GARCIA: Okay. So didn't they tell you  
25 that that's not on the index?

1 MR. MORITZ: Sorry. Say it again?

2 JUDGE GARCIA: They said that they don't have  
3 that on the index. Right?

4 MR. MORITZ: If they don't have it, great. We're  
5 not - - - we're not debating that.

6 JUDGE CANNATARO: And that question hasn't been  
7 resolved yet?

8 MR. MORITZ: Your Honor, it's baffling that after  
9 four years of this matter, the Department of Health has  
10 still never stated what records they have and what records  
11 they have for any specific period.

12 JUDGE CANNATARO: I thought there was testimony.  
13 I think it was from the '78, that - - - that there were  
14 pre-'57 records, which I think go all the way back to 1880,  
15 that had not been indexed? And that - - - you know, that  
16 was some - - - it was not a matter of dispute. But  
17 apparently it is?

18 MR. MORITZ: So - - - so there's two separate - -  
19 - two separate categories of records here. There's the  
20 certificates and then there's the indexes. We're not  
21 talking about certificates.

22 JUDGE GARCIA: Right.

23 MR. MORITZ: We're also not asking - - -

24 JUDGE CANNATARO: You can't have certificates,  
25 right?

1 MR. MORITZ: Well, they're actually public  
2 already.

3 JUDGE CANNATARO: Okay.

4 MR. MORITZ: So anything over fifty years old is  
5 already a public record. Anyone can get the entire  
6 certificate. You don't need to be related. You don't need  
7 to show any connection. It's ~~any~~ anyone, whether  
8 it's a researcher or a news - - -

9 JUDGE RIVERA: ~~I~~ I'm ~~I'm~~ just very  
10 unclear. I just need some real clarity here.

11 MR. MORITZ: Sure.

12 JUDGE RIVERA: There's a thing called the death  
13 index, correct?

14 MR. MORITZ: There's no one thing, but yes, they  
15 have to index their records.

16 JUDGE RIVERA: Are you saying there are multiple  
17 death indices?

18 MR. MORITZ: Yeah. So - - -

19 JUDGE RIVERA: And the - - - ~~and~~ excuse me.  
20 And that is what you want. Whatever these multiple death  
21 indices are?

22 MR. MORITZ: Correct.

23 JUDGE RIVERA: Okay. Are the multiple death  
24 indices different from the death index that they make  
25 publicly available online?

1 MR. MORITZ: Yes.

2 JUDGE RIVERA: Okay. Are those death indices - -  
3 - I think I know where you're going with this. The way  
4 they have organized whatever were the records that they  
5 have archived?

6 MR. MORITZ: So the old way of doing it was, they  
7 were microfilmed or microfiched.

8 JUDGE RIVERA: Yes.

9 MR. MORITZ: So yes. They are archived. They  
10 are preserved.

11 JUDGE RIVERA: Yes.

12 MR. MORITZ: The Department of Health has them.  
13 And in those - - -

14 JUDGE CANNATARO: What are - - - I'm sorry. What  
15 are microfilmed or microfiched? The ~~the~~ certificates  
16 or the indices?

17 MR. MORITZ: Both of them separately. Unrelated  
18 to each other.

19 JUDGE CANNATARO: So there are on microfilm or  
20 microfiche, historical death indexes?

21 MR. MORITZ: Correct.

22 JUDGE CANNATARO: Okay.

23 MR. MORITZ: And some of them - - -

24 JUDGE RIVERA: But these death indices, to be  
25 clear, are something different from a death certificate?

1 MR. MORITZ: Correct.

2 JUDGE RIVERA: Okay. So the - - -

3 JUDGE SINGAS: And something different than a  
4 death record?

5 MR. MORITZ: Yes.

6 JUDGE SINGAS: Is there a death record? And  
7 that's different?

8 MR. MORITZ: And I understand this is very - - -  
9 ~~it~~ it is confusing. And the way the statute is  
10 written is also confusing.

11 JUDGE RIVERA: Well, with all due respect, it's  
12 confusing because I don't understand what your request was.  
13 And I'm not sure the DOH is clear on what your request was,  
14 other than we want every record that you have. So you have  
15 to explain to me how it is you limited this request to  
16 other than, I want every record that you have?

17 MR. MORITZ: So Your Honor, when - - - when ~~-----~~  
18 ~~when~~ someone dies, there - - - a certificate is issued.  
19 Back in the day - - -

20 JUDGE RIVERA: Yes.

21 MR. MORITZ: - - - pre-1900, let's say, it was in  
22 a ~~-----~~ a register. Where, it was a long ledger - - -  
23 ledger and it was filled in.

24 JUDGE RIVERA: Uh-hum.

25 MR. MORITZ: That's the details. Where a death

1 certificate has a lot of information on it. It has your  
2 parents' names. It has date of death, cause of death,  
3 where you're buried, et cetera. The index is just a  
4 finding aid for - - - for the Department. So if you need -  
5 - - you know, now it's common for people who are trying to  
6 get a dual citizenship for a country in Europe, for  
7 example, where they need documentation. Step one is, well,  
8 I have no idea where my grandfather died, when he died.  
9 The starting point is you start with the index. It's just  
10 like the index of a book or the catalogue at the library.

11 JUDGE RIVERA: And that is all that you want?

12 MR. MORITZ: That's all we all we want.

13 JUDGE RIVERA: Okay.

14 MR. MORITZ: Yeah.

15 JUDGE RIVERA: So do they get to define what goes  
16 in the index?

17 MR. MORITZ: The - - - so there's the pre-  
18 computerized indexes. So before computers, these were  
19 indexed on pieces of paper in a book. And the books were  
20 then scanned into microfilm. They have those. And it's in  
21 the record actually. It's ~~-----it's~~ in Mr. Ferretti's  
22 ~~(ph.)~~ affidavit where he attaches to it the actual  
23 catalogue from the Department of Health, which says death  
24 indexes: the years; the cabinet drawer that these  
25 microfilms are in.

1 CHIEF JUDGE WILSON: And if I go to the  
2 Department of Health, I can look at those?

3 MR. MORITZ: Sorry, Your Honor?

4 CHIEF JUDGE WILSON: If I go to the Department of  
5 Health, can I look at them?

6 MR. MORITZ: No. Because they don't let the  
7 public look at them.

8 CHIEF JUDGE WILSON: Even for the very old ones  
9 that are on microfilm?

10 MR. MORITZ: Correct. You have to order it. But  
11 anyway - - -

12 CHIEF JUDGE WILSON: Oh. I'm sorry. You have to  
13 order it?

14 MR. MORITZ: You can order the death certificate  
15 if it's over fifty years old.

16 CHIEF JUDGE WILSON: I wasn't asking about the  
17 certificate. The indexes?

18 MR. MORITZ: Indexes you can. They're - - -  
19 ~~they're~~ they hold them.

20 JUDGE GARCIA: And there is more information on  
21 those microfiched indices than there is in the online one?

22 MR. MORITZ: So the online one only is '57 to now  
23 '72.

24 JUDGE GARCIA: Okay. But they gave you something  
25 pre-'57?

1 MR. MORITZ: Correct.

2 JUDGE GARCIA: And how do you know that what's on  
3 that that they gave you, is not as complete as what is in  
4 the file drawer?

