Matter of Reclaim the Records v New York State Dept. of Health
2023 NY Slip Op 34967(U)
February 6, 2023
Supreme Court, Albany County
Docket Number: Index No. 905532-22
Judge: L. Michael Mackey
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
RECLAIM THE RECORDS,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

DECISION AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

(Supreme Court, Albany County, Special Term, January 13, 2023)
Index No. 905532-22

(RJI No. 01-22-ST2443)

(Justice L. Michael Mackey, Presiding)

APPEARANCES: Michael D. Moritz, Esq.
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Mackey, J.:

In this CPLR Article 78 proceeding, petitioner Reclaim the Records ("petitioner")

seeks a judgment compelling respondent the New York State Department Health ("respondent" or the "DOH") to comply with its Freedom of Information Law (*see* Public Officers Law art. 6 [hereinafter "FOIL"]) request by providing it with the public information it sought, together with costs of this litigation pursuant to Public Officers Law § 89. Respondent opposes the petition.

Petitioner's FOIL Request

On November 11, 2021, Michael D. Moritz, Esq. ("Mr. Moritz"), on behalf petitioner, submitted a FOIL request to respondent[1] for:

> "one complete set, in digital form, of the New York State Index, covering all data that is already retained by DOH in textual or database format, for all available dates through December 31, 2017, inclusive (the "Death Index")" (*see* NYSCEF Doc. No. 4).

Mr. Mortiz expressly stated that he was not seeking "actual copies of death certificates, but rather, merely the basic text index or database...to state deaths that DOH retains, part of which DOH already freely publishes in an online dataset..." He further clarified that based on the online index already published for the years 1957-1970, petitioner was requesting "any and all computerized tabulations or files retained by DOH."

On February 15, 2022, DOH Records Access Officer Rosemary Hewig (the "RAO") responded to petitioner's FOIL request (*see* NYSCEF Document No. 32) by providing petitioner with a record reflecting the death index for 1971. The RAO also provided links to records reflecting the official, published Death Index for the years 1957 through 1970, which are posted on DOH's Health Data NY website. The RAO denied the request for indexes for the years 1972 through 2017 as "specifically exempted from disclosure by State

[1]Respondent maintains New York State's vital records, including birth and death certificates and the information on those records (Public Health Law ["PHL"] § 4100). Under PHL § 4100(2), all "death records" must be kept on file and properly indexed by respondent, whether typewritten, printed, photographed or magnetically stored (PHL § 4100[2]).

or Federal Statute in accordance with New York Public Health Law §4174(1)(a), which states that death records are not subject to disclosure pursuant to article 6 of the Public Officers Law, and §35.5(c)(3) of Title 10 of the New York Codes Rules and Regulations, which states that 'no information shall be released from a record of death unless the record has been on file for at least 50 years.'"

On March 8, 2022, petitioner filed an administrative appeal of respondent's partial denial of its FOIL request (*see* NYSCEF Document No. 33). Petitioner specifically appealed the denial of:

> 1) the Death Index predating 1957; 2) all available data fields from DOH's "internal files" for the Death Index from 1957-1970; 3) already-stored electronic fields of data not already provided for the 1971 Death Index, including the Social Security Number of the deceased, and exact date of birth; and 4) an already "tabulated computerized [Death] index" for 1972-2017.

On March 22, 2022, David Spellman, DOH Records Access Appeals Officer, issued his appeal determination (*see* NYSCEF Document No. 34). Mr. Spellman affirmed that there were no responsive records prior to 1957 because no computerized records were available. He did, however, note that "comma separated value" ("CSV") files from the time period may exist and remanded the matter back to the RAO to conduct a diligent search for such records. Mr. Spellman affirmed the denial of additional fields from the 1957 to 1970 set as an unwarranted invasion of personal privacy under Public Officers Law § 87(2)(b). He also upheld the denial of records from 1972 to 2017 on the basis that, as is pertinent here, the recent indices (after 1971) were properly excluded from FOIL disclosure under the personal privacy exemption (*see* Public Officers Law § 87[2][b]) and under the governing regulations precluding respondent from releasing death records for 50 years (*see* 10 NYCRR § 35.5[c][3]), stating that:

