

Court of Appeals
of the
State of New York

In the Matter of

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

Petitioner-Appellant,

— against —

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent-Respondent.

MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS OF THE
STATE OF NEW YORK

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

**NOTICE OF MOTION
FOR LEAVE TO APPEAL
TO THE COURT OF
APPEALS**

PLEASE TAKE NOTICE that, upon the annexed affirmation of John Dellaportas, and the exhibits thereto, and the accompanying memorandum of law, and all papers and proceedings in this action, Petitioner-Appellant Cortex Television LLC d/b/a The Healthcare Channel will move this Court, on the 19th day of February, 2024 or as soon thereafter as counsel may be heard, for an order pursuant to CPLR 5602(a)(1)(i) and Sections 500.21 and 500.22 of the Court of Appeals Rules of Practice, granting Petitioner leave to appeal to this Court from the Memorandum and Order of the Supreme Court, Appellate Division, Third Department, dated December 7, 2023.

Dated: New York, New York
February 8, 2024

Respectfully submitted,

EMMET, MARVIN & MARTIN, LLP

A handwritten signature in blue ink, appearing to be "H. L. Martin", written over a horizontal line.

By:

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Cortex Television LLC d/b/a The

Healthcare Channel

COURT OF APPEALS OF THE
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CORTEX TELEVISION LLC d/b/a The
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**AFFIRMATION IN
SUPPORT OF MOTION
FOR LEAVE TO APPEAL
TO THE COURT OF
APPEALS**

JOHN DELLAPORTAS, an attorney duly licensed to practice in the Courts of the State of New York, hereby affirms, pursuant to CPLR 2106, that the following statements are true under the penalties of perjury:

1. I am a member of the law firm of Emmet, Marvin & Martin, LLP, counsel to Petitioner-Appellant Cortex Television LLC d/b/a The Healthcare Channel (“The Healthcare Channel”).

2. I respectfully submit this affirmation in support of The Healthcare Channel’s Motion for Leave to Appeal the Memorandum and Order of the Supreme Court, Appellate Division, Third Department, dated December 7, 2023 (the “Order”) to this Court pursuant to CPLR 5602(a)(1)(i) and Practice Rule 1250.16, and for such further and other relief as the Court may deem just and proper.

3. Annexed hereto as **Exhibit A** is a true and correct copy of the Order,

dated December 7, 2023, and served on January 9, 2024 with Notice of Entry via NYSCEF.

4. Annexed hereto as **Exhibit B** is a true and correct copy of the Decision and Order of the Supreme Court of the State of New York, County of Albany, dated July 6, 2022, and served on July 7, 2022 with Notice of Entry via NYSCEF, which was appealed to the Appellate Division.

5. Annexed hereto as **Exhibit C** is a true and correct copy of the Decision and Order of the Supreme Court of the State of New York, County of Albany, dated November 30, 2022, and served on December 7, 2022 with Notice of Entry via NYSCEF, which was also appealed to the Appellate Division.

6. This motion is timely pursuant to CPLR 5513(b) as thirty days have not yet passed since The Healthcare Channel filed notice of entry of the Order in the Supreme Court on January 9, 2024.

7. This Court has jurisdiction over the motion and the proposed appeal because the Order sought to be appealed from is a final determination.

8. The Healthcare Channel wishes to have the Court of Appeals review the following question of law:

May a state agency withhold public documents responsive to a FOIL request merely because (a) the data in those documents, while responsive to the request, is not aggregated, and (b) the requesting party has no right under FOIL to review the underlying documents and aggregate the data itself?

The Appellate Division answered this question in the affirmative.

9. As set forth in the accompanying Memorandum of Law, the Order: (a) presents issues that are of great public importance, and (b) conflicts with prior FOIL decisions of this and other Courts. *See* 22 NYCRR § 500.22(b)(4).

10. Accordingly, for the reasons set forth herein and in the accompanying Memorandum of Law, The Healthcare Channel respectfully requests an order granting leave to appeal the Order to this Court.

Dated: New York, New York
February 8, 2024



JOHN DELLAPORTAS

COURT OF APPEALS OF THE
STATE OF NEW YORK

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

**MEMORANDUM OF LAW IN SUPPORT OF
PETITIONER-APPELLANT'S MOTION FOR LEAVE
TO APPEAL TO THE COURT OF APPEALS**

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QUESTION PRESENTED

May a state agency withhold public documents responsive to a FOIL request merely because (a) the data in those documents, while responsive to the request, is not aggregated, and (b) the requesting party has no right under FOIL to review the underlying documents and aggregate the data itself?

The Appellate Division answered this question in the affirmative.

