

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of

EMPIRE CENTER FOR PUBLIC POLICY,

Petitioner,

**DECISION AND
ORDER/JUDGMENT**

Index No.: 906023-20

RJI No.: 01-20-ST1230

-against-

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

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

(Supreme Court, Albany County, Special Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES: GOVERNMENT JUSTICE CENTER
Attorney for Petitioner
(Tyler K. Patterson, Esq. and
Cameron J. MacDonald, Esq., of Counsel)
30 South Pearl Street, Suite 1210
Albany, New York 12207

HON. LETITIA JAMES
Attorney General for the State of New York
Attorney for Respondent
(Melissa A. Latino, Esq., Assistant Attorney
General, of Counsel)
The Capitol
Albany, New York 12224-0341

MICHAEL P. MANSION, ESQ.
Attorney for Amicus Curiae
Senator James N. Tedisco
Legislative Office Building
Room 515
Empire State Plaza
Albany, New York 12247

O'CONNOR, J.:

On August 3, 2020, petitioner Empire Center for Public Policy (“Empire Center” or “petitioner”), a not-for-profit think tank that educates the public and policymakers about various issues, including healthcare policy, submitted a request to respondent New York State Health Department (“DOH” or “respondent”), pursuant to New York’s Freedom of Information Law (“FOIL”), for “records of COVID-19-related deaths of residents of nursing homes and assisted living facilities, including those who died while physically outside homes” (Ver. Pet, Ex. A; Affidavit of Rosemarie Hewig, Ex. A). Petitioner asked that “[t]he records . . . include, to the extent possible, (a) the total number of such deaths recorded statewide, (b) the number of such deaths recorded on each date[,] and (c) the number of such deaths recorded in each nursing home or assisted living facility” (*id.*). DOH’s Records Access Officer (“RAO”) acknowledged receiving Empire Center’s request that same day, and informed petitioner that its request “ha[d] been forwarded to the appropriate Department program area(s) to identify [responsive] documents,” which “may be made available pursuant to . . . [FOIL]” (Ver. Pet., Ex. B; Hewig Aff., Ex. B). The RAO advised Empire Center that a determination to grant or deny the request “[would] be reached in approximately 20 business days” or petitioner would be notified if “additional time [was required] to locate, assemble, and review documents that may be responsive to [its] request” (*id.*).

By letter dated August 31, 2020, DOH’s RAO notified Empire Center that respondent was “unable to respond to [its] request by the date previously given . . . because a diligent search for responsive documents [was] still being conducted,” and “estimate[d] that [respondent] [would] complete its process by November 5, 2020” (Ver. Pet., Ex. C; Hewig Aff., Ex. C). Respondent further stated that DOH would “notify [petitioner] in writing when/if responsive materials are available for release or if the time needed to complete [its] request extends beyond . . . [that] date” (*id.*). On September 1, 2020, Empire Center administratively “appeal[ed] the constructive denial

of [its] [August 3, 2020] FOIL request,” contending that the “[D]epartment’s failure to provide the requested records within 20 days – and its failure to set a date certain for completing the request – amounts to an effective denial of the request” (Ver. Pet., Ex. D; Hewig Aff., Ex. D). In its appeal, petitioner asserted that “[t]he records in question are being gathered by the [D]epartment through its H[ospital] Emergency Response Data System” and “that [t]he [S]tate [H]ealth [C]ommissioner, Dr. Howard Zucker acknowledged that the [DOH] possesses these records during his recent testimony at hearings held by the Legislature” (*id.*). As such, Empire Center maintained that “[l]ocating the documents could not reasonably require more than 20 days, let alone three months,” and requested that the records be provided without further delay (*id.*).

On September 16, 2020, DOH’s Records Access Appeals Officer denied petitioner’s administrative appeal “in its entirety” (Ver. Pet., Ex. H., Hewig Aff., Ex. E). In rendering the determination, the Appeals Officer stated that “[t]here is no provision in FOIL that prohibits extensions, even repeated extensions, which are particularly reasonable under the circumstances” (*id.*). The Appeals Officer indicated, “[s]pecifically,” that “documents need to be located and then reviewed for responsiveness, accuracy, legal privileges, and applicable FOIL exemptions under the POL,” and concluded that “the response time of DOH’s [Records Access Office] is reasonable under the circumstances” (*id.*). Empire Center was advised by the Appeals Officer that “[j]udicial review of [the] decision may be obtained pursuant to CPLR Article 78” (*id.*).