> "[t]he RAO properly denied your request for records related to 1972-2017 as exempt by statute [POL §87(2)(a), as 'specifically exempted from disclosure by state or federal statute' in accordance with Public Health Law §4174(1)(a), which states that death records are not subject to disclosure pursuant to article six of the POL as well as §35.5(c)(3) of Title 10 of the New York Codes Rules and Regulations]. The RAO is bound by law and by regulation. DOH cannot release information from the files of certified death records. Moreover, the records from 1972-2017 were properly denied as an unwarranted invasion of personal privacy under POL §87(2)(b) because under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") health information about a decedent continues to be protected health information for 50 years following the death of the individual. 45 CFR 164.502(f). The application of HIPAA under POL §87(2)(a) similarly bars the release of these records for 50 years. Likewise, Public Health Law §4174 precludes the release of these records for 50 years as an unwarranted invasion of personal privacy."

On March 24, 2022, the RAO provided petitioner with a copy of the CSV files from the time period 1856-1956 (*see* NYSCEF Document No. 35).

On July 21, 2022, petitioner commenced this Article 78 proceeding (*see* NYSCEF Document No. 1) to compel respondent to comply with its November 11, 2021 FOIL request and produce the "Death Index" for the years 1972-2017, as well as additional fields of data not available on the published Death Index for the period 1957-1970. According to petitioner, there are no state statutes that bar production of the requested information and respondent failed to meet its burden establishing a privacy exemption. Respondent answered,

contending, as relevant here, that the indices from the most recent 50 years are exempt from disclosure pursuant to Public Officers Law § 87(2) on several grounds, including that their disclosure would constitute an unwarranted invasion of personal privacy.

FOIL

It is well settled that the policy underlying FOIL "is to promote open government and public accountability by imposing upon governmental agencies a broad duty to make their records available to the public" (*Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 346 [1st Dept. 1999]; *see also matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 224-225 [2018] [internal quotation marks and citation omitted] ["The statute is based on the policy that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government"]).

An administrative agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant" (*Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 492 [1994]; *Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440–41 [2005]), unless they fall under one of the statutory exemptions listed in Public Officers Law § 87(2) (*Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 496 [1st Dept. 2013]). The "[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; *see Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 657 [2012]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]). "Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed" since FOIL is "based on a presumption of access to the records" calling for disclosure rather than concealment on occasions where the agency fails to sustain its burden to demonstrate that a statutory exemption applies (*Matter of Westchester Rockland Newspapers v Kimball*, 50 NY2d 575,

580 [1980]).

Respondent primarily argues that the requested records are exempt pursuant to Public Officers Law § 87(2)(b), which permits an agency to deny access to records or portions thereof if disclosure "would constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87[2]); §89[2][b]).

In justifying its denial to the requested records, respondent notes that the most recent death-related records/data include not only Social Security numbers and dates of birth, but other detailed "personal information," including, but not limited to, data points such as employment status, military status, pregnancy status, spousal information, parental names, whether an individual is cremated/buried/donated, attending physician names, whether the death is a result of accident/homicide/suicide, cause of death, whether the death is pending investigation, and past hospitalizations. Respondent expresses "grave" concern about identity theft and data breaches should this information be revealed, especially with regard to the release of records closer in time to the present. Respondent urges that disclosure of this information would constitute an "unfathomable and unwarranted" invasion of the "personal privacy" of a decedent's "immediate survivors and survivors-in interest." The index may also include some individuals who are minors, the disclosure of which is "particularly objectionable as a matter of public policy."