Petitioner-Appellant Cortex Television LLC d/b/a The Healthcare Channel (“The Healthcare Channel”) respectfully submits this memorandum of law in support of its Motion for Leave to Appeal to the Court of Appeals from the December 7, 2023 Memorandum and Order of this Court (the “Order”).

INTRODUCTION

This case arises out of the refusal of Respondent New York State Department of Health’s (“DOH” or “Respondent”) to produce certain important public documents responsive to The Healthcare Channel’s request under New York’s Freedom of Information Law (“FOIL”). The purpose of FOIL is to maintain a “free society” by promoting public oversight over government services, revenues, and expenditures “wherever and whenever feasible.” POL § 84. “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.’” *Abdur-Rashid v. New York City Police Dep’t*, 31 N.Y.3d 217-224-25 (2018) (citation omitted).

This case exemplifies why FOIL exists. In the early months of the COVID-19 pandemic, certain New York State-run hospitals experienced COVID death rates that shocked the world. Those hospitals by law were required to, and presumably did, report their treatment protocols to DOH. Yet when The Healthcare Channel, a well-renowned healthcare journalism organization, requested those documents under FOIL, DOH still refused to provide them. This case ensued.

Throughout this case, DOH has been less than forthright about its recordkeeping. First, before the IAS Court, it insisted (in sworn statements) that no such documents existed. Then, when it was established that DOH requires the hospitals under its supervision to maintain such records, it turned around on appeal and argued that it did not have to produce such treatment records, because they were specific to each patient, and it was not required to “aggregate” data. When The Healthcare Channel indicated that it was perfectly qualified and willing to aggregate the data on its own, DOH still refused to produce the underlying records. Remarkably, the Appellate Division said this was OK.

The Court of Appeals should now review the Order. The Courts below allowed DOH to escape disclosure on the basis that it has no obligation to produce aggregate information, while at the same time, not letting The Healthcare Channel aggregate the data itself. This run-around contravenes the very purpose of FOIL, as well as longstanding legal precedent. This Court’s review is also necessary because the Order keeps the public in the dark about significant COVID-19 deaths of patients from historically underserved communities and the treatments that may have contributed. This is not the first time the State has tried to hide COVID-19 death tolls at state-regulated facilities, but it should be the last.¹

¹ See *New York Times*, “Cuomo Aides Spent Months Hiding Nursing Home Death Toll.” <https://www.nytimes.com/2021/04/28/nyregion/cuomo-aides-nursing-home-deaths.html> (Apr. 28, 2021). It was only as a consequence of an Article 78 FOIL proceeding brought by another petitioner that the full scope of nursing home deaths came to light.

FACTUAL BACKGROUND

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

At the time of the Petition, New York State had 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, *e.g.*, Elmhurst Hospital Center in the state-run New York City Health and Hospitals Corporation (“NYC HHC”), performed measurably worse in the pandemic, with deadly consequences for communities of color, immigrants, and other historically disadvantaged communities. *Id.*

The disparities in death rates do not appear to exclusively result from demographic or socio-economic factors. *Id.* Rather, signs point to human error. *Id.* In early 2020, visiting nurses came to New York to assist with care. *Id.* Several went public in social media testimonials as to how state-run hospitals were causing needless death through deficient care. *See, e.g., 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. If these whistleblower allegations are true, then ICU protocol was violated. Doctors were putting patients on ventilators knowing they would not manage those ventilators because the patients were quarantined. Death is a heightened risk from such practice.

B. Dr. Greer and The HealthCare Channel

Founded in 2006, the Healthcare Channel is a multimedia global portal which provides medical education on the latest clinical developments and controversies. R21. The company'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 New York University. *Id.* Dr. Greer has numerous medical journal papers and textbook publications while at NYU Medical Center. Dr. Greer 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 bureaucratic agency called the Center for Medicare and Medicaid Innovation. In 2010, Dr. Greer and The Healthcare Channel, together with the University of Miami Health System, hosted a roundtable discussion on reducing 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 under the Clinton administration. R22.

The Healthcare Channel continues to interview knowledgeable doctors and policymakers to discuss issues in medicine, surgery, public health, and policy. Its target audience are practicing physicians, surgeons, and policymakers. Its content has been carried on Reuters TV and national news sites such as the *Wall Street Journal*, ABC and NPR. It is funded by private grants and receives no funding from the pharmaceutical industry. It is non-partisan and unaffiliated with any PAC, thinktank, lobbying group, or industry lobbyist group. R22.

C. The FOIL Request to DOH

In 2020, as the pandemic worsened, Dr. Greer was among the first to call out the disproportionate COVID-19 deaths occurring in New York's state-run facilities. On January 27, 2021, Dr. Greer, on behalf of The Healthcare Channel, submitted a FOIL request to DOH for the following records:

1. 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. document the total number of deaths recorded at each of these HHC hospitals annually since 2016;
3. documents that detail total deaths by individual HHC hospitals from January 1, 2020 to current;
4. 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. 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. 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 ... detailed by each individual hospital;
7. 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. 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; and
9. documents that detail the administration of COVID vaccines in HHC hospitals to date, detailed by each hospital.

