

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

CORTEX TELEVISION LLC dba The
 Healthcare Channel,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF
 HEALTH,

Respondent,

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

Index No.

VERIFIED PETITION

Petitioner CORTEX TELEVISION, LLC dba The Healthcare Channel (the “HCC” or “Petitioner”), through its undersigned counsel, for its Verified Petition against Respondent New York State Department of Health (“DoH”), hereby alleges as follows:

Introduction

1. Petitioner brings this Article 78 proceeding pursuant to Freedom of Information Law (“FOIL”), New York Public Officers Law § 84 *et seq.*, in order to vindicate the HCC’s and the public’s right to critically important hospital statistics that will enable future researchers to understand the relative efficacy of treatments and approaches across hospitals in addressing COVID-19, thereby leaving the nation better prepared for the next pandemic. Yet, for over four months, DoH has dragged its heels, refusing to produce the requested information, which is readily available to the state agency, without ever formally denying the request, by continually extending its own deadlines. This gamesmanship must stop. DoH does not intend to comply with New York law, and accordingly, judicial intervention is now required.

Jurisdiction and Venue

2. This Court has jurisdiction under CPLR 7804(b) and venue is proper under CPLR 506(b) because the material events took place in this County. Upon information and belief, the Records at issue reside at 125 Worth Street in Manhattan, the headquarters for the New York City Health and Hospitals Corporation.

Parties

3. Petitioner the HCC is a domestic for-profit limited liability company organized under the laws of the State of Ohio.

4. DoH is an “agency” within the meaning of FOIL § 86(3).

Background

Excess COVID-19 Deaths in State-Run Hospitals

5. New York State has experienced more than 52,000 confirmed COVID-19 deaths. Most occurred in hospitals. However, such hospital deaths have not been spread even across the hospitals of this State. Rather, certain hospitals, particularly those such as Elmhurst Hospital Center in the state-run New York City Health and Hospitals Corporation (“HHC”), have performed measurably worse in the Pandemic, with deadly consequences for communities of color, immigrants, and other historically disadvantaged communities.

6. The disparities in death rates do not appear to be a function exclusively of biological or socio-economic factors. Rather, signs point to human error within certain hospitals. In early 2020, visiting nurses from other states came to New York to assist with care. Several of them went public in social media video testimonials to detail how state-run hospitals were causing needless deaths through deficient medical care. *See, e.g.,* Gould, Martin, *Daily Mail*,

“EXCLUSIVE: ‘It’s a horror movie.’ Nurse working on coronavirus frontline in New York claims the city is ‘murdering’ COVID-19 patients by putting them on ventilators and causing trauma to the lungs.” (Apr. 27, 2020), <https://www.dailymail.co.uk/news/article-8262351/Nurse-New-York-claims-city-killing-COVID-19-patients-putting-ventilators.html>.

7. If these whistleblower allegations are true, then ICU protocol and basic medical ethics were violated. Doctors were putting patients on ventilators knowing they would not manage those ventilators because the patients were quarantined and not touched. Death is an almost certain outcome from such a practice.

8. Unfortunately, the State of New York can no longer be trusted to conduct its own, honest, and comprehensive assessment of the COVID-care provided at state-run hospitals. As the *New York Times* reported on April 28, 2021 that, “Cuomo Aides Spent Months Hiding Nursing Home Death Toll.” It was only as a consequence of an Article 78 FOIL proceeding brought by another petitioner, Empire Center for Public Policy, that the truth of nursing home deaths is at last coming to light. The HCC seeks to shine a similar bright light on hospital deaths.

Dr. Greer and the HealthCare Channel

9. Founded in 2006, the HCC is a multimedia global portal with the primary goal of disseminating medical education about the latest clinical developments and controversies. The HCC’s Founder, Executive Producer and Editor-in-Chief is Steven E. Greer, MD, a New York medical doctor licensed to practice surgery after receiving residency training at The New York University. Dr. Greer has numerous white paper and text book publications while at NYU Medical Center. Dr. Greer also received several large grants from the Veterans Affairs to conduct multi-center wound healing trials using sub-atmospheric pressure dressing. Dr. Greer

pioneered new ways to treat chronic wounds in the elderly populations.