Petitioner subsequently commenced this Article 78 proceeding on September 18, 2020, claiming that Empire Center has a right to the requested records and that DOH has constructively denied disclosure of such records by, among other things, failing to provide an approximate date, which is reasonable under the circumstances, as to when respondent will respond to its FOIL request. By its petition, Empire Center seeks an order of the Court: (1) declaring that DOH acted unlawfully in failing to produce the records and that DOH must release the records within five (5)

days of the date of the order; and (2) awarding attorney's fees and costs incurred in this litigation as allowed under FOIL. Before issue was joined, James N. Tedisco, the duly elected New York State Senator for the 49th State Senate District ("Senator Tedisco") moved for leave to appear as *amicus curiae* in this proceeding. Thereafter, respondent interposed an answer to the petition, opposing the requested relief and asserting, as an objection in point of law, that petitioner failed to exhaust its administrative remedies prior to bringing this proceeding. Petitioner replied to the opposition. DOH takes no position with respect to Senator Tedisco's application.

After this matter was returnable, DOH's RAO wrote to Empire Center on November 5, 2020 regarding petitioner's "Freedom of Information Law (FOIL) request of August 3, 2020, which is currently being processed" (NYSCEF Dkt. 34). Petitioner was advised that DOH was "unable to respond to [its] request by the date previously given . . . because the records potentially responsive to [the] request are currently being reviewed for applicable exemptions, legal privileges and responsiveness" (*id.*). DOH estimated that it would "complete its process by January 13, 2021," and indicated that it would "notify [petitioner] in writing when/if the responsive materials are available for release or if the time needed to complete [the] request extends beyond the [January 13, 2021] date" (*id.*). A virtually identical letter was sent to Empire Center by the DOH RAO on January 13, 2021, informing petitioner that the estimated date for completing the process was now March 22, 2021, and that petitioner will be notified "in writing when/if the responsive materials are available for release or if the time needed to complete [the] request extends beyond the [March 22, 2021] date" (NYSCEF Dkt. 37).

Empire Center argues that a potential disclosure date more than three months after it submitted its FOIL request is not reasonable under the circumstances. Petitioner points out that throughout the COVID-19 pandemic, the DOH has required nursing homes to file daily reports through its Hospital Emergency Response Data System ("HERDS"), which includes counts of all

nursing home residents who die from COVID-19 within nursing home facilities and elsewhere. Empire Center notes that as part of their daily HERDS reports, nursing homes are required to complete a questionnaire that asks facilities to report only numbers of COVID-19 fatalities that occurred inside and outside of nursing homes.¹ Petitioner further notes that DOH relied on its HERDS data when it analyzed COVID-19 nursing home fatalities in the State.²

According to Empire Center, there is no reason why DOH hasn't already produced the requested records because respondent has the data and has used it in its own reports. Furthermore, petitioner asserts that no search of physical files is necessary here as disclosure requires a simple data report that does not take more than two months. Moreover, citing *Matter of Linz v. Police Dep't of City of New York* (NYLJ, Dec. 17, 2001 [Sup. Ct., New York County 2001]), Empire Center submits that its request isn't voluminous, that DOH has demonstrated it can access HERDS data when it put that data in a report in July, that petitioner is only seeking the recorded numbers, and that DOH has nothing to review for accuracy or to redact. As such, petitioner contends that DOH's failure to provide a reasonable response date is unjustified and that its nondisclosure runs counter to FOIL's mandate of open, transparent government, and asks the Court to award reasonable attorney's fees and litigation costs.

DOH, in opposition, maintains that its initial response to Empire Center's FOIL request was proper, and contends that petitioner has failed to demonstrate that the projected response to its request is so unreasonable as to constitute a constructive denial. According to respondent, petitioner's claim that DOH did not comply with the requirements of Public Officers Law § 89(3)

¹ Petitioner notes that the inside and outside nursing home death counts are adjacent questions on the HERDS daily survey questionnaire, i.e., questions 4 and 5 (*see* Ver. Pet Ex. E).