5 MR. MORITZ: We don't in entirety because they've  
6 never said what they have. They've never shared what they  
7 have. And ~~and~~ this is a perfect example where they  
8 say our only, quote, "death index" starts in 1957, but then  
9 at the same time, produce to us an index pre-'57.

10 JUDGE GARCIA: Counsel - - -

11 MR. MORITZ: So they're being very inconsistent.

12 JUDGE RIVERA: But you only want the index; is  
13 that correct?

14 MR. MORITZ: There's no one index. And the  
15 problem is as the Department of Health - - -

16 JUDGE RIVERA: Indices. Excuse me. You only  
17 want the indices; is that correct?

18 MR. MORITZ: Correct.

19 JUDGE RIVERA: Okay. Can they decide what is the  
20 content of the indices?

21 MR. MORITZ: Pre-computers - - -

22 JUDGE RIVERA: Yes.

23 MR. MORITZ: - - - they're already printed. It's  
24 a book, like I was saying.

25 JUDGE RIVERA: Okay.

1 MR. MORITZ: So they can redact it if they want.  
2 If there's something that they don't like, if it had a ~~---~~  
3 ~~---~~a cause of death which I would I - - - I've seen indexes  
4 pre-72, they don't have cause of death on them. If there  
5 was another one that they had in their cabinets that did  
6 have cause of death, then if they view it as an invasion of  
7 privacy, they can redact it. That's it.

8 But here, instead of redacting, which is what you  
9 FOIL requires - - -

10 JUDGE RIVERA: Okay. You keep telling me about  
11 pre - - - there are things called indices, yes?

12 MR. MORITZ: Yes.

13 JUDGE RIVERA: Okay. That's what you asked for,  
14 yes?

15 MR. MORITZ: Yes.

16 JUDGE RIVERA: Okay. You're saying they didn't  
17 give you all of those, correct?

18 MR. MORITZ: Correct.

19 JUDGE RIVERA: I feel like I'm doing a cross-  
20 examination. But I need some clarity on this. So all your  
21 coming - - - going back to Judge Garcia's first question.  
22 All you're requesting now are those indices?

23 MR. MORITZ: Yes.

24 JUDGE RIVERA: However they've designed them,  
25 whatever information they have in them, that is what you

1 want? Yes?

2 MR. MORITZ: It's that simple. Yes.

3 JUDGE RIVERA: Okay. Thank you.

4 JUDGE GARCIA: Okay. Let's go to the second  
5 group, '57 to '72.

6 MR. MORITZ: Yes.

7 JUDGE GARCIA: What are you still looking for  
8 that - - - in that?

9 MR. MORITZ: Whatever else they've indexed. And  
10 how do we know there is something else? It's because in  
11 the record, you'll see in Mr. - - - Mr. Ferretti's  
12 affidavit, he filed a FOIL request unrelated to this case,  
13 and they produced to him an index which had different  
14 fields than the index that they show online. They - - -  
15 they, to him, produced a field - - -

16 JUDGE RIVERA: So you want whatever they have  
17 labeled an index?

18 MR. MORITZ: All the fields - - -

19 JUDGE RIVERA: You don't want the thing they've  
20 labeled the index that they're going to make public online?  
21 You want anything in-house that they have labeled an index?

22 MR. MORITZ: Yeah. It's a pretty self-  
23 explanatory concept for departments of health.

24 JUDGE RIVERA: No, no, no. I just - - - they got  
25 to go look for it. You want whatever they have labeled an

1 index?

2 MR. MORITZ: Yes, Your Honor.

3 JUDGE RIVERA: You're not sure what's in this  
4 index?

5 MR. MORITZ: We don't know what's - - - which  
6 fields from certificates were indexed, but we know that  
7 there is a universe.

8 JUDGE RIVERA: You want them because they are  
9 supposed to be an aid for a search. And you know they have  
10 - - - in your opinion, ~~you~~ you gather it has more  
11 than what this public death index or index contains?

12 MR. MORITZ: We know it does because they've  
13 produced it elsewhere.

14 JUDGE RIVERA: In the example you just gave?

15 MR. MORITZ: Yes.

16 JUDGE MENDEZ: And is ~~is~~ this something  
17 that you need in order to be able to find one of these, to  
18 get a certificate? Is this information that is necessary?

19 MR. MORITZ: Yeah. So the reality is the  
20 Department of Health is the sole holder of death  
21 certificates for all of New York except New York City. And  
22 if someone needs a needs a certified record, they go to the  
23 Department of Health. Now, if you don't have access to the  
24 index, the Department of Health has to do its own search,  
25 and they charge you for it.

1 JUDGE MENDEZ: What is the basic information that  
2 you are looking for in terms of what - - - what information  
3 do you really need in order to be able to get that record?

4 MR. MORITZ: Just the biographical information.

5 JUDGE MENDEZ: Just - - -

6 MR. MORITZ: Name ~~name~~, date of birth, date  
7 of death - - -

8 JUDGE CANNATARO: Is that your client's purpose  
9 in this? Are they ultimately seeking certificates or are  
10 they going to do what they do, based on the information  
11 contained in the indexes?

12 MR. MORITZ: So Reclaim The Records, it's a  
13 nonprofit, and their sole job is to help people locate  
14 records relating to their families or for any of these  
15 other purposes - - -

16 CHIEF JUDGE WILSON: You're a nonprofit - - -

17 JUDGE CANNATARO: They don't need a certificate  
18 to do that, right? In other words - - -

19 MR. MORITZ: The organization?

20 JUDGE CANNATARO: - - - if you got all the  
21 indexes or indices that you're looking for, it's not as if  
22 then you would start requesting certain copies of death  
23 certificates?

24 MR. MORITZ: The organization won't be requesting  
25 them, but ~~it it~~ it's - - -



1 JUDGE CANNATARO: People who use it - - -

2 MR. MORITZ: - - - a public service.

3 JUDGE CANNATARO: Yeah.

4 MR. MORITZ: Essentially. It - - - it's  
5 providing the library catalogue online to people.

6 CHIEF JUDGE WILSON: And it's affiliated somehow  
7 with Ancestry.com.? Reclaim The Records?

8 MR. MORITZ: No, Your Honor.

9 CHIEF JUDGE WILSON: Not at all?

10 MR. MORITZ: No. No. They're ~~they're~~ an  
11 independent nonprofit.

12 CHIEF JUDGE WILSON: So - - -

13 MR. MORITZ: But if they - - - if they - - -

14 CHIEF JUDGE WILSON: Right.

15 MR. MORITZ: - - - succeed in - - - so in these  
16 cases they have all over the country, when they  
17 successfully acquire records, they share it with  
18 organizations. One is called FamilySearch, which is a  
19 large organization, where I mentioned I actually have  
20 looked at the New York State index on FamilySearch because  
21 the ~~the~~ ones that are older than fifty years old were  
22 shared with that organization.

23 CHIEF JUDGE WILSON: And so to go back to the  
24 hypothetical you gave about somebody wanting to do  
25 genealogical research, and let's say it's for somebody who

1 passed away in 1980. So it's not in the ~~---~~ ~~in the~~  
2 records that are available. There's no index available  
3 from which that person could themselves look?

4 MR. MORITZ: There is. So in New York - - -

5 CHIEF JUDGE WILSON: In New York.

6 MR. MORITZ: - - - there is. They'll have access  
7 to the Social Security death master file, which is a  
8 federal index. So the federal index is public. It has  
9 over a hundred million decedents' birth and death dates in  
10 it, and place of - - - generally the place of residence,  
11 and it includes the Social Security number. So actually,  
12 Social Security numbers are public for anyone who has died.  
13 And you can request it yourself.

