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# New York Supreme Court

## Appellate Division—Third Department

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In the Matter of

CORTEX TELEVISION LLC d/b/a The Healthcare Channel,

*Petitioner-Appellant,*

– against –

NEW YORK STATE DEPARTMENT OF HEALTH,

*Respondent-Respondent.*

**Case Nos.:**

**536110**

**CV-22-2266**

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### BRIEF FOR PETITIONER-APPELLANT

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Petitioner-Appellant Cortex Television LLC dba The Healthcare Channel (the “HCC” or “Petitioner”) respectfully submits this brief in support of its appeal from (i) the Decision and Order dated July 1, 2022, and entered on July 6, 2022, by which the Supreme Court denied HCC’s Petition (“Decision #1”), and (ii) the Decision and Order dated November 30, 2022, and entered November 30, 2022, by which the Supreme Court granted the HCC’s motion to reargue, but upon reargument, adhered to Decision #1 (“Decision #2”).

### **PRELIMINARY STATEMENT**

Freedom of Information Law (“FOIL”), Article 6 (Sections 84-90) of the NYS Public Officers Law, provides the public the right to access records maintained by government agencies (with certain exceptions not applicable here). Respondent-Respondent New York State Department of Health (“DoH” or “Respondent”) is bound by FOIL but prevailed below by claiming that it could not locate the requested records following a “diligent search.” As set forth below, Respondent’s claim is both non-credible and fails the test set forth by the Court of Appeals in *Matter of Rattley v. N.Y. City Police Dep’t*, 96 N.Y.2d 873 (2001), given that the records in question (addressing COVID-19 protocols) must be maintained and submitted to Respondent under New York State Sanitary Code (10 NYCRR 2.10). Those records are essential for an accurate accounting of the COVID-19 pandemic, and thus reversal of the decisions below is both important and warranted.

## **QUESTIONS PRESENTED**

1. Did the Supreme Court err when it denied the Petition, even though the documents requested were required by law to be maintained by Respondent and Respondent failed to specifically state that it had searched for them?

2. Did the Supreme Court err when it granted reargument but adhered to its decision dismissing the Petition?

## **BACKGROUND**

### **A. Excess COVID-19 Deaths in State-Run Hospital**

At the time of the Petition, New York State had already experienced more than 52,000 confirmed COVID-19 deaths. R20. Most occurred in hospitals. *Id.* However, such hospital deaths were not spread evenly across the hospitals of this State. *Id.* Rather, certain hospitals, particularly those such as Elmhurst Hospital Center in the state-operated New York City Health and Hospitals Corporation (“NYC HHC”), performed measurably worse than others in the pandemic, with particularly deadly consequences for communities of color, immigrants, and other historically disadvantaged communities. *Id.*

The disparities in death rates cannot be attributed solely to biological and socio-economic factors. R20. Rather, signs point to human error within certain hospitals. *Id.* In early 2020, visiting nurses from other states went public in social media testimonials as to 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). R21.<sup>1</sup>

If these whistleblower allegations are true, 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 practice.

Unfortunately, the State of New York can no longer be trusted to conduct an honest and comprehensive assessment of the COVID-care provided at its state-run hospitals. As the *New York Times* reported on April 28, 2021, “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 has come to light.<sup>2</sup> The HCC seeks to shine a similar bright light on hospital deaths.

**B. Dr. Greer and the HealthCare Channel**

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. R21. The HCC’s Founder, Executive Producer, and Editor-in-Chief

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<sup>1</sup> <https://www.dailymail.co.uk/news/article-8262351/NurseNew-York-claims-city-killing-COVID-19-patients-putting-ventilators.html>

<sup>2</sup> <https://www.nytimes.com/2021/04/28/nyregion/cuomo-aides-nursing-home-deaths.html>

is Steven E. Greer, MD, a New York medical doctor licensed to practice surgery after receiving residency training at New York University. *Id.* Dr. Greer published numerous medical journal papers and textbook publications while at NYU. He also received several large grants from Veterans Affairs to conduct multi-center wound healing trials using sub-atmospheric pressure dressing. *Id.* Dr. Greer pioneered new ways to treat chronic wounds in elderly populations and became an expert with the nursing home population of patients. R22.

