COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY,

SELECT SUBCOMMITTEE ON THE CORONAVIRUS PANDEMIC,

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

INTERVIEW OF: BRADLEY HUTTON

Tuesday, August 27, 2024

Washington, D.C.

The interview in the above matter was held via Teams, commencing at 10:20 a.m.

Appearances:

For the SELECT SUBCOMMITTEE ON THE CORONAVIRUS PANDEMIC:

JACK EMMER, COUNSEL

ERIC OSTERHUES, CHIEF COUNSEL

[redacted] MINORITY STAFF DIRECTOR

[redacted], MINORITY CHIEF COUNSEL

For BRADLEY HUTTON:

KEVIN LUIBRAND

Mr. Emmer. All right. We can go on the record.

This is a transcribed interview of Mr. Brad Hutton, conducted by the House Select Subcommittee on the Coronavirus Pandemic under the authority granted to it by House Resolution 5 and the rules of the Committee on Oversight and Accountability.

Further, pursuant to House Resolution 5, the select subcommittee has wide-ranging jurisdiction but specifically to investigate the implementation or effectiveness of any Federal law or regulation applied, enacted, or under consideration to address the coronavirus pandemic and prepare for future pandemics.

Can the witness please state his name and spell his last name for the record?

Mr. Hutton. Bradley Hutton, H-u-t-t-o-n.

Mr. Emmer. Thank you, Mr. Hutton.

My name is Jack Emmer, and I am a senior counsel for the majority staff of the select subcommittee. I want to thank you for coming in today for this interview. The select subcommittee recognizes that you are here voluntarily and we appreciate that.

Under the select subcommittee and Committee on Oversight and Accountability's rules, you are allowed to have an attorney present to advise you during this interview. Do you have an attorney representing you in a personal capacity present with you today?

Mr. Hutton. Yes, I do.

Mr. Emmer. Will counsel please identify themselves for the record?

Mr. Luibrand. Kevin Luibrand, L-u-i-b-r-a-n-d.

Mr. Emmer. Thank you.

For the record, starting with the majority staff, can the additional staff members please introduce themselves with their name, title, and affiliation?

Mr. Osterhues. Eric Osterhues, chief counsel, majority staff.

[redacted] [redacted], chief counsel, Democratic staff.

[redacted]. [redacted] Democratic staff director.

Mr. Emmer. Thank you all.

Mr. Hutton, before we begin, I would like to go over the ground rules for this interview. The way this interview will proceed is as follows: The majority and minority staff will alternate asking you questions, 1 hour per side per round, until each side is finished with their questioning. The majority staff will begin and proceed for an hour, and then the minority staff will have an hour to ask questions. We will then alternate back and forth in this manner until both sides have no more questions. If either side is in the middle of a specific line of questions, they may choose to end a few minutes past an hour to ensure completion of that specific line of questioning, including any pertinent followups.

In this interview, while one member of the staff for each side may lead the questioning, additional staff may ask questions.

There is a court reporter taking down everything I say and everything you say to make a written record of the interview. For the record to be clear, please wait until the staffer questioning you finishes each question before you begin your answer, and the staffer will wait until you finish your response before proceeding to the next question.

Further, to ensure the court reporter can properly record this interview, please speak clearly, concisely, and slowly. Also, the court reporter cannot record nonverbal answers such as nodding or shaking your head, so it is important that you answer each question with an audible, verbal answer.

Exhibits may be entered into the record. Majority exhibits will be identified numerically. Minority exhibits will be identified alphabetically. Do you understand?

Mr. Hutton. Yes.

Mr. Emmer. We want you to answer our questions in the most complete and

truthful manner possible, so we will take our time. If you have any questions or do not fully understand the question, please let us know. We will attempt to clarify, add context to, or rephrase our questions. Do you understand?

Mr. Hutton. Yes.