14 So the ~~---~~ ~~the~~ problem there is just having  
15 that information doesn't help you get the original death  
16 record because you don't know necessarily where they died.  
17 In New York, it's done on a town basis.

18 CHIEF JUDGE WILSON: So what I would then need to  
19 do is to go to the Department of Health, pay them  
20 something? Twenty dollars?

21 MR. MORITZ: I don't recall offhand what the fee  
22 is - - -

23 CHIEF JUDGE WILSON: Some - - -

24 MR. MORITZ: - - - but it's an hourly.

25 CHIEF JUDGE WILSON: Oh, it's an hourly rate for



1           them to run the index?

2                       MR. MORITZ:  They ~~-----they~~ have a search.  
3           They'll - - - that they - - - for a certain number of  
4           hours, that they'll use to search for the record.  But if  
5           you take someone in New York who goes there and says, my  
6           grandfather is John Smith, he died in the 50s.  I mean,  
7           good luck.  And so the reality is this is why people need  
8           the index.  It saves them money.  It saves them time.  And  
9           also, the Department of Health has a ~~-----a~~ backlog of  
10          thousands of records, and they just put it off and put it  
11          off.  And so you have these people who need records for all  
12          sorts of reasons.

13                     JUDGE CANNATARO:  So for your purposes, the more  
14          different indexes you get:  date of death;  place of death;  
15          cause of death;  the more helpful you can be to your users?  
16          Is ~~-----is~~ that - - -

17                     MR. MORITZ:  And by "users", it's really just the  
18          public.  It - - - it's a public service.  It - - - there -  
19          - - ~~it's-----~~ these are just posted online.  It's a  
20          database.  And so it's a free - - -

21                     JUDGE CANNATARO:  But somebody has to go seek it  
22          out and use it?  I mean, I've never heard of it before I  
23          got this case.

24                     MR. MORITZ:  Right.  So it's - - - they're not  
25          posted on Reclaim The Records' website, for example.



1 They're posted on public providers.

2 JUDGE GARCIA: So for the '57 through '72 indices  
3 that you have or can get - - - the public can get, does it  
4 have the certificate number on it?

5 MR. MORITZ: Yes.

6 JUDGE GARCIA: Isn't that really the search tool?  
7 I mean, I've never done this in the state, but in the cCity  
8 you give them a certificate number, they give you a  
9 certificate. I mean, as long as it's ~~it's~~ the age.

10 MR. MORITZ: So - - -

11 JUDGE GARCIA: I think it's fifty years.

12 MR. MORITZ: - - - the certificate number is very  
13 helpful. But again, let's ~~let's~~ use the example, if  
14 - - - you know, we take someone on this court with a very  
15 common last name, we'll take Wilson. If you're looking for  
16 someone named James Wilson, who died in Syracuse in the  
17 50s, just having the - - - the number - - -

18 JUDGE GARCIA: Then why would I need to know how  
19 James Wilson died?

20 MR. MORITZ: "How" is not the focus.

21 JUDGE GARCIA: So you're not seeking cause of  
22 death on anything?

23 MR. MORITZ: Over fifty years ago, there's ~~there's~~  
24 ~~there's~~ no restriction on it whatsoever. It's not - - -

25 JUDGE CANNATARO: So for the middle category you

1 are seeking cause of death index? Or the last category?

2 MR. MORITZ: If it exists - - -

3 JUDGE CANNATARO: You want it?

4 MR. MORITZ: Sure. But - - - but - - -

5 JUDGE GARCIA: But it doesn't help you find a  
6 record, right?

7 MR. MORITZ: Those are for other - - -

8 JUDGE GARCIA: Unless, for some reason, you knew  
9 James Wilson died of a heart attack or something. I mean -  
10 - -

11 MR. MORITZ: Right. So the ~~the~~ other  
12 example is death certificates cost money to order. And so  
13 a lot of people don't want to have to expend the cost.  
14 It's thirty dollars to order each record. So if you're  
15 looking for a common person, James Smith, and you don't  
16 know which one it is, then the person might have to spend  
17 some several hundred dollars just to try to get.

18 JUDGE GARCIA: You're going to have James Smith  
19 and a date of death, right? So the only other thing I  
20 think that might help you is place, right?

21 MR. MORITZ: Yes, Your Honor. Place - - -

22 JUDGE GARCIA: Of death?

23 MR. MORITZ: - - - place is remarkably helpful.  
24 And that's something - - - it's mainly birthday, death  
25 date, place of birth, place of death, are the most

1 important. The biographical information. There might be  
2 other fields indexed, but - - -

3 JUDGE RIVERA: Is that on the online index?

4 MR. MORITZ: Sorry, Your Honor?

5 JUDGE RIVERA: Is that on the online index - - -

6 MR. MORITZ: The online index does not have - - -

7 JUDGE RIVERA: - - - those - - - those fields?

8 MR. MORITZ: - - - does not have date of birth,  
9 place of birth, or place of death. It doesn't have any of  
10 those. It just has name, age, and a place of residence,  
11 which is not necessarily where someone died, and therefore  
12 not necessarily the town that has - - -

13 JUDGE RIVERA: But the essential one for your  
14 purposes is place of death?

15 MR. MORITZ: Yes, Your Honor. Because that's  
16 where the death certificate would be issued. And so this  
17 is a town by town. New York State does it by town. So  
18 it's either you can go to the Department of Health, and you  
19 say, person died - - - I said Syracuse, but you know, if  
20 you think - - -

21 JUDGE RIVERA: Do you want medical information?

22 MR. MORITZ: Medical information? Generally  
23 speaking, no.

24 JUDGE CANNATARO: Cause of death?

25 MR. MORITZ: Cause of death is very valuable, and

1 the main reason is family health history.

2 JUDGE RIVERA: I'm sorry. I thought you said you  
3 didn't want the cause of death?

4 MR. MORITZ: We don't want - - - I mean, about  
5 doctors or things like that. I don't think any - - - none  
6 of that is - - -

7 JUDGE RIVERA: That - - - that's not the cause of  
8 death?

9 MR. MORITZ: Cause of death is very beneficial  
10 for people.

11 JUDGE RIVERA: Is it part of the request?

12 MR. MORITZ: Yes.

13 JUDGE RIVERA: Is this what you're saying you  
14 want?

15 MR. MORITZ: Yes. To the extent it exists, yes.  
16 Again, the Department of Health here, instead of - - -

17 JUDGE RIVERA: But exists on an indice~~y~~ ~~(sic)~~?

18 MR. MORITZ: If it did, sure.

19 JUDGE RIVERA: Or index. Excuse me.

20 MR. MORITZ: Right. If it exists on any index,  
21 we don't know if it does. Because - - -

22 JUDGE GARCIA: It seems, though, it's different.  
23 You first seemed to be saying these indices are important  
24 and important to be in public, so people can go in, find  
25 the right record, and request a certificate. But now it's

1           - - - and that's why cause of death isn't particularly  
 2 helpful to that function. But now you seem to be arguing  
 3 that these substitute for the certificate. Because if I'm  
 4 doing genealogical research, what do I need the certificate  
 5 for? I can go into these things. So what is it you want?  
 6 Do you want indices so people can get records? Or do you  
 7 want indices, so people don't need to get records?