R29-30 (collectively, the “Requests”).

D. The DOH Makes An Incomplete Production

DOH sent The Healthcare Channel a series of letters thereafter delaying its time to determine whether the January 27, 2021 FOIL request would be approved or denied. Finally, on May 25, 2021, DOH’s Records Access Officer, Rosemarie Hewig, responded to The Healthcare Channel in relevant part as follows:

I have enclosed documents responsive to parts 1-4 and part 9 of your request. ... 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 [Statewide Planning and Research Cooperative System] SPARCS data is available at this time.

R37.

Thereafter, on May 26, 2021, Dr. Greer, on behalf of The Healthcare Channel, appealed the 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.

R39-40.

Dr. Greer, on behalf of The Healthcare Channel, requested that:

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. ...

R39-40.

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." R43.

E. Procedural History

On June 10, 2021, The Healthcare Channel commenced this Article 78 proceeding by filing a Verified Petition in the Supreme Court for New York County, later transferred to Albany County (the "Petition"). R19-28. The Petition sought, *inter alia*, a judgment declaring that DOH had acted unlawfully and with no reasonable basis in failing to produce the Records, and that it should therefore release them within five days of the date of judgment. R27.

In support of that relief, The Healthcare Channel pointed to DOH's own web site, which states that: "Reporting of suspected or confirmed communicable diseases is mandated 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 HHC are Article 28 institutions subject to this law, and thus 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.* In sum, the DOH undeniably has responsive records.

F. The Insufficient Affidavit of Rosemarie Hewig

Nevertheless, DOH denied it. In August 2021, it filed a Verified Answer to the Petition, along with an affidavit in opposition to the Petition. R44-49; R75-81. The affiant was Rosemarie Hewig, who described herself as “an employee of the Records Access of the New York State Department of Health”. R75. In her affidavit, Ms. Hewig stated under oath that DOH “conducted a diligent search for records responsive to” the HCC’s 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 that “the relevant Programs” (a term she did not define) “confirmed” that DOH had no further documents responsive to the Requests. R79.

Notably, Ms. Hewig made no mention of the mandatory reports imposed on HHC’s hospitals under 10 NYCRR 2.10. R75-81. She only specifically mentioned her review of the SPARCS “comprehensive all payer data reporting system,” which would seem unlikely to contain the requested documents. R78-80.

G. The IAS Court’s July 6, 2022 Decision and Order

By Decision dated July 1, 2022, entered on July 6, 2022, Justice Koweeck dismissed the Petition in its entirety. R2-9. The IAS Court held that:

[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 its possession of the information contemplated by items 5 through 9 in the FOIL request. . .

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.

H. The IAS Court’s November 30, 2022 Decision and Order

On August 8, 2022, The Healthcare Channel moved to reargue, explaining that the IAS Court had overlooked the fact that DOH never specifically denied that it possessed the mandatory reports imposed upon HHC’s hospitals under 10 NYCRR 2.10, nor did it ever claim that such reports were destroyed, nor that it had waived the HHC’s reporting requirement. R105; R106-115; R121-122.

By Decision and Order dated and entered on November 30, 2022, the IAS Court adhered to its original Decision and Order, holding 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 Appellate Division's Order

The Healthcare Channel appealed both of the aforementioned IAS Court Decisions to the Appellate Division. R1; R10. Following appellate briefing, oral argument was held on October 18, 2023. Thereafter, on December 7, 2023, that Court issued its Order affirming the Decisions below. Specifically, the Appellate Division affirmed the dismissal of the Petition, held that Ms. Hewig's affidavit (the sole evidence in support of DOH's position) was a sufficient basis to deny the FOIL request, and rejected The Healthcare Channel's request for an evidentiary hearing where these issues could have been properly vetted.

The Appellate Division speculated that "the fact that these forms contain spaces where optional comments can be provided regarding a patient's treatment does not necessarily mean that hospitals actually reported the particular information being pursued by petitioner," and that "even assuming that such [treatment] information had been reported on these forms for certain patients, petitioner's FOIL request sought data in the aggregate, and petitioner has made no showing that respondent possesses any such aggregated data."

ARGUMENT

THE ORDER MUST BE REVIEWED TO STOP DOH FROM SHIELDING THE PUBLIC FROM THE TREATMENT DATA NEEDED TO UNDERSTAND WHY MASS DEATHS OCCURRED IN STATE-RUN HOSPITALS

This is a matter of immense public importance—the mass death of thousands of individuals from underserved communities who quite possibly were improperly cared for in state-run hospitals during the COVID-19 pandemic. Specifically, the Court of Appeals should review whether the lower courts erred when they held that there was no demonstrable basis that the requested information exists even though the law requires such information be reported to the DOH.