10. In addition to his clinical and research work, Dr. Greer is a groundbreaking medical journalist. In 2012, Dr. Greer published an OpEd with the *Wall Street Journal* entitled “Inside ObamaCare’s Grant-Making” in which he exposed problems with an Affordable Care Act bureaucracies called the Center for Medicare and Medicaid Innovation. See <https://www.wsj.com/articles/SB10001424052702303552104577438242412932340>. In 2010, Dr. Greer and the HCC, together with the University of Miami Health System, hosted a roundtable discussion on ways to reduce the growth of healthcare spending, featuring Donna Shalala, PhD, President of The University of Miami and former Secretary of the Health and Human Services Department for eight years under the Clinton administration.

11. The HCC continues to interview the most knowledgeable doctors and policymakers to discuss issues in medicine, surgery, public health, and policy. Its target audience is the practicing physician, surgeon, and policymaker. The HCC content has been carried on Reuters TV as well as national news sites, such as the WSJ, ABC and NPR. The HCC is funded by private grants and receives no funding from the pharmaceutical industry. It is non-partisan and not affiliated with any PAC, thinktank, lobbying group, or industry lobbyist group.

The HCC’s Foil Request to DoH

12. Last year, as the pandemic worsened, Dr. Greer was among the first to call out the disproportionate deaths occurring in New York’s state-run facilities.

13. On January 27, 2021, Dr. Greer, on behalf of the HCC, submitted a FOIL Request to DoH for the following records (collectively, the “Records”):

1. Please provide documents that list all of the acute care hospitals controlled by the New York City Health and Hospitals Corporation (HHC), which is a New York State public benefit corporation.

2. Please documents the total number of deaths recorded at each of these HHC hospitals annually since 2016.
3. Please provide documents that detail total deaths by individual HHC hospitals from January 1, 2020 to current.
4. Please provide documents that detail total deaths by all hospitals regulated by the New York Health Department from January 1, 2020 to current, and broken down by each individual hospital.
5. Please provide documents that detail the guidelines issued by the State of New York for handling the clinical care of COVID-infected patients. These guidelines should include when and how to administer medications and ventilators.
6. Please provide documents that detail the number of COVID patients in HHC hospitals, since January of 2020, who received monoclonal antibodies, and/or remdesivir, and/or plasma from COVID patients. The data should be detailed by each individual hospital.
7. Please provide documents that detail the number of COVID patients who were treated with ventilators while admitted to an HHC hospital and their outcome (i.e. discharged alive or died while on the ventilator)
8. Please provide documents that plans to create hospice-like wards within ICUs of HHC hospitals where COVID patients were left to receive minimal care from doctors and nurses.
9. Please provide documents that detail the administration of COVID vaccines in HHC hospitals to date, detailed by each hospital.

A true and correct copy of the HCC's FOI Request is annexed hereto as Exhibit A.

14. On January 29, 2021, DoH responded by letter, acknowledging receipt of the FOIA request, and predicting that a "determination as to whether your request is granted or denied will be reached in approximately 20 business days." A true and correct copy of DoH's January 29, 2021 letter is annexed hereto as Exhibit B. That did not happen.

15. Instead, on March 1, 2021, DoH sent *another* letter (a true and correct copy of which is annexed hereto as Exhibit C) stating: "this Office is unable to respond to your request by the date previously given to you because a diligent search for responsive documents is still

being conducted. We estimate that this Office will complete its process by April 12, 2021.”

That, too, did not happen.

16. Instead, on April 12, 2021, DoH sent another letter (a true and correct copy of which is annexed hereto as Exhibit D) stating: “this Office is unable to respond to your request by the date previously given to you because a diligent search for responsive documents is still being conducted. We estimate that this Office will complete its process by June 15, 2021.”

That, too, did not happen.

17. Instead, on May 5, 2021, DoH sent another letter (a true and correct copy of which is annexed hereto as Exhibit E) stating: “this Office is unable to respond to your request by the date previously given to you because a diligent search for responsive documents is still being conducted. We estimate that this Office will complete its process by July 9, 2021.”

18. On May 21, 2021, Dr. Greer, on behalf of the HCC, appealed the aforementioned May 5, 2021 FOIL determination to DoH’s Records Access Appeals Officer. A true and correct copy of the appeal is annexed hereto as Exhibit F.