8           MR. MORITZ: Any of ~~any of~~ it. I mean, and  
 9 that's part of FOIL, is you don't have to state the  
 10 rationale. And so it's Reclaim The Records' purpose is a  
 11 broad - - - you know, do-good purpose of help people for  
 12 whatever person - - - for whatever reason it is. I mean,  
 13 the - - - the amicus brief - - -

14           JUDGE CANNATARO: You could do a lot of things  
 15 with this information without having to get certificates,  
 16 right? One could, not you. If I want to do research on my  
 17 - - - you know, family medical history to see what diseases  
 18 I might be susceptible to, I - - - and I had access to a  
 19 database that showed me the cause of death of every  
 20 ancestor I had, that would be valuable to me. Would you  
 21 agree with that?

22           MR. MORITZ: Of ~~of~~ course it would be  
 23 valuable. And - - -

24           CHIEF JUDGE WILSON: And if I wanted to price a  
 25 life insurance policy for Judge Cannataro, that might be



1 useful to me, too?

2 JUDGE CANNATARO: I - - - ~~I~~ ~~it~~ it's  
3 funny, but it's ~~it's~~ serious too. Wouldn't it be  
4 useful to other people?

5 MR. MORITZ: Well, they would then have to hire a  
6 whole genealogy team. So assuming the life insurance's  
7 company - - -

8 CHIEF JUDGE WILSON: Some of them are pretty big,  
9 last I checked.

10 MR. MORITZ: Again, if there's any worry about  
11 that, it's in the Department of Health's control to redact  
12 that field. That's ~~that's~~ step one for them. It's  
13 not to just say we're not going to give you anything.

14 JUDGE CANNATARO: So if they had a cogent reason  
15 why, say, cause of death might constitute a privacy  
16 interest, you would abide by that? Or you just say that's  
17 a different argument to have, other than the one we're  
18 having now?

19 MR. MORITZ: Fine. If that's what their response  
20 is. I mean, from - - - from day one, we're saying we'd  
21 like to have what you have. And their response is we don't  
22 have anything, but we've also given you everything we have.

23 JUDGE RIVERA: But just a moment. It's not, we  
24 want to have what you have, because I started with that.  
25 And you, I think, clarified that that's not what you're

1 asking for. You're asking for these indices only.

2 MR. MORITZ: We want what you have of the  
3 indices. Sorry, I didn't - - -

4 JUDGE RIVERA: Okay. So if - - -

5 MR. MORITZ: - - - finish that. Yes.

6 JUDGE RIVERA: - - - because they obviously have  
7 death records, they have other materials that they - - -

8 MR. MORITZ: Yes.

9 JUDGE RIVERA: - - - draw from to create the  
10 index. Yeah. He's nodding, yes. Okay. But you're not  
11 asking for those things?

12 MR. MORITZ: No.

13 JUDGE RIVERA: No. Just the index, however, they  
14 have designated this index, whatever they have chosen to  
15 put in the index, that is all you want?

16 MR. MORITZ: That is all we want.

17 JUDGE RIVERA: Okay.

18 MR. MORITZ: And not only that - - -

19 JUDGE RIVERA: Okay.

20 MR. MORITZ: - - - these are generally public in  
21 other states.

22 JUDGE MENDEZ: Is - - -

23 MR. MORITZ: So that - - -

24 JUDGE MENDEZ: - - - is there an index for the  
25 third period '72 to 2017?

1 MR. MORITZ: Is there a what? Sorry.

2 JUDGE MENDEZ: An index?

3 MR. MORITZ: Is there an index? Our  
4 understanding is that they have these more so computerized.  
5 So yes, there is an index. There was - - - in the '70s and  
6 '80s and '90s. ~~It~~ ~~it's~~ the same kind of paper index  
7 that was then microfilmed, which is in their cabinet  
8 drawers, which we know they have. But today how it's done  
9 is generally speaking, if someone dies at a hospital, it's  
10 input into a computer system. And then it's a spreadsheet.  
11 They can choose which columns to export.

12 So we ~~we~~ ~~that's~~ - - - that's the  
13 whole regime.

14 JUDGE RIVERA: So - - -

15 MR. MORITZ: Is it used to be paper - - -

16 JUDGE RIVERA: - - - so if - - -

17 MR. MORITZ: - - - now it's digital.

18 JUDGE RIVERA: - - - if ~~if~~ the categories  
19 you desperately would like to see are not on any of these  
20 indices, you're not ~~you're not~~ asking them to add it  
21 on and create something new, correct?

22 MR. MORITZ: Correct, Your Honor. We're - - -

23 JUDGE RIVERA: Or at least you're - - -

24 MR. MORITZ: - - - we are not - - -

25 JUDGE RIVERA: - - - you're starting here. Give

1 me the indices, and then maybe you'll have another FOIL  
2 request after.

3 MR. MORITZ: Correct, Your Honor.

4 JUDGE RIVERA: Okay.

5 MR. MORITZ: We ~~we~~ just want what has  
6 already been made. We're not asking for anything new. And  
7 because ~~because~~ New York law has always mandated the  
8 creation of an index for the Department of Health, we know  
9 they have it. And we also know they have it from the  
10 produced records from - - -

11 JUDGE RIVERA: Yes. But they could have one that  
12 they consider the index that the statute mandates. And yet  
13 you are saying, ah, but you have many others, and we want  
14 all of those.

15 MR. MORITZ: It - - - in ~~the~~ ~~in~~ the record,  
16 and I ~~I~~ can tell you the page it's on, 191 to 193.  
17 It's the spreadsheet from the Department of Health where  
18 they call them indexes and they identify is it in paper, is  
19 it in microfilm, or is it in microfiche, and what cabinet  
20 drawer is it in. So that's why. We're not ~~we're not~~  
21 creating ideas here. We're using their own catalogue.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. MORITZ: Thank you, Your Honors.

24 MR. HU: All right. Good afternoon, Your Honors.  
25 Kevin Hu on behalf of the Department of Health.



1           So I ~~-----I~~ would like to start with this issue  
2 of what exactly is in the Department's possession, because,  
3 quite frankly, I'm a little bit confused and concerned at  
4 this point. So - - -

5           JUDGE RIVERA: That does not bode well for me,  
6 I'll tell you that.

7           MR. HU: I ~~-----I~~ know, Your Honor. I've been  
8 sitting here panicking. So Public Health Law 4100 - - -

9           JUDGE RIVERA: Sorry.

10          MR. HU: - - - you know, requires the Department  
11 to serve as the sole custodian for all death records, which  
12 is a general term that includes death certificates from all  
13 localities except for the City of New York. That provision  
14 further requires the Department of Health to then create an  
15 index, but the sole substantive requirement that it imposes  
16 on the Department is to list the decedents by name.