The Appellate Division’s novel ruling sanctions the DOH’s absurd and unseemly end-run around this State’s FOIL requirements—claiming the data has never been aggregated, and then refusing to provide the data in unaggregated form so that the requestor can do the aggregation itself. As noted above, The Healthcare Channel is a well-respected medical journalism organization whose Founder and President has published multiple medical studies. The Healthcare Channel can handle the treatment data in whatever form it exists.

In support of its ruling, the Appellate Division offers up this *non sequitur*: “[a]n agency is not required to create records in order to comply with a FOIL request.” But the Healthcare Channel has never asked DOH to “create” records; it only asks that DOH produce records that already exist.

As even the Appellate Division begrudgingly acknowledges, 10 NYCRR 2.10 “requires, as relevant here, that public hospitals report the name, age and address of each individual diagnosed with such a disease” and the mandatory reporting “forms contain spaces where optional comments can be provided regarding a patient’s treatment....” The word “optional” is the Court’s commentary—it appears nowhere in the mandatory reporting form. But even putting that aside, there is no concept under FOIL by which, if only incomplete information is available, the agency can simply give nothing.

Further, to the extent a disagreement exists over whether the mandatory reporting forms contain the requested treatment data, the solution is not for the lower courts to engage in conjecture. Even “[w]here an agency properly certifies that it does not possess a requested record, a petitioner may be entitled to a hearing on the issue if it can articulate a demonstrable factual basis to support the contention that the requested document existed and was within the agency’s control.” *Matter of Empire Ctr. for Pub. Policy v. New York State Energy & Research Dev. Auth.*, 188 A.D.3d 1556, 1558 (3d Dep’t 2020); accord *Oddone v. Suffolk County Police Dept.*, 96 A.D.3d 758, 761 (2d Dep’t 2012) (same). Such an evidentiary hearing would be particularly appropriate here, given that this particular state agency—DOH—has a well-documented history of improperly withholding documents related to COVID-19 deaths in state-run facilities.

As was widely reported after the fact, when initially reporting the number of nursing home deaths caused by COVID-19, the DOH 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. *See Empire Center for Public Policy v. New York State Department of Health*, Index No. 906023-20 (Sup. Ct., Albany Cnty.). The Court in that case ultimately scolded DOH for repeatedly falsely telling the petitioner that “it was unable to respond to the [FOIL] request”. *Id.* at Dkt. 39. Ultimately, DOH provided dates and locations of nearly 16,000 deaths of long-term care residents, including more than 5,000 in hospitals following transfer from nursing homes. *See <https://www.empirecenter.org/publications/covid-nursing-home-data/>*.

Here as well, DOH has a substantial motivation to avoid another public reckoning concerning the extent of state-caused COVID-19 deaths. If the DOH is unwilling to simply produce the individual reporting forms (the simplest and most efficient result) for the sake of transparency and accountability—tenets FOIL purports to guarantee—The Healthcare Channel should, at a minimum, be granted a hearing to determine what is in those forms. This winter has seen a resurgence of COVID-19 cases, and new deadly viruses surely await. The only way researchers and scholars can learn from mistakes is for the truth to be revealed.

CONCLUSION

For the reasons set forth above, The Healthcare Channel respectfully requests that this Court grant leave to appeal the Order.

Dated: New York, New York
February 8, 2024

/s/ John Dellaportas _____
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DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Court of Appeals Rules of Practice, I hereby affirm that Petitioner CORTEX TELEVISION LLC d/b/a The Healthcare Channel does not have parents, subsidiaries or affiliates.

/s/ John Dellaportas

JOHN DELLAPORTAS

EXHIBIT A

Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 7, 2023

536110
CV-22-2266

In the Matter of CORTEX
TELEVISION LLC, Doing
Business as THE
HEALTHCARE CHANNEL,
Appellant,

MEMORANDUM AND ORDER

v

NEW YORK STATE DEPARTMENT
OF HEALTH,
Respondent.

Calendar Date: October 18, 2023

Before: Clark, J.P., Aarons, Pritzker, Ceresia and Fisher, JJ.

Emmet, Marvin & Martin, LLP, New York City (*Judith L. Swartz* of counsel), for appellant.

Letitia James, Attorney General, Albany (*Beezly J. Kiernan* of counsel), for respondent.

Ceresia, J.

Appeals (1) from a judgment of the Supreme Court (Richard M. Koweek, J.), entered July 6, 2022 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent denying petitioner's Freedom of Information Law request, and (2) from an order of said court,

entered November 30, 2022 in Albany County, which, upon reargument, adhered to its prior decision dismissing the petition.