² According to Empire Center, the DOH used the HERDS death count data to generate graphs for its July 20, 2020 revised report, "Factors Associated with Nursing Home Infections and Fatalities in New York State during the COVID-19 Global Crisis" (*id.*, Ex. F).

is baseless. To that end, respondent asserts that Public Officers Law § 89(3) and its implementing regulations expressly permit an agency to extend or adjust the time frame to respond to a FOIL request for a “reasonable period” when “circumstances prevent disclosure” (Public Officers Law § 89[3][a]; 21 N.Y.C.R.R. § 1401.5[c], [d]). Respondent further submits that the statute does not prescribe any specific time period within which an agency must grant or deny a FOIL request or restrict the amount of time of an extension, but rather requires the agency to notify the requester of an “approximate” date by which the agency can reasonably produce the records. DOH argues that it has neither denied petitioner’s FOIL request nor ignored the request; it has provided a reasonable timeframe within which it believes it can respond, which was within its authority under FOIL.

According to DOH, Empire Center’s claim that the HERDS data can be easily compiled and produced is inaccurate. Respondent explains that the information petitioner seeks is health information that the respondent has been collecting on a daily basis from approximately 1,000 providers since March 2020 in response to the COVID-19 pandemic through HERDS. DOH submits that the information collected in HERDS provides more than the requested information; it includes much of the State’s emergency data such as available hospital beds, medical supplies, personnel, and the numbers, status, and immediate care needs of ill or injured persons, along with other urgent information to facilitate rapid and effective emergency responses. Respondent contends that the raw data and information being requested requires reconciliation before the records are provided to the Records Access Office for further review before release.

DOH also asserts that the records requested by Empire Center contain information that requires review for exemptions and privilege, such as protected health information, which, if disclosed, would constitute an unwarranted invasion of personal privacy (Public Health Law § 87[2][b]), and redaction of any information that would violate the Federal Health Insurance

Portability and Accountability Act of 1966 (“HIPPA”). As to the latter, respondent avers that a HIPAA violation can occur even if an individual patient’s name or personal information is not disclosed, if such information can be gleaned from circumstantial facts such as the low number of data points for a particular nursing home or long-term care facility. DOH submits that given the voluminous and sensitive nature of the information petitioner has requested, respondent’s limited time and resources, and the burden imposed upon staff already dealing with various COVID-19 issues, the review will take considerable time. Respondent argues that, under such circumstances, DOH’s revised estimated date for responding to Empire Center’s FOIL request is reasonable and necessary to properly respond to the request.

Moreover, DOH argues that Empire Center has attempted to evade the exhaustion requirement by asserting that its FOIL request was constructively denied pursuant to Public Officers Law § 89(3). In that regard, respondent contends that petitioner misquoted the statute by asserting that DOH was required to provide a “date certain, within a reasonable period, when the request will be granted in whole or in part or denied” (Public Officers Law § 89[3][a]). DOH asserts that this cited portion of the statute is addressed only to instances in which an agency determines to grant a request, and maintains that respondent has not determined if it will grant petitioner’s request, either in whole or in part. DOH submits that in such circumstance, “a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied,” which respondent provided to petitioner in its August 31, 2020 letter, is all that was required. Thus, DOH argues that Empire Center’s FOIL request was not constructively denied and, accordingly, petitioner failed to exhaust its administrative remedies before bringing this proceeding.

In reply, Empire Center asserts that although a response on August 31, 2020 may have been reasonable, an approximate response date more than three months after its FOIL request is not

reasonable under the circumstances. Petitioner contends that it made a straightforward FOIL request for numbers, asking for the daily counts of nursing home and assisted living facility resident COVID-19 related deaths and the statewide total number of such deaths, and that by August 31, 2020, DOH was supposed to know whether it was granting or denying the request. According to petitioner, if DOH was granting the request and could not disclose the records on that date, it was required to provide a date certain for disclosure. Petitioner submits respondent was also required to explain its inability to comply with FOIL's deadline for disclosure 20 business days from acknowledging its request, but instead informed Empire Center that it hoped to be finished looking for the records on November 5, 2020.

Furthermore, petitioner maintains that the requested records are neither voluminous nor complex, and reside in a database that DOH accesses and manipulates daily to provide information it chooses to provide, stripped of personally identifiable information. Petitioner contends that DOH uses HERDS data to generate reports on the numbers of in-facility nursing home and adult care facility COVID-19 deaths daily, already has staff in place reviewing in-facility COVID-19 deaths and putting that data into publishable form, and, since the spring, has regularly taken HERDS data, stripped of personally identifying information, and posted the data in reports online. As such, Empire Center submits that there is no need to conduct any physical or manual search for the records as the data sits in the HERDS system readily available for immediate retrieval and disclosure.