19. On May 25, 2021 appeal, DoH’s Records Access Officer, Rosemarie Hewig, Esq., responded to the May 21, 2021 appeal in relevant part as follows:

I have enclosed documents responsive to parts 1-4 and part 9 of your request. Please note, with regard to the records responsive to parts 2 through 4 of your request, Statewide Planning and Research Cooperative System (SPARCS) Inpatient and Outpatient reported deaths from January 2020 to the present are incomplete, as there is a reporting lag. With regard to the record responsive to part 9 of your request, please note that vaccine information being provided has a report date of February 5, 2021. After conducting a diligent search, no records responsive to parts 5, 6, and 8 of your request have been located. In response to part 7 of your request, please note that no complete data on ventilator use for COVID patients utilizing SPARCS data is available at this time. After conducting a diligent search, no records responsive to parts 5, 6, and 8 of your re-quest have been located. In response to part 7 of your request, please note that no complete data on ventilator use for COVID patients utilizing SPARCS data is available at this time.

A true and correct copy of the May 25, 2021 letter is annexed hereto as Exhibit G.

20. On May 26, 2021, Dr. Greer, on behalf of the HCC, appealed the aforementioned May 25, 2021 FOIL determination to DoH's Records Access Appeals Officer, based, *inter alia*, on the following grounds:

... [T]he Department of Health writes that: "After conducting a diligent search, no records responsive to parts 5, 6, and 8 of your request have been located. In response to part 7 of your request, please note that no complete data on ventilator use for COVID patients utilizing SPARCS data is available at this time." As a licensed physician who has worked in several New York hospitals, I know for a fact that such records are maintained; the Department's claim that such records cannot be located means only that it did not conduct a diligent search, as New York FOIL requires. Indeed, the determination letter suggests that the Department only searched the Statewide Planning and Research Cooperative System (SPARCS) system. That is plainly insufficient.

For example, Request No. 6 requests, *inter alia*: "documents that detail the number of COVID patients in HHC hospitals, since January of 2020, who received monoclonal antibodies, and/or remdesivir, and/or plasma from COVID patients." Every hospital pharmacy tracks drug prescriptions. In particular, drugs approved only for COVID, such as remdesivir and monoclonal antibodies, can be easily tracked.

Similarly, Request No. 7 requests: "documents that detail the number of COVID patients who were treated with ventilators while admitted to an HHC hospital and their outcome (*i.e.* discharged alive or died while on the ventilator)." Again, every hospital tracks durable medical equipment, and every hospital has records of deaths, underlying DRG diagnosis codes, etc.

Lastly, Request Nos. 5 and 8 seek documentation concerning various practices and protocols which HHC hospitals adopted for treatment of COVID patients. Those documents certainly do exist. Such hospitals did not, by chance, all adopt the same practices and protocols at once.

... The Department of Health also writes that that "reported deaths from January 2020 to the present are incomplete, as there is a reporting lag." However, no "reporting lag" should account for a delay of nearly six months.

A true and correct copy of the May 26, 2021 appeal is annexed hereto as Exhibit H.

21. Dr. Greer requested that DoH remedy the foregoing deficiencies as follows:

For Request Nos. 5-8, please confirm that you will direct the Department to conduct a diligent search and produce the missing records to me forthwith.

...

For Request Nos. 1-4, please direct the Department to provide complete records through, at least, December 31, 2020, and to periodically update its production to me as 2021 records become available.

Id.

22. On June 10, 2021, DoH's Records Access Appeals Officer denied the foregoing appeal in "in its entirety" and further held that: "Judicial review of this decision may be obtained pursuant to CPLR Article 78." HCC now pursues such judicial review. A true and correct copy of the June 10, 2021 appeal denial letter is annexed hereto as Exhibit I.

23. This game of "hide the ball" has gone on long enough. These Records plainly exist. New Yorkers have a right to know exactly how its state-run hospitals handled COVID-19. Accordingly, the HCC now petitions the Court for those Records.

Cause of Action:
Wrongful Denial of FOIL Request

24. The HCC realleges each of the foregoing paragraphs as if fully set forth herein.

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

26. The HCC has a right to the Records under FOIL.

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

28. DoH has denied disclosure of the Records.

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

30. The HCC has exhausted its administrative remedies and has no other remedy at law.

31. The HCC has not made any prior application for the relief requested here.

Relief Requested

Petitioner respectfully requests that this Court enter a Judgment: (a) declaring that DoH acted unlawfully and with no reasonable basis in failing to produce the Records, and that DoH must therefore release the Records within five days of the date of the Judgment; (b) Awarding attorneys' fees and costs incurred in this litigation as allowed under FOIL; and (c) Granting such other and further relief as this Court may deem just and proper.

Dated: New York, New York
June 10, 2021

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