In support of its position, respondent submits the affidavit of respondent's Director of the Bureau of Vital Statistics ("BVS"), Stephanie Ostrowski ("Ms. Ostrowski") (*see* NYSCEF Document No. 36). According to Ms. Ostrowski, who oversees the maintenance of and requests for vital records, the indices created from these documents dating back to approximately 1880, differ in format and content, depending upon the year, and contain a variety of personal information, expanded over the years, regarding deceased persons. According to Ms. Ostrowski, the disclosure of the requested death records, in combination with other publicly available information and details acquired through large-scale data breaches, would facilitate various types of identity theft, account hacking and the creation

of fake identities. In this regard, Ms. Ostrowski opines that petitioner's request for records less than 50 years old "should not be viewed in isolation, but rather through the lens of societal interests and their reflection in statutes, regulations, and the legitimate exercise of the State's administrative discretion; especially since identify theft has increased significantly with recent technological advancements." According to Ms. Ostrowski, the release of a list of names and other fields of personal information requested by petitioner in this case could be used "in combination with other, parallel data resources" to "misappropriate the identity of hundreds of thousands of individuals." Ms. Ostrowki further notes that in response to previous FOIL requests, petitioner has already received records from DOH regarding the birth and marriage indexes and "when these records are viewed in conjunction with one another, anyone wishing to misappropriate information can create a complex identity using actual names."

Ms. Ostrowski further states that respondent has only released these records in the past to "authorized recipients" under the Public Health Law § 4174(1)(a) in situations where release is mandated or permitted by law, or in a non-identifying statistical format. She states that death records that are at least 50 years old have also been released pursuant to Public Health Law § 4174(1)(c) and 10 NYCRR § 35.5(a), upon an authorized request for a particular record forgenealogical purposes and payment of statutory fees (not permitted for commercial purposes). However, in Ms. Ostrowski's opinion, the past release of these records does not prevent the agency from "increasing its safeguards in the face of a newly-comprehended threat." According to Ms. Ostrowski, alongside authorized local registrars across the state, BVS has a "shared responsibility to help mitigate identity theft and fraud crimes by protecting the data within its Vital Records" and on this basis, the release of death indexes less than 50 years old, which contain social security numbers, dates of birth, and other person information would constitute an unwarranted invasion of the personal privacy of a decedent's immediate survivors and survivors-in-interest, and this is especially true given that some of the names included in the indexes at issue belong to minors.

Moreover, Ms. Ostrowski explains that while respondent maintains one official "Death Index" similar to what petitioner is looking for, and that is the record from 1957-1970 that is already published online on DOH's Health Data NY website and contains an individual's first name, middle initial, last name, age, gender, date of death, and residency code, the remainder of the death-related records are maintained in a "multitude of formats and storage mediums" depending on year, and not all are digitized, and are not consistent in terms of the formatting or fields presented. According to Ms. Ostrowski, even if deemed "legally releasable," this record would have to be custom built using data from the database and an entirely new Death Index containing this additional data must be created - an extensive process which would "require assistance from a technological team" to accomplish.

In support of its position, respondent relies heavily on *Matter of Hepps v New York State Dept. of Health*, 183 AD3d 283, 293 (3rd Dept. 2020). In *Hepps*, the petitioner sought production of an index of all marriages performed in New York State over the preceding 50 years, which respondent DOH opposed based on personal privacy (*Matter of Hepps v New York State Dept. of Health*, 183 AD3d at 291). The Third Department found that while the petitioner's purpose (to create a searchable database for genealogical research) was "a legitimate public interest," it did not outweigh the privacy concerns of the individuals listed in the marriage records (*Id.* at 287 - 288). In performing the balancing of interests analysis that is part of all FOIL requests, the Third Department specifically found that the "[p]etitioners have not shown that the requested disclosure is required to serve the public interest . . ., [whereas the] respondent has persuasively demonstrated that such disclosure 'would be offensive and objectionable to a reasonable person of ordinary sensibilities' whose personal, marital information would be disclosed and published" (*Matter of Hepps v New York State Dept. of Health*, 183 AD3d 290, quoting *Matter of Ruberti, Girvin & Ferlazzo v New York State Div. of Police*, 218 AD2d 498, 494 [3rd Dept. 1996]). The determinative factor in precluding the requested disclosure was that the petitioner sought to create a publicly available online database for the information, which respondent DOH demonstrated

would facilitate identity theft.