Additionally, petitioner asserts that its request does not require DOH to manually review the data to guard against revealing personal data through "circumstantial facts such as low number of data points for a particular nursing home or long-term care facility." Petitioner notes that records of deaths by facility is only one part of its request, and that the other two parts, which seek (1) the aggregate total number of nursing home and assisted living facility COVID-19 related

deaths; and (2) the aggregate number of deaths recorded statewide on each date do not require DOH to identify nursing homes or assisted living facilities or call for data that could point to a particular death in a particular nursing home or assisted living facility. Petitioner also notes that respondent already publishes reports that contain low data points for particular places, such as, for example, an October 26, 2020 report of nursing home and adult care facility COVID-19 deaths that included one more reported death than the report the day before in two different nursing homes.

Next, Empire Center argues that although the DOH claims that under normal circumstances, a three-month processing time for a FOIL request is not unusual or extraordinary, respondent did not commit to disclosing the records in three months, and admits that it only committed to getting back to petitioner on or before November 5, 2020. Recognizing that under certain circumstances, agencies may require additional time to figure out what records it possesses, petitioner submits that a lack of resources is not an excuse. Empire Center contends that the DOH has not explained how the pandemic is keeping the same personnel who electronically mine HERDS data for in-facility nursing home and adult care facility deaths for regular electronically published reports from doing the same for total deaths.

Furthermore, petitioner argues that while an agency may not have an absolute deadline to respond to a FOIL request, the time it requires to respond to such request is subject to the Court's determination of reasonableness. And citing Public Officer's Law §89(4)(a), petitioner contends that any failure to comply with Public Officers Law §89(3) is a denial that can be appealed. Petitioner submits that the DOH RAO gave a boilerplate response that respondent may still be searching for results from a database query that would need to be reviewed for responsiveness, legal privileges, and other unnamed exceptions to disclosure under FOIL, and maintains that

respondent has not provided anything specific to excuse not disclosing the records already or doing so within three months of the request.

Moreover, Empire Center claims that its only remedy when DOH failed to conform to the provisions of Public Officers Law § 89(3)(a) was to file an administrative appeal pursuant to Public Officers Law § 89(4)(a), which petitioner did, based on respondent's failure to give a date that was reasonable for disclosing the requested records more than 20 days after acknowledging receipt of petitioner's FOIL request. Lastly, petitioner asserts that it has no other administrative remedy relating to DOH's failure to comply with Public Officers Law § 89(3)(a), that the decision is final, and that the respondent's Records Access Appeals Officer indicated that "[j]udicial review of [the] [appeal] decision may be obtained pursuant to CPLR Article 78."

As an initial matter, Senator Tedisco's application for leave to appear as *amicus curiae* is granted. The Court has reviewed the Senator's affirmation and proposed *amicus curiae* brief, and, applying the criteria set forth in *Kruger v. Bloomberg*, finds that the *amicus curiae* brief "would otherwise be of special assistance to the court" in this proceeding (1 Misc.3d 192, 197 [Sup. Ct., New York County 2003]). The Court further finds that there is no prejudice to Empire Center and DOH by permitting Senator Tedisco to be heard in this matter of important public interest (*see Kruger v. Bloomberg*, 1 Misc.3d at 196-197 and *Colmes v. Fisher*, 151 Misc. 222, 223 [Sup. Ct., Erie County 1934])[observing that "[i]n cases involving questions of important public interest[,] leave is generally granted to file a brief as *amicus curiae*"].

Next, DOH's claim that Empire Center failed to exhaust its administrative remedies before bringing this proceeding is lacking in merit. Unlike in *Matter of Empire Ctr. for Public Policy, Inc. v. New York City Office of Payroll Admin.* (158 A.D.3d 539, 530 [1st Dep't 2018], petitioner filed an appeal from DOH's August 31, 2020 response, and that "appeal [was] denied in its entirety" by respondent's Records Access Appeals Officer. Further, the DOH's Records Access Appeals

Officer advised petitioner that “[j]udicial review of [the] decision may be obtained pursuant to CPLR Article 78.” Moreover, Public Officers Law § 89(4)(a) expressly provides that “[f]ailure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial,” and Empire Center appealed the August 31, 2020 response based, in part, on the failure of DOH to give a reasonable date for disclosing records more than 20 days after acknowledging petitioner’s FOIL request.