Petitioner, a media company that produces healthcare-related content for a target audience of doctors and policymakers, made a Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]) request to respondent. The nine-part request sought information about the treatment provided to COVID-19 patients in hospitals, as well as statistics relating to hospital deaths in general and those specifically due to COVID-19. Some parts of the FOIL request were limited to public hospitals in the New York City area, which fall under the auspices of the New York City Health and Hospitals Corporation (hereinafter HHC), a New York State public benefit corporation (*see* McKinney's Uncons Laws of NY § 7382) over which respondent exercises oversight (*see* Public Health Law § 2800; *Harlem Hosp. Ctr. Med. Bd. v Hoffman*, 84 AD2d 272, 281 [1st Dept 1982], *appeal dismissed* 56 NY2d 807 [1982]). Respondent's records access office (hereinafter the RAO) provided records pertaining to parts 1 through 4 and 9 of the FOIL request. The RAO also indicated that a diligent search had revealed no records responsive to parts 5, 6 and 8 of the request, and that no complete data was available in response to part 7 of the request.

Petitioner then filed an administrative appeal in which it sought complete responses to parts 5 through 8 of its FOIL request and updated responses to parts 1 through 4.¹ The administrative appeal was denied, following which petitioner commenced the instant CPLR article 78 proceeding seeking, among other things, to annul respondent's determination and compel respondent to provide it with all of the records sought. Supreme Court dismissed the petition in its entirety, and petitioner moved to reargue. Supreme Court granted reargument but adhered to its prior decision, prompting this appeal by petitioner, challenging both rulings.

As set forth in its appellate brief, petitioner only takes issue with the responses provided by respondent relative to parts 5 through 8 of the FOIL request, arguing that they were incomplete. We disagree. Upon receipt of a proper FOIL request, an agency is required by statute to provide the record in question or "certify that it does not have possession of such record or that such record cannot be found after diligent search" (Public Officers Law § 89 [3] [a]; *see Matter of Rattley v New York City Police Dept.*, 96

¹ Petitioner did not reference part 9 of its FOIL request in its administrative appeal.

NY2d 873, 875 [2001]; *Matter of Binghamton Precast & Supply Corp. v New York State Thruway Auth.*, 196 AD3d 944, 945 [3d Dept 2021]).

In connection with its answer, respondent submitted a sworn affidavit from Rosemarie Hewig, its records access officer. According to Hewig, the RAO reached out to representatives from several of respondent's various programs while searching for documents responsive to petitioner's FOIL request. Specifically, the RAO consulted with respondent's Office of Primary Care and Health Systems Management Division of Hospitals, its Division of Certification and Surveillance and its Office of Quality and Patient Safety. Relative to part 5 of petitioner's request, seeking state guidelines for handling the clinical care of COVID-19 patients, including when and how to administer medications and ventilators, and part 8, which sought plans to create hospice-like wards within intensive care units of hospitals where COVID-19 patients were left to receive minimal care, representatives confirmed that they do not maintain any such guidelines or plans. As for part 6, requesting the number of COVID-19 patients in HHC hospitals who received certain specified treatments, and part 7, which requested the number of COVID-19 patients in HHC hospitals who were treated with ventilators and their respective outcomes, representatives verified that they do not possess data responsive to these requests. Hewig also noted in her affidavit that, because HHC is a separate entity, respondent does not have access to all of the records kept by HHC, but only those that are required to be provided to respondent in its regulatory role. In light of the aforementioned, we are satisfied that respondent furnished appropriate responses to the subject portions of the FOIL request by certifying that the sought-after documents did not exist or could not be found despite a diligent search (*see Matter of Wright v Woodard*, 158 AD3d 958, 959 [3d Dept 2018]; *Matter of McFadden v Fonda*, 148 AD3d 1430, 1432 [3d Dept 2017]).

We are similarly unpersuaded by petitioner's alternative contention that Supreme Court was required to conduct an evidentiary hearing prior to resolving the petition. "Where an agency properly certifies that it does not possess a requested record, a petitioner may be entitled to a hearing on the issue if it can articulate a demonstrable factual basis to support the contention that the requested document existed and was within the agency's control" (*Matter of Empire Ctr. for Pub. Policy v New York State Energy & Research Dev. Auth.*, 188 AD3d 1556, 1558 [3d Dept 2020] [internal quotation marks, brackets and citations omitted]). "That said, unsupported speculation that records have been withheld is an insufficient basis upon which to grant a petition" (*Matter of*

Jewish Press, Inc. v New York State Police, 207 AD3d 971, 973 [3d Dept 2022] [internal quotation marks, brackets and citations omitted]).