In reply, petitioner characterizes respondent's arguments as illogical. While petitioner acknowledges the Third Department's holding in *Matter of Hepps v New York State Dept. of Health*, petitioner argues that *Hepps* is distinguishable inasmuch as *Hepps* involved FOIL requests which included personal marital information on thousands of *living* individuals whereas here, the records requested pertain only to *deceased* individuals. According to petitioner, this is "critical" as deceased individuals generally have no privacy interests *(Jones v Town of Kent*, 46 Misc. 3d 1227[A] [Sup. Ct., Putnam Cty., 2015]). Additionally, petitioner points out that while respondent urges that *Hepps* stood in favor of privacy interests "to ward-off identity theft of wrong-doers using the identify [sic] of a deceased person," such a holding is nowhere to be found in *Hepps*. Indeed, *Hepps* was about marriage records, not death records, and the Third Department made no mention of deceased individuals.

In addition, petitioner points out that respondent cites no support for its proposition that surviving relatives have a privacy interest in basic biographical information concerning a deceased relative. In this regard, petitioner argues that if a surviving family member had a right of privacy in this manner, then, according to respondent's logic, descendants of decedents could block the release of records on their ancestors in perpetuity. Yet, petitioner argues, respondent already makes historical death records publicly available. Petitioner also provides evidence that the records sought are similar to those that are made public in countless states throughout the country, including New York's neighboring states—Connecticut, New Jersey and Massachusetts.

Discussion

Public Officers Law § 87(2)(b) "permits an agency to deny a FOIL request for records that would amount to an unwarranted invasion of personal privacy under the provisions of section 89(2) if disclosed" (*Matter of Pennington v Clark*, 16 AD3d 1049, 1051 [4th Dept.2005], *lv denied* 5 NY3d 712 [2005]; *see* Public Officers Law § 87). The personal

privacy exemption incorporates a nonexhaustive list of categories of information that falls within the exemption (*see* Public Officers Law § 89 [2] [b][i]–[vii]). Where, as here, none of the categories applies specifically, the issue of whether there is an "unwarranted invasion" of privacy is decided "by balancing the privacy interests at stake against the public interest in disclosure of the information" (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]; *see McFadden v Fonda*, 148 AD3d 1430 [3rd Dept. 2017]; *Matter of Harbatkin v New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 380 [2012]; *Livson v Town of Greenburgh*, 141 AD3d 658, 661 [2nd Dept. 2016]). Moreover, "[w]hat constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable person of ordinary sensibilities" (*Matter of Empire Realty Corp. v New York State Div. of Lottery*, 230 AD2d 270, 273 [1997], quoting *Matter of Dobranski v Houper*, 154 AD2d 736, 737 [1989]; *see Matter of Pennington v Clark*, 16 AD3d 1049, 1051–1052 [2005], *lv denied* 5 NY3d 712 [2005]).

As noted above, "the [public] agency must articulate 'particularized and specific justification' for not disclosing requested documents" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267 [1996]). Conclusory assertions, unsupported by facts, will not suffice (*see Church of Scientology of N.Y. v State of New York*, 46 NY2d 906, 907-908 [1979]; *Matter of Rose v Albany County Dist. Attorney's Off.*, 111 AD3d 1123, 1126 [3rd Dept. 2013]; *Matter of Carnevale v City of Albany*, 68 AD3d 1290, 1292 [3rd Dept. 2009]). An agency must present "specific, persuasive evidence" and "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm" (*Matter of Markowitz v Serio*, 11 NY3d 43, 50-51 [2008]). Respondent must meet its burden "in more than just a plausible fashion" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]).