In addition to his clinical and research work, Dr. Greer is a groundbreaking medical journalist. In 2012, Dr. Greer published an OpEd in the *Wall Street Journal* entitled “Inside ObamaCare’s Grant-Making” in which he exposed problems with a federal bureaucracy called the Center for Medicare and Medicaid Innovation.<sup>3</sup> 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, who was then President of The University of Miami and a former Secretary of the Health and Human Services Department for eight years in the Clinton administration. R22.

The HCC continues to interview knowledgeable doctors and policymakers on issues in medicine, surgery, public health, and policy. R22. Its target audience are practicing physicians, surgeons, and policymakers. The HCC’s content has been

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<sup>3</sup> <https://www.wsj.com/articles/SB10001424052702303552104577438242412932340>

carried on Reuters TV and national news sites such as the WSJ, ABC and NPR. *Id.* The HCC is funded by private grants and receives no funding from the pharmaceutical industry. *Id.* It is non-partisan and unaffiliated with any PAC, thinktank, lobbying group, or industry lobbyist group. *Id.*

## **STATEMENT OF FACTS**

### **A. The HCC's FOIL Request to DoH**

In 2020, as the pandemic worsened, Dr. Greer was among the first to call out the disproportionate COVID deaths occurring in New York's state-run facilities. 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 document 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.

R29-30.

**B. DoH's Delayed Response**

On January 29, 2021, DoH responded by letter, acknowledging receipt of the HCC's FOIL request, and stating that a "determination as to whether your request is granted or denied will be reached in approximately 20 business days." R31. That did not happen.

Instead, on March 1, 2021, DoH sent another letter 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." R32. That, too, did not happen.

Instead, on April 12, 2021, DoH sent another letter 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.” R33. That, too, did not happen.

Instead, on May 5, 2021, DoH sent another letter 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.” R34.

**C. The Appeals to DoH’s Records Access Appeals Officer**

On May 21, 2021, Dr. Greer, on behalf of the HCC, appealed the May 5, 2021 FOIL determination to DoH’s Records Access Appeals Officer. R35-36. On May 25, 2021, DoH’s Records Access Officer, Rosemarie Hewig, 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.

R37.

On May 26, 2021, Dr. Greer, on behalf of the HCC, appealed the

determination to DoH's Records Access Appeals Officer, based, *inter alia*, on the following grounds:

... [T]he Department of Health writes that: "...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.

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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.

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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.

Dr. Greer, on behalf of the HCC, thereafter 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.

R39-40.

On June 10, 2021, DoH's Records Access Appeals Officer denied the foregoing appeal "in its entirety" and further held that: "Judicial review of this decision may be obtained pursuant to CPLR Article 78." R43.

**D. The HCC's Article 78 Proceeding**

On June 10, 2021, the HCC commenced an Article 78 proceeding by filing a Verified Petition in the Supreme Court of the State of New York, County of New York<sup>4</sup> (the "Petition"). R19-28. The Petition sought, *inter alia*, a judgment declaring that Respondent had acted unlawfully and with no reasonable basis in failing to produce the Records, and that the Respondent should therefore release them within five days of the date of the Judgment. R27.