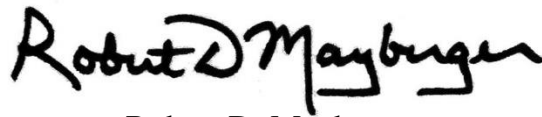
Petitioner, claiming that the information sought must necessarily exist, pointed to a regulation obligating physicians to report outbreaks of communicable diseases (*see* 10 NYCRR 2.10). However, that regulation merely requires, as relevant here, that public hospitals report the name, age and address of each individual diagnosed with such a disease (*see* 10 NYCRR 2.10). It does not mandate the reporting of protocols, plans, treatments or outcomes, as sought in petitioner's FOIL request. Petitioner also relied upon certain forms used by hospitals for reporting individual patients with communicable diseases, but the fact that these forms contain spaces where optional comments can be provided regarding a patient's treatment does not necessarily mean that hospitals actually reported the particular information being pursued by petitioner. Moreover, even assuming that such information had been reported on these forms for certain patients, petitioner's FOIL request sought data in the aggregate, and petitioner has made no showing that respondent possesses any such aggregated data. To that end, and subject to certain exceptions not applicable here, "[a]n agency is not required to create records in order to comply with a FOIL request" (*Matter of He'ron v Office of the Dist. Attorney, Bronx County*, 96 AD3d 531, 531 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]; *see* Public Officers Law § 89 [3] [a]; *Matter of Reubens v Murray*, 194 AD2d 492, 492 [1st Dept 1993]).

Accordingly, based upon all of the foregoing, we find that Supreme Court properly dismissed the petition. To the extent not specifically addressed herein, petitioner's remaining contentions have been considered and determined to be without merit.

Clark, J.P., Aarons, Pritzker and Fisher, JJ., concur.

ORDERED that the judgment and the order are affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

CORTEX TELEVISION LLC d/b/a
THE HEALTHCARE CHANNEL,

Index No. 901436/2022

Petitioner, **NOTICE OF ENTRY**

- against -

NEW YORK STATE
DEPARTMENT OF HEALTH,

Respondent,

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

-----X

PLEASE TAKE NOTICE that the attached is a true and complete copy of the Decision and Order of the Court that was duly entered and filed in the Office of the Clerk of the County of Albany on July 6, 2022.

Dated: New York, New York
July 7, 2022

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondent

By:
/s/ Seth Farber
Seth Farber, Esq.
Assistant Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8029

To: John Dellaportas, Esq.
EMMET, MARVIN & MARTIN, LLP
120 Broadway
New York, NY 10271
(212) 238-3000
Attorneys for Petitioner

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

CORTEX TELEVISION LLC dba The
Healthcare Channel,

Index No. 901436-22
RJI No. 01-22-ST2221

Petitioner,

-against-

DECISION AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

INTRODUCTION

Petitioner filed a FOIL request seeking nine areas of statistics regarding nonparty New York City Health and Hospital Corporation, (“HHC”), a public benefit corporation, that are more particularly set forth in the Verified Petition (NYSCEF Doc. #1 at pages 4 and 5). According to Respondent and not persuasively contradicted by Petitioner, HHC is a creature of statute, not part of the Department of Health (DoH) and operates a number of hospitals in New York State.

After a series of delays, the Respondent searched for and located some of the records it receives from the HHC hospitals pursuant to certain reporting requirements and statutes. It identified those documents it believed to be responsive to the request under items 1 through 4 and part of item 9 and supplied an Affidavit from Rosemarie Hewig, its Records Access Officer (RAO), explaining both the response supplied and the reason why other information sought

could not be located.

Petitioner, in reply, alleges, through counsel, upon information and belief, that all hospitals under the control of HHC are subject to the requirement of reporting suspected or confirmed communicable diseases to the DoH, if the facility is licensed under Article 28 of the Public Health Law (PHL). He makes reference to Section 2.1 of 10 NYCRR as the obligatory reporting statute, compelling HHC hospitals to report this information to DoH. The forms promulgated by DoH for use by hospitals require them to report treatment. The absence of these records from these hospitals cannot be explained by the response that the information is unavailable, asserts Petitioner.

DISCUSSION

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.’ The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required. (*Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001] [brackets omitted], quoting Public Officers Law § 89 [3] [a]).

Here, the RAO averred that part of her duties included reviewing requests for records, and she reviewed Petitioner's requests for the information sought. From her review of the records maintained by Respondent and from conversations

with staff employed by the office that is responsible for maintaining Respondent's archived records, including with the Office of Primary Care and Health Systems Management, Division of Hospitals and D&TCs, Division of Certification and Surveillance, and Office of Quality and Patient Safety, she averred that, after a diligent search, no requested records were identified for topics contained in 5, 6 and 8. She further averred that, with regard to item 7, no complete data on ventilator use for COVID patients, utilizing a comprehensive all payer data reporting system (SPARCS), was available at the time of the request.