Turning to the merits of the petition, Public Officers Law § 89(3)(a) provides, in relevant part that “within five business days of the receipt of a written request for a record reasonably described,” an agency “shall make such record available to the person requesting it, deny such request in writing[,] or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.” Although, “there is no specific time period in which an agency must grant [or deny] access to [requested] records” set forth in Public Officers Law §89(3)(a) (*Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 465 [2007]; *Matter of New York Times Co. v. City of New York Police Dep’t*, 103 A.D.3d 405, 407 [1st Dep’t 2013]), factors such as the volume of the request, retrieval methods, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure have been considered by courts in determining whether an agency’s estimated time to respond to a FOIL request is reasonable under the circumstances of the request (see *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d at 465; *Matter of Linz v. Police Dep’t of the City of New York*, NYLJ, Dec. 17, 2001 at 22, col 6 [Sup. Ct., New York County 2001]). Guided by these factors and upon a review of the record, the Court is not persuaded that the respondent’s estimated date for responding to Empire Center’s FOIL request is reasonable under the circumstances of the request.

Petitioner has demonstrated, DOH concedes, and it is clear from a review of the record, that the COVID-19 nursing home and assisted living center fatalities data Empire Center seeks in this proceeding is specifically collected and maintained by respondent through HERDS. Furthermore, DOH does not dispute and the record makes clear that respondent has used HERDS data, stripped of personally identifying information, to generate and publish online reports of the numbers of in-facility nursing home and adult care facility COVID-19 deaths (*see* Ver. Pet, Ex. F; Reply Affirmation of Cameron J. MacDonald, Exs. A & B). Moreover, Empire Center has submitted a straightforward request for records and data that are admittedly collected and maintained by DOH, and that have been disclosed to the public, in part. DOH does not, in the Court's opinion, offer an adequate explanation as to why it has not responded to that request within its estimated time period or to date. Indeed, during the pendency of this proceeding, DOH notified petitioner, by two separate letters, that it "was unable to respond to [the] request by the date previously given . . . because the records potentially responsive to [the] request are currently being reviewed for applicable exemptions, legal privileges and responsiveness," and now anticipates a response date by March 22, 2021.

That there is authority for adjusting an agency's anticipated response date in certain circumstances (*see Matter of Gannett Satellite Info. Network, LLC v. New York State Thruway Auth.*, 181 A.D.3d 1072, 1075 [3d Dep't 2020]), does not compel a different result here. On each day that a response was expected, DOH informed Empire Center that it was unable to respond to the FOIL request, first because respondent needed time to locate the information and, thereafter, because it needs time to review the information for applicable exemptions, legal privileges, and responsiveness. Notwithstanding any assertions to the contrary, DOH has had ample time to respond to Empire Center's FOIL request. Its continued failure to provide petitioner a response, given the straightforward nature of the request, how the data is collected and maintained, and the

fact that some of the requested data has already been made publicly available without personally identifying information, goes against FOIL's broad standard of open and transparent government and is a violation of the statute.

For those reasons, the Court finds that DOH violated Public Officers Law § 89(3)(a) by failing to provide an "approximate date, which shall be reasonable under the circumstances of the request, when [Empire Center's] request will be granted or denied," and directs DOH to disclose the requested information to Empire Center within five (5) business days.

Finally, "[w]here, as here, '[an] agency fail[s] to respond to a [FOIL] request or appeal within the statutory time,' the court may award counsel fees and other litigation costs to a litigant who 'substantially prevail[s]' in a CPLR [A]rticle 78 proceeding brought to review the constructive denial of the request" (*Matter of Legal Aid Soc'y v. New York State Dep't of Corr. & Cmty. Supervision*, 105 A.D.3d 1120, 1121 [3d Dep't 2013], quoting Public Officers Law § 89 [4] [c] [i]; see *Matter of Gannett Satellite Info. Network, LLC v. New York State Thruway Auth.*, 181 A.D.3d at 1074; *Matter of 101CO, LLC v. New York State Dep't of Env't'l Conservation*, 169 A.D.3d 1307, 1311 [3d Dep't 2019]; *Matter of Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67, 78-79 [2017]; *Matter of New York Civ. Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 [2011]). "A petitioner substantially prevails under Public Officers Law § 89(4)(c) when it receives all the information that it requested and to which it was entitled in response to the underlying FOIL litigation" (*Matter of 101CO, LLC v. New York State Dep't of Env't'l Conservation*, 169 A.D.3d at 1311 [internal quotation marks, brackets and citations omitted]).