17          So Judge Rivera, you ~~-----you~~ were asking who  
18 has the discretion to decide what substantive categories of  
19 information go into the index? It is necessarily the  
20 Department of Health. And here, the Department has  
21 exercised that discretion to limit the information for each  
22 decedent to seven particular categories. And you can see  
23 those seven on the published death index that is available  
24 on its website. It is first - - - first name, middle  
25 initial, last name, age, gender, and a residency code. And

1 I might be missing one.

2 JUDGE RIVERA: But ~~but~~ ~~but~~ you do  
3 have other things that are indices, even if you don't  
4 consider that? I understand - - -

5 MR. HU: Yes. I - - -

6 JUDGE RIVERA: - - - your point here.

7 MR. HU: Yes.

8 JUDGE RIVERA: As that death index that the  
9 statute requires, more than that?

10 MR. HU: That's right, Your Honor. We have - - -  
11 the Department has always acknowledged that it has  
12 additional information it could add to the death index. It  
13 has further recognized that it has additional documents  
14 that it has labeled an index. But the FOIL request was key  
15 to the New York State Death Index and expressly referred to  
16 what is available online.

17 JUDGE CANNATARO: Why isn't that argument  
18 semantic? All the information is being collected, I would  
19 assume from the same source, whether it's the certificate  
20 or some other informational source. So some of it's being  
21 called death index because it falls within those seven  
22 categories, one statutorily required category, and I assume  
23 six discretionary categories that have been designated  
24 death indexes, and the others haven't. But that's just  
25 because somebody at DOH says so.

1           So I'm not sure I understand how you could - - -  
2           you know, how you can make the argument that that's not  
3           part of the death index?

4           MR. HU:   Certainly, Your Honor.   So perhaps we  
5           could take a step back a moment.   So how the Department  
6           has chosen to store the death certificates has changed over  
7           time.   From 1988 through 2005, there were copies of each  
8           particular death certificate stored on microfiche.   But  
9           then, as technology advanced, the ~~the~~ Department has  
10          also turned to electronic storage formats.

11          And so for 1957 to the present, every time it  
12          receives a particular record, it scans and basically  
13          extracts all of the data points from those records into a  
14          database.   And from that database, it can then pick which  
15          particular fields it wants to produce for any given  
16          purpose.

17          JUDGE CANNATARO:   So you can index it any way you  
18          want?

19          MR. HU:   That is correct, Your Honor.   And so it  
20          ~~it~~ has - - - the Department has always recognized  
21          that it has additional categories of data that it could add  
22          to the seven, but the statute only requires the Department  
23          to list these - - - the decedents - - -

24          JUDGE RIVERA:   But - - -

25          MR. HU:   - - - by last name.

1 JUDGE RIVERA: - - - let's assume for one moment  
2 that the request is the thing you all call the death index,  
3 as well as any other index. What's the grounds for not  
4 giving them all the other indices?

5 MR. HU: Your Honor, unfortunately, I can't give  
6 you a definitive answer because it ~~is~~ is not clear to  
7 me that the department understood the FOIL request to be so  
8 broad. But at least some of the examples that Petitioner  
9 gave - - - so for example, one of the indexes just relates  
10 to the physical location of where the underlying death  
11 certificate is. Another one relates to an initiative the  
12 department had to digitize these certificates to begin  
13 with, and it tracked the progress. And given how the FOIL  
14 request expressly referred to what is available online and  
15 seemed like the more relevant genealogical information, the  
16 department just simply did not think that's what Petitioner  
17 actually cared about.

18 CHIEF JUDGE WILSON: Can I just back up?

19 JUDGE SINGAS: But I think in - - - I'm sorry.

20 CHIEF JUDGE WILSON: Oh, sorry. Go ahead. Go  
21 ahead.

22 JUDGE SINGAS: For the 1957 to 1970, they asked  
23 for all available data fields, not merely the fields shown  
24 publicly online. I think they were pretty clear about  
25 that.

1 MR. HU: That's correct, Your Honor. And that  
 2 perhaps gets to an issue with the scope of Petitioner FOIL  
 3 ~~FOIL~~ request. So if you take it at its broadest  
 4 interpretation, it's not just asking for the state death  
 5 index. Also any additional data fields, as ~~as~~ Your  
 6 Honor just pointed out. But then in responding to the  
 7 department's privacy-based concerns, suddenly Petitioner  
 8 retreats to a much more restrictive interpretation of what  
 9 they're actually seeking.

10 CHIEF JUDGE WILSON: I just want to understand a  
 11 prior answer you gave. So it - - - maybe I misunderstood.  
 12 But it sounded to me as if what you have '57 forward is a  
 13 database, and the database is built by essentially a  
 14 scanning and automatic extraction of all the data that is  
 15 on death certificates into a database. One would typically  
 16 not call a database an index, but from a database you could  
 17 ask for a report to be run, and a report that is produced  
 18 could be - - - wouldn't have to be - - - but could be an  
 19 index. And you ~~you~~ create - - - you use that  
 20 database to create the what you call the death index.  
 21 Everything so far sound right?

22 MR. HU: Yes. Agreed, Your Honor.

23 CHIEF JUDGE WILSON: Okay. And from time to  
 24 time, for the department's own purposes, you query the  
 25 database and ask for a report. And the report could be

1 something that you might call an index, depending on how -  
2 - - what the search terms were used and what you wanted  
3 reported, or it might be something you wouldn't actually  
4 call an index, but a different kind of report. Is that all  
5 fair?

6 MR. HU: Yes, that's correct, Your Honor. And so  
7 the ~~the~~ affidavit of the Bureau of Vital Records - -  
8 - the director of the Bureau of Vital Records explained  
9 that most of the queries that the Department does run are  
10 for administrative purposes.

11 CHIEF JUDGE WILSON: And some of those queries  
12 produce something that you could call an index, and some  
13 produce results that are not really an index?

14 MR. HU: That's correct, Your Honor. And so as -  
15 ~~as~~ Petitioner's pointed out, there are many things that  
16 the department has created and labeled an index. But  
17 ultimately the department, based on the language in the  
18 FOIL request, understood Petitioner to be seeking something  
19 quite different.

20 JUDGE SINGAS: What - - - ~~what~~ - - - how do you  
21 understand his request?

22 MR. HU: So the FOIL request specifically asked  
23 for the New York State Death Index, which each - - - with  
24 each word capitalized, and it made reference to what the  
25 State - - - what the Department of Health currently has

1 available on its website. And so we understood the FOIL  
2 request to be seeking basically two things. First,  
3 additional years, two to be - - - so the - - - excuse me,  
4 Your Honors. That state death index currently only covers  
5 the years 1957 through 1972. So the department understood  
6 his request - - - the petitioner's request to be along two  
7 forms. First, to add additional years to that index, and  
8 secondly, for each year to add additional categories of  
9 data beyond the seven that the Department has chosen.

10 CHIEF JUDGE WILSON: And just so I put a pin in  
11 this. You haven't yet queried the database to produce the  
12 death index, for example, for 2010?

13 MR. HU: That is correct, Your Honor. So - - -

14 CHIEF JUDGE WILSON: You could do that?

15 MR. HU: We could do - - - the department  
16 certainly could - - -

17 CHIEF JUDGE WILSON: But you haven't done it yet?

18 MR. HU: - - - but has not done yet yet because  
19 of privacy-based concerns as well as Title ~~30~~ 35.5.  
20 so - - -

21 JUDGE CANNATARO: Just to put one more pin in  
22 that. With respect to the pre-'57 records, is it your  
23 position that you've now disclosed what you call the New  
24 York State Death Index for pre-'57 records? Because  
25 clearly, those are not available on the website.

1 MR. HU: That is correct, Your Honor. So I ~~-----~~  
2 ~~I~~ was under the impression that that time period was no  
3 longer in dispute. Because in - - - after the  
4 administrative appeal in this matter, the Department  
5 produced what's called a comma separated value file  
6 covering the years 1856 through 1956.