In support of that relief, the HCC pointed to DoH's own website, which states that: "Reporting of suspected or confirmed communicable diseases is mandated

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<sup>4</sup> Pursuant to Respondent's motion, venue was later transferred to the Supreme Court of the State of New York, County of Albany.

under the New York State Sanitary Code (10 NYCRR 2.10).” R107. Section 2.10, in turn, provides that: “When a case which is required to be reported under section 2.1 of this Part occurs in a State institution or a facility licensed under Article 28 of the Public Health Law, the person in charge of the institution or facility shall report the case to the State Department of Health...” *Id.*

All eleven hospitals operated by NYC HHC are Article 28 institutions subject to this law, and thus such hospitals must comply with these reporting requirements. *Id.* Further, the DOH specifically lists COVID-19 as one of the “communicable diseases” for which reporting is mandatory, explaining that: “Diseases listed in bold type [COVID is among those so listed] warrant prompt action and should be reported immediately ... by submission of the confidential case report form (DOH-389). In NYC use case report form PD-16.” *Id.* Both forms require the hospital to report “treatment” to the DoH. *Id.*

**E. The Insufficient Affidavit of Rosemarie Hewig**

In August 2021, Respondent filed a Verified Answer to the Petition, and filed an affidavit in opposition to the Petition (the “Hewig Affidavit”). R44-49; R75-81. The affiant was Rosemarie Hewig, who described herself as “an employee of the Records Access Office of the New York State Department of Health.” R75.

In the Hewig Affidavit, Ms. Hewig stated that DoH “conducted a diligent search for records responsive to” the FOIL request. R76. While she admitted that

DoH “would have records in its possession in its role as regulator such as information that is required to be reported to the Department by hospitals,” she claimed “the relevant Programs” (a term she did not define) “confirmed” that DoH had no further documents responsive to the Requests. R79.

Tellingly, Ms. Hewig made no specific mention of the mandatory reports imposed by 10 NYCRR 2.10, leaving it unclear whether she was unaware of them altogether or ever sought to look for them. *See* R75-81. Indeed, the Hewig Affidavit only mentioned her review of the “SPARCS” database, which she described as “a comprehensive all payer data reporting system established in 1979 as a result of cooperation between the healthcare industry and government,” and which would not contain the requested documents. R78-80.

**F. Decision #1**

By Decision dated July 1, 2022, and entered on July 6, 2022, Justice Kowec dismissed the Petition. R2-9. Specifically, the Supreme Court held:

This certification [of Rosemarie Hewig] satisfied Respondent’s obligation under Public Officers Law 89 (3). . . The Reply Affirmation of Petitioner’s attorney does not articulate a demonstrable factual basis to support the contention that the requested documents existed and were within Respondent’s control. . . [T]he obligation to report the existence of communicable diseases, as imposed by 10 NYCRR 2.10, does not mean that DoH must be in possession of the information contemplated by items 5 through 9 in the FOIL request. The mere assertion that “they must have them” is insufficient to create a demonstrable factual basis to require a hearing.

R6-8.

**G. The HCC’s Reargument Motion**

Thereafter, on August 8, 2022, the HCC filed a motion for reargument, wherein the HCC explained that the Court overlooked that DoH never specifically denied it possessed the requested records and, in particular, Ms. Hewig made no specific mention of the mandatory reports imposed on NYC HHC’s hospitals under 10 NYCRR 2.10, including whether such reports were destroyed, or whether DoH waived the NYC HHC’s reporting requirement. R105; R106-115; R121-122. Rather, the Hewig Affidavit only mentioned the affiant’s review of the “SPARCS” database, which by definition would be an incomplete search. R109-110.

**H. Decision #2**

By Decision dated and entered on November 30, 2022, the Supreme Court granted the HCC’s motion to reargue but, upon reargument, adhered to Decision #1.

R11-16. In Decision #2, the Court concluded that:

The argument that the Respondent had the affirmative obligation to specifically deny it possessed the requested records covered by paragraphs 5 through 9 in its FOIL request, in contrast to the certification supplied by Rosemarie Hewig in her response, is unsupported by any case law or persuasive authority.

R14-15.

**I. The Instant Appeal**

On August 2, 2022, the HCC filed a Notice of Appeal for Decision #1, and on December 7, 2022, the HCC filed a Notice of Appeal for Decision #2. R1; R10. For the reasons set forth below, both Decisions are in error.