Empire Center submitted its FOIL request to DOH six months ago, and notwithstanding commencement of this proceeding, petitioner has not yet received a response. Additionally, DOH has informed petitioner that it estimates that it will complete its process by March 22, 2021, and

that it will notify petitioner in writing “when/if responsive materials are available for release or if the time needed to complete [the] request extends beyond . . . [that] date.” Notably, “the counsel fee provision was added [to the Public Officers Law] in recognition that persons seeking to force an agency to respond to a proper FOIL request ‘must engage in costly litigation,’ and the statute was [later] amended ‘in order to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL’” (*Matter of Legal Aid Soc’y v. New York State Dep’t of Corr. & Cmty. Supervision*, 105 A.D.3d at 1122, quoting *Matter of New York Civ. Liberties Union v. City of Saratoga Springs*, 87 A.D.3d at 338 [further internal quotation marks and citation omitted]). By continuing to delay its response to petition’s FOIL request, the DOH has subjected Empire Center “to the very kinds of ‘unreasonable delays and denials of access’ which the counsel fee provision seeks to deter (*id.* at 1122). Under such circumstances, the Court finds an award of counsel fees and costs to be warranted.

Any remaining arguments not specifically addressed herein have been considered and found to be without merit, or need not be considered in light of this determination. Accordingly it is hereby

ORDERED AND ADJUDGED, that the petition is granted; and it is further

ORDERED AND ADJUDGED, that DOH violated Public Officers Law § 89(3)(a) and, as a result, DOH is directed to disclose the requested information to Empire Center within five (5) business days of the date of that this Decision and Order/Judgment; and it is

ORDERED, that within sixty (60) days of the date of this Decision and Order/Judgment, petitioner’s counsel shall submit, on notice to respondent’s counsel, an affirmation setting forth petitioner’s counsel’s qualifications, billing rate, billing records and the attorney’s fees and litigation costs sought, along with a proposed order for such fees and costs; and it is further

ORDERED, that within thirty (30) days of service of petitioner’s counsel’s affirmation and proposed order, respondent may submit opposition papers, if any, concerning the reasonableness of the fees and costs; and it is further

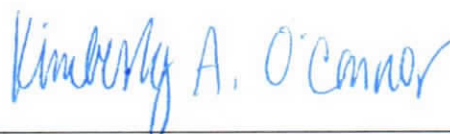
ORDERED, that petitioner’s counsel may submit a reply to any objections within fifteen (15) days of service of the objections, and, if necessary, a hearing of the subject the fees and costs will be scheduled thereafter.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order/Judgment and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to filing, entry, service, and notice of entry of the original Decision and Order/Judgment.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: February 3, 2021
Albany, New York



HON. KIMBERLY A. O’CONNOR
Acting Supreme Court Justice

Papers Considered/Submitted:

1. Notice of Petition, dated September 21, 2020; Verified Petition, dated September 18, 2020, with Exhibits A-H annexed; Memorandum of Law in Support of Verified Petition, dated September 18, 2020;
2. Order to Show Cause (McDonough, J.), dated September 30, 2020; Affirmation of New York State Senator James N. Tedisco in Support of His Motion for Leave to Appear as *Amicus Curiae*, dated September 28, 2020, with Exhibit A annexed (Brief of Proposed *Amicus Curiae* James N. Tedisco, dated September 28, 2020);
3. Verified Answer, dated October 26, 2020; Affidavit of Rosemarie Hewig in Support of Answer and in Opposition to Petition, sworn to October 26, 2020, with Exhibits A-E

- annexed; Memorandum in support of Respondent's Answer to the Verified Petition, dated October 26, 2020;
4. Reply Affirmation in Support of Verified Petition of Cameron J. MacDonald, Esq., dated October 29, 2020, with Exhibits A & B annexed;
 5. Correspondence from Melissa A. Latino, Esq., dated October 29, 2020;
 6. Correspondence from Cameron MacDonald, Esq., dated November 9, 2020, with unmarked letter annexed;
 7. Correspondence from Cameron MacDonald, Esq., dated January 19, 2021, with unmarked letter annexed; *and*
 8. Correspondence from Cameron MacDonald, Esq., dated January 28, 2021, with unmarked report annexed.³

³ This correspondence and the annexed report were submitted in connection with this proceeding, and were considered only to the extent of the request by petitioner's counsel that the Court issue its ruling. The letter and report were not considered by the Court in rendering its determination.