More specifically, with regard to the request in part 5, guidelines issued by the State for handling clinical care of COVID-infected patients, including administration of medications and ventilators, she averred no such documents are maintained. Concerning part 6, Respondent does not have the data that identifies patients in HHC hospitals that received monoclonal antibodies, remdesivir or plasma from COVID patients. Additionally, concerning part 7, it did not have readily available data by which it could identify outcomes of COVID patients treated with ventilators and their discharge status. Finally, as to part 8, it did not maintain documents that outline plans to create hospice-like wards within ICUs of HHC hospitals.

This certification satisfied Respondent's obligation under Public Officers Law § 89 (3) (*see Matter of Wright v Woodard*, 158 AD3d 958, 958-959

[2018]; Matter of McFadden v Fonda, 148 AD3d at 1432; Matter of Curry v Nassau County Sheriff's Dept., 69 AD3d 622, 622 [2010], lv dismissed 14 NY3d 853 [2010]; Matter of Gregory Jackson v. Albany County District Attorney, 176 A.D.3d 1420, 1421-22 (3d Dept. 2019).

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. This is in contrast to the determination of the Third Department in the case of Binghamton Precast & Supply Corp. v. New York State Thruway Authority, 196 A.D.3d 944, 946 (3d Dept. 2021).

That these documents may be maintained and in the possession of these hospitals does not mean that they are subject to FOIL by this Respondent. It has been asserted, without reasonable contradiction by Petitioner, that HHC is a Public Benefit Corporation and not a subdivision of the State of New York.¹ Nothing has been demonstrated by Petitioner that leads ineluctably to the conclusion that HHC is a municipal or district corporation. Because HHC is not a subdivision of the Respondent, it does not have access to all records kept by HHC, but rather only

¹ General Construction Law 66[4] defines this phrase as "....a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this state or other states, or to the people thereof." A public corporation, in turn, includes a municipal corporation, district corporation or a public benefit corporation. (General Construction Law 66[1]).

those records sent to it by HHC that are required to be reported pursuant to regulations.

Moreover, the 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.

Additionally, an agency has no obligation to create documents that do not exist nor to compile data in a form different from an existing form. Bronx v. NYC Police Department, 264 A.D.2d 558, 561-562 (1st Dept. 1999). In this case, DoH did not rely on any of the exemptions available under the Public Officers Law. Rather, it conducted a diligent search of its records and supplied those it found, along with an explanation as to why it could not find other records sought, thus complying with Public Officers Law §89(3). Matter of Gregory Jackson v. Albany County District Attorney, supra at 1421-1422.

Given the voluminous nature of the information sought, the Court does not find that the time taken to supply a response in this case was excessive. Matter of Data Tree v. Romaine, 9 N.Y.3d 454, 465 (2007). Therefore, there was no constructive denial of the information sought.

It follows from the foregoing that Petitioner has not “substantially


prevailed.” The Respondent did not wrongfully deny access to records to which Petitioner might otherwise be entitled, but rather exercised due diligence in supplying such records as it could locate. Therefore, Petitioner is not entitled to attorney’s fees under Public Officers Law §89(4). Beechwood Restorative Care Ctr, v. John Signor, 5 N.Y.3d 435, 441 (2005).

The Petition is dismissed.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry and filing by the Albany County Clerk. Upon such entry, counsel for the petitioner shall promptly serve notice of entry on all other parties entitled to such notice and is not relieved from the applicable provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the proceeding, whether accomplished by mailing or electronic means.

This is the Decision and Order of this Court.

DATED: July 1, 2022
Hudson, New York


RICHARD M. KOWEEK
Acting Supreme Court Judge



07/06/2022

Papers Considered:

1. Verified Petition of Cortex Television LLC verified by Steven E. Greer, MD, on June 10, 2021; together with Exhibits "A" through "I" (NYSCEF Docs. #1 through 10)
2. Verified Answer of Seth J. Farber, Esq., Assistant Attorney General, dated August 16, 2021 (NYSCEF Doc. #17)
3. Respondents' Memorandum of Law in Opposition to Petition and in Support of Cross-Motion of Seth J. Farber, Assistant Attorney General, dated August 16, 2021 (NYSCEF Doc. #18)
4. Affidavit of Rosemarie Hewig in opposition to Petition sworn to August 16, 2021, together with Exhibits "A" through "H" (NYSCEF Docs. #19 through 27)
5. Reply Affirmation in Further Support of Article 78 Petition of John Dellaportas, Esq., dated August 30, 2021, together with Exhibit "A" (NYSCEF Docs. #33 and 34)
6. Decision and Order (NYSCEF Doc. 35) granting Cross-Motion (NYSCEF Doc. #29) to change venue executed by the Honorable John J. Kelly, Supreme Court Justice, dated January 11, 2022