## **STANDARD OF REVIEW**

This appeal is from the grant of a motion to dismiss an Article 78 petition. On a pre-answer motion to dismiss, only “the allegations contained in the petition” are to be considered, and the “[court] must deem all allegations in the petition to be true on such a motion.” *Matter of East End Res. v. Town of Southold Planning Bd.*, 81 A.D.3d 947, 949 (2d Dep’t 2011). The trial court’s rulings are issues of law subject to *de novo* appellate review. *See, e.g., Humane Soc’y of the United States v. Brennan*, 53 A.D.3d 909 (3d Dep’t 2008) (conducting in camera review of documents at issue in FOIL appeal and holding after *de novo* review that specific documents were not exempt from disclosure under FOIL); *see also Andrea v. Arnone, Hedin, Casker, Kennedy & Drake*, 5 N.Y.3d 514, 520-21 (2005) (appellate court need not defer to trial court’s judgment on a question of law).

## **ARGUMENT**

### **POINT I**

#### **The Supreme Court Erred in Holding That Respondent’s Affidavit Was Sufficient Under Public Officers Law § 89 And That There Was No Demonstrable Factual Basis That the Requested Documents Exist**

The Supreme Court erred in applying Public Officers Law § 89 when it held – in both Decision #1 and Decision #2 – that the Hewig Affidavit evidenced a sufficient search for documents in response to Request Nos. 5-8 and that a hearing about the existence of the documents was therefore unwarranted.



**A. The Supreme Court Improperly Applied the Due Diligence Standard**

In *Matter of Rattley v. N.Y. City Police Dep't*, 96 N.Y.2d 873, 875 (2001), the Court of Appeals established the certification standard that courts must apply when a FOIL Officer claims documents do not exist or cannot be located:

When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89 (3) requires the agency to “certify that it does not have possession of (a requested) record or that such record cannot be found after diligent search.”

Here, the Supreme Court did not properly apply the *Rattley* “due diligence” standard, but instead blindly deferred to the FOIL Officer’s self-serving affidavit, disregarded that a fulsome search was not made, and ignored the demonstrable factual basis – mandatory state law cited on DoH’s own website – that the requested documents do exist and are within Respondent’s control.

The Requests at issue include, *inter alia*, documents that outline the clinical care of COVID-infected patients (Request 5), data that identifies patients in NYC HHC’s hospitals that received monoclonal antibodies and/or remdesivir and/or plasma from COVID patients (Request 6), data by which to specifically identify outcomes of COVID patients that were treated with ventilators and their discharge status (Request 7), and documents that outline plans to create hospice-like wards within ICUs of NYC HHC’s hospitals (Request 8).

The Hewig Affidavit’s denial of the existence of documents responsive to

Requests 5-8 is insufficient. In it, Ms. Hewig merely states in boilerplate language that Respondent conducted a “diligent search” and then mentions a review of a “SPARCS” database which is not where the requested documents would be located. The Hewig Affidavit does not state, because it would be untrue to state, that Respondent specifically searched for the Section 2.10 reports which require NYC HHC to report details of Covid-19 treatment to Respondent. Such records are in Respondent’s possession, custody and/or control.

In Decision #2, the Supreme Court rejected the HCC’s argument about the insufficiency of the Hewig Affidavit: “The cases cited by this Court in its original Decision and Order on pages 3 and 4 are still persuasive and of precedential value.” R15. While still “good law,” the cases referenced by the Supreme Court are inapposite, as none of them address the situation here in which the requested records are required by law to exist. *See, e.g., Wright v. Woodard*, 158 A.D.3d 958, 958-59 (3d Dep’t 2018) (agency’s affidavit explicitly stated it did not create or maintain certain records sought by petitioner); *McFadden v. Fonda*, 148 A.D.3d 1430, 1432 (3d Dep’t 2017) (petitioner made unsubstantiated allegations that unavailability of records was caused by employee misconduct); *Curry v. Nassau Cnty. Sheriff’s Dep’t*, 69 A.D.3d 622 (2d Dep’t 2010) (petitioner failed to offer factual basis upon which to reject respondents’ certification that requested videotapes could not be located after diligent search); *Jackson v. Albany Cnty. Dist. Attorney’s Off.*, 176

A.D.3d 1420, 1421-22 (3d Dep't 2019) (agency certified it searched where requested documents would have been maintained).