7 JUDGE CANNATARO: I saw that.

8 MR. HU: And the ~~-----the~~ substance of that file  
9 is very similar to the New York State Death Index as we  
10 know it, for the subsequent years.

11 JUDGE CANNATARO: So your position is, or at  
12 least you think, that the producing the CSV file satisfied  
13 the ~~-----the~~ request for pre-'57 death index information?

14 MR. HU: Exactly right, Your Honor.

15 JUDGE CANNATARO: There should be no dispute in  
16 this court over that?

17 MR. HU: ~~That-----that~~'s exactly right. That ~~-~~  
18 ~~-----that~~ is certainly the - - -

19 CHIEF JUDGE WILSON: So how did you get the data  
20 that created - - - that you used to create the CSV file  
21 pre-'57?

22 MR. HU: I believe it was actually a process of  
23 looking at each death record that was in the microfiche,  
24 and so obviously it was a very time intensive process.

25 JUDGE RIVERA: You did it for this purpose

1 specifically?

2 MR. HU: I believe - - -

3 JUDGE RIVERA: Or that - - - or it existed  
4 because it had been done?

5 MR. HU: I believe it already existed.

6 JUDGE RIVERA: My thought.

7 MR. HU: And that's why we see the cutoff is 1956

8 - - -

9 JUDGE RIVERA: That was my understanding.

10 MR. HU: - - - and then suddenly the Department  
11 changed it.

12 JUDGE RIVERA: Okay. Can I - - - when you said  
13 your understanding of ~~-----of~~ the request is that they  
14 wanted more years beyond the '57 to '72. And ~~-----and~~  
15 your understanding now is also that, pre-'57 you gave them  
16 everything that they requested, but on the post-'72 they  
17 want more years. But then you said, ~~-~~"and - - - and DOH  
18 understood that they wanted more categories." What are  
19 these additional categories, as DOH understood it, based on  
20 the request?

21 MR. HU: So to be frank, Your Honor, DOH had no  
22 idea which particular categories that Petitioner was  
23 seeking, and so out of an abundance of caution, it  
24 interpreted the request to potentially cover all of them.  
25 Because every data point within a death record is now

1 available on the database to give the full request its ~~---~~  
2 ~~its~~ broadest interpretation, it would cover the entirety  
3 of that database. And so that ~~--- that~~ potential scope  
4 formed the basis of the particular privacy-based  
5 objections.

6 JUDGE SINGAS: Yeah. I have a question about the  
7 privacy-based exemption because - - -

8 MR. HU: Yes.

9 JUDGE SINGAS: - - - it's hard in - - - ~~in~~  
10 without context - - - you know, without knowing what's  
11 actually in those records to make a decision about whether  
12 those exemptions should apply or not. So for example, in a  
13 cause of death, someone might kill themselves by taking  
14 pills, but their cause of death might be cardiac arrest  
15 because their heart stopped. What's on that? Like, I ~~---~~  
16 ~~I~~ have no idea what it would be.

17 So if it was suicide, then I would say, yes, that  
18 would be a privacy concern. If it's not, we have no  
19 information about what it is ~~--- what it is~~ that's on  
20 there for cause of death. Can you help us out?

21 MR. HU: Your Honor, so based on my - - - my - -  
22 - based on conversations with my client, and so this isn't  
23 necessarily reflected in the record, for cause of death,  
24 that field, more often than not, will mimic what you would  
25 find on a long-term - - - on a long-form coroner's report.

1 And so the amount of detail is that it could potentially be  
2 substantial.

3 On page 121 of the record in the BVR director's  
4 affidavit, she lays - - - she sets forth what the  
5 Department considers to be sensitive categories of  
6 information such that the mere disclosure would necessarily  
7 intrude on the privacy of a deceased individual. And this  
8 court has recognized that even the deceased do have a  
9 privacy interest in their private affairs, which flows to  
10 their survivors.

11 JUDGE RIVERA: There ~~--- there~~ was not an in-  
12 camera review of records; is that correct?

13 MR. HU: That is ~~--- that is~~ correct, Your  
14 Honor. The D~~--- the~~ department has never shown the  
15 entirety of its database to ~~--- to~~ a judicial fact-finder  
16 for - - -

17 JUDGE RIVERA: But ~~--- but~~ merely, as you say,  
18 assume that it's all these other categories and then made  
19 its arguments regarding either the unwarranted invasion of  
20 privacy and/or the statutory argument?

21 MR. HU: That's correct, Your Honor.

22 JUDGE RIVERA: Right?

23 MR. HU: And it's ~~--- it's~~ worth mentioning  
24 that there are two distinct privacy interests that the  
25 Department is concerned with. So the first relates to a

1 subset. So certain sensitive categories of information  
2 such as cause of death, pregnancy status, whether the death  
3 was the result of a homicide, accident, or suicide. So the  
4 disclosure of those categories would necessarily violate  
5 someone's personal privacy. But the second privacy  
6 interest is in how the disclosure of even basic  
7 biographical details might be misused.

8 And so essentially, the department is saying that  
9 all of this data, even the seven categories for this most  
10 recent fifty years, would violate personal privacy because  
11 it would ~~---~~ ~~it would~~ create an unwarranted risk that  
12 this information could be used to perpetrate identity  
13 theft.

14 JUDGE RIVERA: But year 49, it doesn't? Or year  
15 51, excuse me. I went in the wrong direction. It doesn't?

16 MR. HU: That ~~---~~ ~~that~~ is correct, Your Honor.  
17 And ~~---~~ ~~and~~ the Department believes that's consistent  
18 with this court's precedent in matter of Harbatkin this  
19 court seemed to recognize that fifty years is ~~---~~ ~~is~~ a  
20 cutoff in ~~---~~ ~~in~~ which privacy interests might be  
21 extinguished. And the department also relied on a  
22 concurrent fifty-year period in ~~---~~ ~~in~~ which federal law,  
23 namely HIPAA, finds a privacy interest in certain health  
24 information.

25 JUDGE GARCIA: Counsel, can we go back to pre-

1 '57?

2 MR. HU: Yes.

3 JUDGE GARCIA: And now you have said that in the  
4 course of this litigation, you've turned over this  
5 additional CSV or whatever - - -

6 MR. HU: Yes.

7 JUDGE GARCIA: - - - information which you  
8 thought ended the dispute pre-'57. Your opposing counsel  
9 has made the point that there are these other indices. But  
10 having turned over this additional information, is it  
11 possible that these other indices contain any other  
12 information in addition to what's in this supplemental  
13 discovery you made or production?

14 So you turned over this CSV file. Could there be  
15 indices, existing indices that they now say they're looking  
16 for, and I understand there's a dispute over that, but is  
17 it possible that there are fields on that that have not  
18 been turned over in this latest production you've made?

19 MR. HU: I ~~-----~~ cannot provide the court with  
20 a definitive answer on that, and that's certainly something  
21 that I could discuss with co-counsel afterwards.

22 CHIEF JUDGE WILSON: Do you know whether the data  
23 was put into the CSV - - - or into the database, at least,  
24 from which you could extract the CSV information for the  
25 purpose for the period before 1957 of replicating the

1 fields that are publicly available in the death index?