EXHIBIT C

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

CORTEX TELEVISION LLC dba The
Healthcare Channel,

Index No. 901436-22
RJI No. 01-22-ST2221

Petitioner,

-against-

DECISION AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

INTRODUCTION

Petitioner filed a FOIL request seeking nine areas of statistics regarding nonparty New York City Health and Hospital Corporation, (“HHC”), a public benefit corporation, that are more particularly set forth in the Verified Petition (NYSCEF Doc. #1 at pages 4 and 5). According to Respondent and not persuasively contradicted by Petitioner, HHC is a creature of statute, not part of the Department of Health (DoH) and operates a number of hospitals in New York State.

The Respondent searched for and located some of the records it received from the HHC hospitals pursuant to certain reporting requirements and statutes. It identified those documents it believed to be responsive to the request under items 1 through 4 and part of item 9 and supplied an Affidavit from Rosemarie Hewig, its Records Access Officer (RAO), explaining both the response supplied and the

reason why other information sought could not be located. After exhausting its administrative steps, Petitioner commenced an Article 78 proceeding, which was opposed by Respondent. By Decision and Order dated July 1, 2022, this Court dismissed the Petition. Petitioner filed a Notice of Appeal on August 12, 2022, with the Albany County Clerk. It also filed this Motion for Permission for Leave to Reargue pursuant to CPLR 2221(d) on August 8, 2022, returnable September 7, 2022. The Motion is opposed by Respondent.

ARGUMENTS

CPLR 2221 provides in part:

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:

1. if the order was made upon a default such motion may be made, on notice, to any judge of the court; and
2. if the order was made without notice such motion may be made, without notice, to the judge who signed it, or, on notice, to any other judge of the court.

(b) Rules of the chief administrator of the courts. The chief administrator may by rule exclude motions within a department, district or county from the operation of subdivision (a) of this rule.

(c) A motion made to other than a proper judge under this rule shall be transferred to the proper judge.

(d) A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

In support of its application, Petitioner makes many of the same arguments contained in its original Article 78 Petition. 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. Indeed, the only case cited by Petitioner in support of its argument, Rattley v. New York City Police Department, 96 N.Y.2d 873,875 (2001) held:

The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required. Here, the Department satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate.

The cases cited by this Court in its original Decision and Order on pages 3 and 4 are still persuasive and of precedential value. Moreover, Petitioner overlooks the distinction made by the Court between HHC, a Public Benefit Corporation and New York State Department of Health¹. In short, Petitioner has failed to demonstrate that the Court has overlooked or misapprehended the facts or law in arriving at its earlier decision. Weaver v. Weaver, 198 A.D.3d 1140, 1143 (3d Dept. 2021).

In the interest of discretion, the Court grants Petitioner's Motion to Reargue. Upon reargument, the Court adheres to its previous Decision and Order of July 1, 2022.

The Motion is denied.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry and filing by the Albany County Clerk. Upon such entry, counsel for the Petitioner shall promptly serve notice of entry on all other parties entitled to such notice and is not relieved from the applicable provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of

¹ Decision and Order at page 4.

the filed document upon all other parties to the proceeding, whether accomplished by mailing or electronic means.

This is the Decision and Order of this Court.

DATED: Nov 30, 2022
Hudson, New York



RICHARD M. KOWEEK
Acting Supreme Court Judge



11/30/2022

Papers Considered:

1. Notice of Motion for Reargument of John Dellaportas, Esq., dated August 8, 2022 (NYSCEF Doc.#47)
2. Affirmation in Support of Motion for Reargument of John Dellaportas, Esq., dated August 8, 2022 (NYSCEF Doc. #48)
3. Affirmation in Opposition to Motion for Reargument of Seth Farber, Esq., Assistant Attorney General, dated August 25, 2022 (NYSCEF Doc. #50)
4. Reply Affirmation in Further Support of Motion for Reargument of John Dellaportas, Esq., dated August 31, 2022 (NYSCEF Doc. #51)

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF SERVICE
BY OVERNIGHT FEDERAL
EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On February 8, 2024

deponent served the within: **Motion for Leave to Appeal**

upon:

LETITIA JAMES
ATTORNEY GENERAL OF THE STATE OF NEW YORK
BEEZLY JAMES KIERNAN ASSISTANT ATTORNEY GENERAL
Attorneys for Respondent-Respondent
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2023
beezly.kiernan@ag.ny.gov

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on February 8, 2024



MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026



Job# 327522