Accordingly, even under DoH's own cited case law, the Hewig Affidavit is insufficient because in this case, there is no question that the requested records *do* exist, but for unexplained reasons were not produced.

**B. Even If the Supreme Court Properly Applied the Due Diligence Standard, Which It Did Not, The HCC Is Entitled to a Hearing Because There Is a Demonstrable Factual Basis That the Requested Documents Exist**

As this Court further held in *Jackson, supra*:

[E]ven where an entity properly certifies that it was unable to locate requested documents after performing a diligent search, the person requesting the documents may nevertheless be entitled to a hearing on the issue where he or she can 'articulate a demonstrable factual basis to support the contention that the requested documents existed and were within the entity's control.

176 A.D.3d 1420, 1421-22 (citation omitted).

The HCC is entitled to a hearing. The Supreme Court gave short shrift to the HCC's demonstrable factual basis that Respondent has control over the requested documents – the mandatory legal reporting requirements under which NYC HHC must report Covid-19 treatment to Respondent. Specifically, "Reporting of suspected or confirmed communicable diseases is mandated under the New York State Sanitary Code (10 NYCRR 2.10)... health care facilities ... and any other individuals/locations providing health care services are also required to report

communicable diseases.”<sup>5</sup>

Section 2.10 further provides that: “When a case which is required to be reported under section 2.1 of this Part occurs in a State institution or a facility licensed under Article 28 of the Public Health Law [which includes all eleven hospitals operated by NYC HHC], the person in charge of the institution or facility shall report the case to the State Department of Health ....” 10 NYCRR 2.10. Respondent’s website, in turn, makes clear that Covid-19 is one of the “communicable diseases” for which reporting is mandatory and that reporting requirements for Covid-19 “warrant prompt action and should be reported immediately.”<sup>6</sup> The forms referenced for such reports are Form DOH-389 and PD-16 (for NYC) and require the hospital to report “treatment” which would be responsive to Requests 5-7.

The foregoing regulations constitute a demonstrable factual basis that supports the contention that the requested documents exist and are within Respondent’s control. At a minimum, this requires a hearing.

The instant case thus falls squarely within the line of case law where courts grant hearings after an agency claims that a diligent search was conducted, but petitioner offers proof suggesting that responsive documents do exist. *See, e.g.,*

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<sup>5</sup> <https://www.health.ny.gov/professionals/diseases/reporting/communicable/>

<sup>6</sup> [https://health.ny.gov/forms/instructions/doh-389\\_instructions.pdf](https://health.ny.gov/forms/instructions/doh-389_instructions.pdf)

*Oddone v. Suffolk Cnty. Police Dep't*, 96 A.D.3d 758, 761 (2d Dep't 2012) (ordering hearing where agency's determination that it could not find documents after diligent search "was not based on any evidence in the record, the respondents failed to conclusively demonstrate that the determination was not arbitrary and capricious"); *Surveillance Tech. Oversight Project v. N.Y.C. Police Dep't*, 2021 N.Y. Misc. Lexis 6780, \*7 (Sup. Ct., N.Y. Cnty. Dec. 28, 2021) (petitioner met demonstrable-factual-basis standard where agency claimed it conducted diligent search and no responsive documents existed, but petitioner found publicly available sources identifying studies responsive to document request); *LatinoJustice PRLDEF v. S. Country Cent. Sch. Dist.*, 2018 NY Slip Op 51440(U), \*4-5 (Sup. Ct., Suffolk Cnty. Oct. 12, 2018) (finding it "inconceivable, and at the very least highly improbable," that school district did not have additional records related to its efforts to address gang-related activity when several documents "amply demonstrate[d]" its importance to the school); *Wagstaffe v. David*, 2010 NY Slip Op 50311 (U), \*5-6 (Sup. Ct., N.Y. Cnty. Feb. 22, 2010) (remitting matter where petitioner proffered paper trail with respect to 911 tapes respondent denied existed and offered newspaper articles questioning conduct of two officers assigned to case); *Freewheels Bicycle Defense Grp., Inc. v. N.Y.C. Police Dep't*, 2008 N.Y. Slip Op. 33763(U), \*2-3 (Sup. Ct., N.Y. Cnty. Apr. 23, 2008) (ordering hearing where "it is reasonable to expect that, at the very least, overtime records and radio tapes relating to the event were generated. Their