In view of the foregoing, this Court finds that the denial of access to the records requested under the personal privacy exemption is not adequately supported by the respondent. First, the Court concludes that the privacy rights of the deceased individuals as they pertain to identity theft or data breaches have been dissipated or extinguished by their

death. The Court is not saying that under FOIL deceased persons have no privacy interests upon death, but in this context, the deceased by definition cannot personally suffer the privacy-related injuries that may plague the living as articulated by the Third Department in *Hepps*. So the Court must evaluate whether the decedent's survivors' rights of privacy are implicated in the death data and the Court again finds that the risk is simply too attenuated and too speculative. Moreover, the Court finds that disclosure of the death index data would not be "highly offensive" to a reasonable person. Nor does Public Health Law § 4174(1)(a)'s requirements[2] regarding the issuance of certified copies of vital records imply that the public cannot have access to the information contained in the index; the statute simply specifies the requirements for any such certified copy which arguably contains much more identifying information than the records sought here. That the Legislature was concerned with the potential release of certified copies of death records in bulk to various agencies does not imply that it intended to restrict the public's right to the indexes containing less identifying information.

Upon review of the law and in view of the fact that the FOIL is a pro-disclosure statute with narrowly construed exemptions, this Court concludes that respondent has failed to meet its burden. The Court notes respondent's assertion that the Death Index does not exist in a single, uniform format, and that the format can vary from year to year. To the extent that some of requested records contain Social Security numbers, respondent should redact this information upon the ground that disclosure of such information would constitute

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[2]Public Health Law § 4174(1)(a) provides that DOH is authorized to provide an applicant with a certified copy or certified transcript of death only in the following circumstances: (1) when a documented medical need has been demonstrated, (2) when a documented need to establish a legal right or claim has been demonstrated, (3) when needed for medical or scientific research approved by the commissioner, (4) when needed for statistical or epidemiological purposes approved by the commissioner, (5) upon specific request by municipal, state or federal agencies for statistical or official purposes, (6) upon specific request of the spouse, children, siblings or parents of the deceased or the lawful representative of such persons, or (7) pursuant to the order of a court of competent jurisdiction on a showing of necessity.

an unwarranted invasion of personal privacy. Disclosure thereof "'would be offensive and objectionable to a reasonable [person] of ordinary sensibilities'" (*Matter of Empire Realty Corp. v New York State Div. of Lottery*, 230 AD2d at 273, quoting *Matter of Dobranski v Houper*, 154 AD2d at 737; *see Matter of Pennington v Clark*, 16 AD3d at 1051-52; Public Officers Law§§ 87[2][b]; 89[2]).

Next, respondent argues that the documents sought by petitioner are exempt from disclosure under Public Officers Law § 87(2)(a), which bars access to records "specifically exempted from disclosure by state…statute." Such exemptions, however, "are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 5665 [1986]; *see also Matter of Friedman v Rice*, 30 NY3d 461, 475 [2017] [same]).

Here, respondent cites Public Health Law § 4174(1)(a), which states "no certified copy or certified transcript of a death record shall be subject to disclosure under article six of the public officers law ..." and 10 NYCRR § 35.5(c)(3), which provides that "no information shall be released from a record of death unless the record has been on file for at least 50 years."

The Court finds that neither prohibits access under FOIL.

Under FOIL, only state and federal statutes may bar disclosure, not administrative regulations. As the Third Department recently held, the NYCRR is not a state statute for purposes of FOIL (*see Vertucci v N.Y. State Dep't of Transp.*, 195 AD3d 1209, 1211 [3rd Dept. 2021] ["[A] regulation is not a statute and, therefore, does not fall within the ambit of this narrowly construed exemption"]; *see also N.Y. Times Co. v N.Y. State Dep't of Health*, 173 Misc.2d 310, 319 [Sup. Ct. Albany Cty. 1997] ["[It has been held that exemptions from FOIL may only be created by State or Federal statute, not by administrative regulation"]; *Archdeacon v Town of Oyster Bay*, 12 Misc.3d 438, 446 [Sup. Ct. Nassau Cty. 2006] ["9

NYCRR part 9978, the rules and regulations enacted to guide the temporary commission, does not constitute a 'statute' sufficient to provide an exemption under FOIL"]). As such, respondent cannot rely on 10 NYCRR § 35.5(c)(3), an administrative regulation, to withhold the indexes.