2 MR. HU: It is my understanding that the CSV file  
3 data has not been put into the current database that covers  
4 1957 through - - -

5 CHIEF JUDGE WILSON: No, no, I guess I was trying  
6 to ask something different.

7 MR. HU: Okay. I apologize.

8 CHIEF JUDGE WILSON: So the ~~the~~ records  
9 before 1957 were all on microfilm or microfiche. They were  
10 not initially entered ~~by~~ into a computer or anything  
11 like that. And as I think you said it was a laborious  
12 process for some people to look at these  
13 microfilm/microfiche records and I assume, manually enter  
14 the data into something. Because the CSV field is a  
15 digital field, right? It's ~~it's~~ numbers separated by  
16 commas.

17 MR. HU: Yes. That's correct.

18 CHIEF JUDGE WILSON: So they ~~they~~ didn't -  
19 - - they probably didn't just type numbers and commas, they  
20 probably put it into something, a database of some sort.  
21 And my question is, they - - - my ~~my~~ assumption is  
22 they were doing that for the purpose of taking some of the  
23 information, or maybe all the information, that was in  
24 those certificates and putting them into some format where  
25 you could then extract the CSV files. Do you know if the

1           purpose they were doing that - - - so when they were  
2           looking at these records and extracting information, were  
3           they limiting the ~~-----the~~ information they were  
4           extracting to the fields that you now find in the death  
5           index, so they could have a replication of those fields  
6           from the pre-'57 period, or were they trying to extract  
7           additional information as well?

8                       MR. HU: Your Honor, unfortunately I don't know  
9           because I didn't realize the - - - this time period - - -

10                      CHIEF JUDGE WILSON: Yeah.

11                      MR. HU: - - - was ultimately at issue in this  
12           proceeding.

13                      CHIEF JUDGE WILSON: Okay.

14                      MR. HU: So I see that my time is up. So if I  
15           could just make one comment in closing?

16                      CHIEF JUDGE WILSON: Yes.

17                      MR. HU: So the department respectfully requests  
18           that this court affirm the Third Department and dismiss the  
19           petition. But in the event that this court does not, we  
20           ask that this court provide guidance on two - - - on two -  
21           - - two grounds. First, clarify which additional years the  
22           department must produce, must add to the death index. And  
23           second, what additional categories of information, if any,  
24           the department must supplement the health index with.  
25           Thank you.

1 CHIEF JUDGE WILSON: Thank you.

2 MR. MORITZ: I just want to clarify a few of the  
3 questions that ~~that~~ were raised. In terms of what  
4 has - - - what the Department has done in terms of the CSV  
5 file you mentioned. They've contracted with private  
6 companies to do this. It's a government contract that they  
7 get to index the files. And so this has been done in New  
8 York; it's done all over the country. So it's not  
9 necessarily a laborious process where the - - - the agency  
10 is taking all this time to do it. These are government  
11 contracts; it's a third-party. They ~~they they~~  
12 copy the indexes into spreadsheets, and then, the agency  
13 has now a spreadsheet that they can filter and sort,  
14 instead of having to go to the drawers and find these old -  
15 - -

16 CHIEF JUDGE WILSON: Yeah. My question wasn't  
17 really who did it. My question is whether there was a - -  
18 - whether the extraction of the information from the pre-  
19 '57 records, which was done manually, extracted all the  
20 information or some of the information? And the answer is  
21 he doesn't know, and I assume you don't know either.

22 MR. MORITZ: I do know. I - - - ~~it's it's~~  
23 ~~it's~~ it's a - - - they just extracted - - - they copied  
24 the indexes into computers. And what these indexes had was  
25 just basic fields. So the - - - the pre-'72, let's say,

1 fields - - - pre-'57 - - -

2 CHIEF JUDGE WILSON: Pre-'57.

3 MR. MORITZ: Yeah, yeah. These are ~~-----these~~  
4 ~~are~~ very basic tabular sheets. You can find them online.

5 JUDGE CANNATARO: So is it the same indices as  
6 what's in the online version of '57 to '72? Or is - - -

7 MR. MORITZ: It - - - it's - - -

8 JUDGE CANNATARO: - - - it more than that?

9 MR. MORITZ: - - - it's similar. So a lot of  
10 them will have the residence code - - - the code for the  
11 town of death. That's not in the online one, which is  
12 something we're ~~-----we're~~ really looking for. They use  
13 codes - - -

14 JUDGE CANNATARO: So there is more? So to - - -

15 MR. MORITZ: Yes.

16 JUDGE CANNATARO: I ~~-----I~~ think the answer to  
17 the Chief's question is you believe, or you know - - -

18 MR. MORITZ: Yeah.

19 JUDGE CANNATARO: - - - that there is more  
20 information in what was extracted for pre-'57 records than  
21 what has been turned over thus far?

22 MR. MORITZ: And post-'57.

23 CHIEF JUDGE WILSON: Wait. Maybe I missed - - -  
24 one of us, misunderstood the answer I think. So for the  
25 pre-'57, do you think that the CSV files you got include

1 all the information that was on those microfilm records?

2 MR. MORITZ: It's likely what was on one of these  
3 forms of indexes they looked at. Unfortunately, what has  
4 happened is DOH has produced - - - has created numerous  
5 indexes over the years. It might have been what's on one,  
6 it might not have been what's on another.

7 And so the page I mentioned earlier 190, I  
8 believe it was 191. Yeah. 191 is a spreadsheet of the  
9 various indexes they have. They have indexes that go from  
10 varying different age ranges - - - year ranges that overlap  
11 each other.

12 JUDGE CANNATARO: Counsel, when ~~when~~ your  
13 adversary left the podium, he said if you don't affirm the  
14 Appellate Division, then please tell us what time periods  
15 we still have to disclose. And far more frighteningly, he  
16 said, tell us what categories of information we need to  
17 disclose.

18 MR. MORITZ: Yeah.

19 JUDGE CANNATARO: And your presentation since you  
20 came back, doesn't - - - like, that doesn't clarify  
21 anything about what categories are missing. So can you  
22 just tell us? Let me ask you simply, what categories of  
23 information do you not have from pre-'57 that you know that  
24 they do have and that you want?

25 MR. MORITZ: Pre-'57, I don't know offhand if

1 there is anything else, because I've never seen the index.

2 JUDGE CANNATARO: So can we call it a day on pre-  
3 '57? Because we don't know. I promise you we don't know.

4 MR. MORITZ: But we don't ~~we don't~~ aver  
5 that it's your responsibility to make that decision. It's  
6 ~~it's~~ the trial court or the Appellate Division, none  
7 of whom did an in-camera review. That ~~that~~'s step  
8 one, here, is no one knows what they have.

9 JUDGE RIVERA: So - - - so - - -

10 MR. MORITZ: Why are we taking their word - - -

11 JUDGE RIVERA: - - - ~~would that~~ so would  
12 that - - - is that what's missing? That there should have  
13 been an in-camera review of every one of their indices?  
14 Not the death index. Not ~~not~~ what you've got. No,  
15 I'm not talking about that.

16 MR. MORITZ: Or at least a meet and confer.

17 JUDGE RIVERA: These - - - these other indices?  
18 Because you're saying all I want is the indices. You  
19 didn't want anything else.