purported absence also requires an explanation.”).

**C. The Supreme Court’s Decision Relies on Irrelevant Rationale**

The Supreme Court dismissed the Petition based in part on its apparent confusion as to what documents would be in NYC HHC’s possession versus Respondent’s. *See* R6-7 (“Because HHC is not a subdivision of the Respondent, it does not have access to all records kept by HHC, but rather only those records sent to it by HHC that are required to be reported. . . .”); R15 (“Petitioner overlooks the distinction made by the Court between HHC, a Public Benefit Corporation and New York State Department of Health.”).

The Supreme Court’s confusion is not a basis to deny this appeal. The HCC agrees that NYC HHC is not a subdivision of the State of New York and is not a part of DoH. However, this fact is irrelevant to whether NYC HHC has a legal requirement to create certain reports pursuant to 10 NYCRR 2.10 as an Article 28 institution, and send them to Respondent. Notably, Respondent has not once disputed NYC HHC’s reporting obligation to DoH. Rather, the Hewig Affidavit specifically acknowledged that, “[t]he Department would have records in its possession in its role as a regulator, such as information that is required to be reported to the Department by hospitals.” R79. Accordingly, the Supreme Court was incorrect to issue Decisions #1 and #2 on this ground.

**D. This Court Should Consider Respondent’s Past Practice Of Withholding Documents**

Given the evidence, and the agency’s own history, DoH cannot be assumed to have voluntarily produced all responsive documents.

For example, when initially reporting the number of nursing home deaths caused by COVID-19, the State only reported those who died in the facilities themselves, leaving out those who died after being taken to hospitals. 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 came to light.<sup>7</sup> In a 16-page decision, the Supreme Court scolded the DoH for repeatedly telling the petitioner “that it was unable to respond to the [FOIL] request”.<sup>8</sup> Ultimately, DoH provided dates and locations of nearly 16,000 deaths involving long-term care residents, including more than 5,000 that occurred in hospitals.<sup>9</sup> A top aide to Governor Cuomo subsequently told legislators that the administration had withheld the data out of concern it would be used by federal investigators.<sup>10</sup>

Here as well, DoH has a substantial motivation to avoid another public reckoning concerning the extent of state-caused Covid deaths. In the spirit of

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<sup>7</sup> See *Empire Center for Public Policy v. New York State Department of Health*, Index No. 906023-20, Supreme Court of the State of New York, Albany County.

<sup>8</sup> *Id.* at Dkt. 39.

<sup>9</sup> <https://www.empirecenter.org/publications/covid-nursing-home-data/>

<sup>10</sup> <https://nypost.com/2021/02/11/cuomo-aide-admits-they-hid-nursing-home-data-from-feds/>

transparency, accountability, and access to information – tenets FOIL purports to guarantee – the HCC respectfully requests that it be granted a hearing, with attendant discovery necessary to arrive at the whole truth.

**CONCLUSION**

For the reasons set forth above, the HCC respectfully requests that both Decision #1 and Decision #2 be reversed in their entirety.

Dated: New York, New York  
February 2, 2023

Respectfully submitted,

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## **PRINTING SPECIFICATIONS STATEMENT**

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: February 2, 2023