Secondly, as afore stated, while Public Officers Law § 4174(1)(a) indeed restricts public access to a "certified copy or certified transcript of a death record," the Public Health Law defines "certified copy" as a "photographic reproduction . . . of the original certificate or electronically produced print of the original certificate" that is "certified by the commissioner, his designated representative, a local registrar, deputy registrar or sub-registrar as a true copy thereof" (Public Health Law § 4100-a[1]). Here, petitioner is not requesting access to certified copies of records - it is asking for indexes summarizing some of the information contained in those records.

Respondent also relies on Public Officers Law § 87(2)(b)(iii), which includes as an "unwarranted invasion of personal privacy" the "sale and release of names and addresses if such lists would be used for commercial or fund-raising purposes." Respondent notes that petitioner uses social media to solicit business and increase interest in its website, which provides access to a donation button. In *Federation of New York State Rifle & Pistol Clubs, Inc. v New York City Police Dep't*, 73 NY2d 92, 97 (1989), the Court of Appeals recognized that Public Officers Law § 87(2)(b)(iii) protects " the rights of individuals to be free from unwanted commercial contacts or nonprofit fund-raising efforts." In this case, the documents are not sought for the purpose of soliciting donations. Indeed, the individuals contained in the death index are deceased. Accordingly, this exemption is not remotely applicable here. Even if it were, respondent failed to raise it at the administrative level, and the issue is therefore waived.

Counsel Fees

"The Public Officers Law authorizes an award of [counsel] fees where the petitioner has substantially prevailed in the FOIL proceeding and the agency either lacked a reasonable

basis for denying access to the requested records or failed to respond to a request or appeal within the statutory time" (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 78–79 [2017] [internal quotation marks and citations omitted]; *see Matter of 101CO, LLC v New York State Dept. of Envtl. Conservation*, 169 AD3d 1307, 1311 [3rd Dept. 2019], *lv dismissed* 34 NY3d 1010 [2019]; *Matter of Competitive Enter. Inst. v Attorney Gen. of N.Y.*, 161 AD3d 1283, 1284–1285 [3rd Dept. 2018]; *Matter of Legal Aid Socy. v New York State Dept. of Corr. & Community Supervision*, 105 AD3d 1120, 1121 [3rd Dept. 2013]). "A petitioner substantially prevails under Public Officers Law § 89(4)(c) when it receives all the information that it requested and to which it was entitled in response to the underlying FOIL litigation" (*Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d 1072, 1074 [3rd Dept. 2020] [internal quotation marks and citations omitted]). "[E]ven when these statutory prerequisites are met, the decision to grant or deny counsel fees still lies within the discretion of the court." *Matter of Henry Schein, Inc. v Eristoff*, 35 AD3d 1124, 1126 (3rd Dept. 2006).

Here, despite this Court's direction that the records be redacted, the petitioner "substantially prevailed" within the meaning of the Public Officers Law (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 79 [2017] ["petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request—including both disclosure that was volunteered by the agency and disclosure that was compelled by Supreme Court's order"]). Nevertheless, while respondent may have, in the Court's opinion, relied on an overly expansive reading of the personal privacy exemption, the Court cannot state respondent's reliance on the Third Department's holding in *Matter of Hepps v New York State Dept. of Health* was "unreasonable." Indeed, the respondent reasonably considered the threat of identity theft. The Court therefore finds that an award of counsel fees is not justified.

Accordingly, it is hereby, ORDERED AND ADJUDGED that the petition is granted, with the redactions as outlined herein. Petitioners shall pay all estimated costs to prepare the

redacted copies pursuant to Public Officers Law § 87(1)(c)(i-iv).

SO ORDERED.
ENTER.

Dated: Albany, New York
February 6, 2023

L. MICHAEL MACKEY
Supreme Court Justice

Papers Considered:

02/07/2023

NYSCEF Document Nos. 1 – 10, 27 – 46.