20 MR. MORITZ: Yeah.

21 JUDGE RIVERA: You're staying with that.

22 MR. MORITZ: Yes, Your Honor. And that's - - -  
23 and that's what's the precedent in this state - - -

24 JUDGE RIVERA: So but - - -

25 MR. MORITZ: - - - the data tree - - -

1 JUDGE RIVERA: - - - so is that - - - is that the  
2 step, perhaps? That's might - - - might be helpful here,  
3 all the way around, if there was an in-camera in case they  
4 don't want to produce the indices for you to view. To show  
5 to the judge and let the judge make a preliminary decision  
6 about whether or not the indices and any additional  
7 information should be released?

8 MR. MORITZ: Yes, Your Honor. I think step one,  
9 here, a very reasonable approach would be - - -

10 JUDGE RIVERA: Did you ever ask for that?

11 MR. MORITZ: Well, there was no hearing at the  
12 trial level.

13 JUDGE RIVERA: Okay.

14 MR. MORITZ: And on appeal, the two judges in  
15 dissent suggested an in-camera review.

16 JUDGE RIVERA: Okay.

17 MR. MORITZ: And so - - - and as I mentioned, I  
18 would have loved to have a meet and confer over the past  
19 four years, but it never happened. And so we would love to  
20 just know what's the universe, so we can reasonably discuss  
21 it. And we're not asking for everything under the sun, we  
22 - - -

23 JUDGE RIVERA: Well, ~~let - - - let's - - -~~ let's  
24 just - - - because we never really got to their other  
25 arguments. So let's go with the, the most recent fifty

1 years that they do not want to give anything from that  
2 period because they claim it's an unwarranted invasion of  
3 privacy or otherwise violates the statute. Can you address  
4 why there's not fraud issues that perhaps are relevant  
5 here, or identity theft issues that may - - -

6 MR. MORITZ: Yes, Your Honor.

7 JUDGE RIVERA: - - - you know, it sounds rational  
8 to say, I don't want to give up all this information  
9 because identity theft and fraud is rampant. Why aren't  
10 they right about that?

11 MR. MORITZ: Right. So it might be true that  
12 identity theft is an issue, but they've provided no  
13 evidence, and the burden's on them under FOIL to show how  
14 can access to a death index possibly lead to identity  
15 theft. We're talking about people who are deceased, some  
16 of whom up to fifty years ago. If you know when someone  
17 died fifty years ago - - - if you walk into a cemetery and  
18 see - - - read a tombstone, do you now have the ability to  
19 commit identity theft?

20 CHIEF JUDGE WILSON: I think there's some pretty  
21 good evidence that people in the 1960 presidential  
22 election, who were dead, voted in Chicago.

23 JUDGE CANNATARO: I recently heard that Social  
24 Security is paying out to 250-year old people. I mean - -  
25 -

1 MR. MORITZ: So - - -

2 JUDGE CANNATARO: - - - maybe this information  
3 can be used nefariously.

4 MR. MORITZ: So to - - - to both of those - - -

5 JUDGE RIVERA: And they say, of course you can  
6 come up with sort of piecemeal use of identity, right?

7 MR. MORITZ: So - - -

8 JUDGE RIVERA: Different fields of identity from  
9 different individuals to try and use that for fraudulent  
10 purposes - - -

11 MR. MORITZ: So - - -

12 JUDGE RIVERA: - - - why aren't they right about  
13 that?

14 MR. MORITZ: - - - something - - - something that  
15 we mentioned in our most recent brief is ~~is~~ actually  
16 the Department of Treasury recently said that having access  
17 to a death index helped them prevent fraud and recover  
18 funds. And because it's using the death index, you can  
19 check if someone - - -

20 JUDGE CANNATARO: But cCounsel, that depends on  
21 who's using it for what purpose. I mean, it's great that  
22 Treasury found a ~~a~~ fraud reducing use for it, but  
23 there could be someone out there who's using it to commit  
24 fraud, couldn't there?

25 MR. MORITZ: Well, we ~~we~~ should look at ~~we~~

1 ~~at~~ the ~~the~~ landscape of the country, which is, this  
2 is already the ~~the~~ federal death index; the Social  
3 Security death index; goes up to the present, and you have  
4 death indexes public in all of our neighboring states. And  
5 there's not a not a single reported use from the department  
6 of anyone having committed fraud using a death index.

7           And so the burden falls on them. It's not on  
8 Reclaim The Records' part to have to find evidences of  
9 fraud. They have the burden and they've shown zero  
10 instances. And so if we look - - - if ~~if~~ New Jersey  
11 has it public, if Connecticut has it public, if  
12 Massachusetts has it public, which they all do, and no one  
13 says there's any fraud, and you can go on the Social  
14 Security death index and find your grandmother in there  
15 with her birth - - - birthday, last date, and Social  
16 Security number all public, and no one's claiming fraud,  
17 then why are we just taking the word of the employee of the  
18 Department of Health on their own behalf? So they're using  
19 their own statement without any expertise, without any  
20 factual evidence, and just claiming you can't have anything  
21 because we think there might be fraud.

22           JUDGE RIVERA: But what about the unwarranted  
23 invasion of privacy?

24           MR. MORITZ: So the ~~the~~ case law upon which  
25 they rely, the New York Times, is probably the most unique

1 fact-pattern you can come up with, with the 9/11 calls - -  
2 - 911 calls on 9/11. And that's not precedent that should  
3 apply to every FOIL case involving privacy. That - - - the  
4 court - - - this court said in that case, it's an extremely  
5 unique fact-pattern involving the most egregious forms of -  
6 ~~of~~ communications.

7 JUDGE RIVERA: So the test is a balancing test,  
8 right?

9 MR. MORITZ: Sorry, Your Honor?

10 JUDGE RIVERA: It's a balancing test. You don't  
11 disagree with that?

12 MR. MORITZ: Correct. It's a balancing test.  
13 And so - - -

14 JUDGE RIVERA: Okay. All right. So ~~so~~ why  
15 does it balance in favor of your request? Whatever that  
16 request may be.

17 MR. MORITZ: It's because - - - so if you look at  
18 Harbatkin, for example, they talk there about even private  
19 matters fade with time. So it's ~~it's~~ a scale. So  
20 something that's private yesterday, and so they mentioned  
21 obituaries in the newspaper - - - in their post - - - not  
22 in their post, in their brief. That's from yesterday. But  
23 if someone died forty-five years ago, why are we to apply  
24 the same restrictive reading as we do to the 911 calls of  
25 people in the towers? And so they - - - it ~~it~~ is a

1 scale between those types of privacy invasions. Is just  
2 having a name and a date of birth and a date of death on a  
3 piece of paper invading someone's privacy? Like I said,  
4 you can go to a cemetery and see the same information.

5 JUDGE RIVERA: Except you want many more fields  
6 than that?

7 MR. MORITZ: But that goes to the question of  
8 redaction. That doesn't go to the question of withholding.  
9 ~~That~~ that's a separate consideration. Their  
10 obligation is to produce. And if they don't produce, they  
11 can redact what they view as private. Instead, they just  
12 said, it's all private, we're throwing our hands up and  
13 giving you nothing. Versus, on the other hand, the public  
14 interest. It's not just genealogists; it's also - - - one  
15 of the amicus briefs was about surrogate's court. How if  
16 someone dies intestate, you need to prove the whole family  
17 structure. ~~There~~there's many other examples here  
18 where ~~where~~it comes into play. I know I'm well over  
19 my time, so I thank you all for your questions.

20 CHIEF JUDGE WILSON: Thank you.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Reclaim The Records v. NYSDOH, No. 49 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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