Mr. Emmer. If we ask about specific conversations or events in the past and you are unable to recall the exact words or details, you should testify to the substance of those conversations or events to the best of your recollection. If you recall only a part of the conversation or event, you should give us your best recollection of those events or parts of conversations that you do recall. Do you understand?

Mr. Hutton. Yes.

Mr. Emmer. Although you are here voluntarily and we will not swear you in, you are required, pursuant to title 18, section 1001, of the United States Code, to answer questions from Congress truthfully. This also applies to questions posed by congressional staff in this interview. Do you understand?

Mr. Hutton. Yes.

Mr. Emmer. If at any time you knowingly make false statements, you could be subject to criminal prosecution. Do you understand?

Mr. Hutton. Yes.

Mr. Emmer. Is there any reason you are unable to provide truthful testimony in today's interview?

Mr. Hutton. We were trying to stop an echo. Do you mind repeating that?

Mr. Emmer. Yes. Is there any reason you are unable to provide truthful testimony in today's interview?

Mr. Hutton. No.

Mr. Emmer. The select subcommittee follows the rules of the Committee on

Oversight and Accountability. Please note that if you wish to assert a privilege over any statement today, that assertion must comply with the rules of the Committee on Oversight and Accountability.

Pursuant to that, committee rule 16(c)(1) states, for the chair to consider assertions of privilege over testimony or statements, witnesses or entities must clearly state the specific privilege being asserted and the reason for the assertion on or before the scheduled date of testimony or appearance.

Do you understand?

Mr. Hutton. Yes.

Mr. Emmer. Ordinarily we take a 5-minute break at the end of each hour of questioning, but if you need a longer break or a break before that, please let us know, and we will be happy to accommodate. However, to the extent that there is a pending question, we would ask that you finish answering the question before we take a break. Do you understand?

Mr. Hutton. Yes.

Mr. Emmer. Do you have any other questions before we begin?

Mr. Luibrand. Mr. Emmer, the only other question we have is, will we be provided a copy of the transcript?

Mr. Emmer. You'll be provided a copy of the transcript to review. Sometime in the coming weeks, our admin team will be in contact with you.

As far as the custody of the transcript, it is the property of the committee, and our intention would be that it will be released at some point in the future.

Mr. Luibrand. Thank you.

Mr. Emmer. All right. Let's begin.

EXAMINATION

BY MR. EMMER:

Q Let's start by discussing your education and experience. Where did you attend undergraduate school?

A Columbia College in New York City.

Q And what degree did you graduate with?

A Bachelor of arts.

Q And do you have a master's degree?

A Yes.

Q And what is that in?

A Master of Public Health.

Q Who is your current employer and what is your current job title?

A I'm self-employed. It's Hutton Health Consulting, LLC.

Q Can you briefly go through your professional career up until now?

A Can we pause for just 2 minutes. Kevin, my attorney, is going to move into a different room so we can get rid of our echo problem here.

Mr. Emmer. That's fine. We'll go off the record.

Mr. Hutton. Thank you.

[Off the record.]

Mr. Emmer. We'll go back on the record.

BY MR. EMMER:

Q Mr. Hutton, can you briefly go through your professional career up until now?

A Yes. After I obtained my master's of public health, I got my first professional position at the New York State Department of Health in their injury control program as an epidemiologist. I worked in that position for approximately 2 years. I

obtained a promotion as the data manager for the Cancer Services Program, also in an epidemiology position, working on breast and cervical cancer screening and other cancer-control initiatives. I worked in that position for approximately 5 years, and then I obtained -- my next position was a promotional opportunity to direct the Bureau of Early Intervention, which was a large service system providing infants and toddlers in New York State with developmental disabilities and delays, with services that would help them catch up to their typically developing peers. I oversaw that bureau and that large service system for 5 years.

I then was promoted to be the director -- all of this was in the New York State Department of Health -- to be the director of the Center for Community Health. This included four large divisions of public health programs, those in childhood nutrition, programs that included WIC, and the Child and Adult Care Food Program; all of our programs in chronic disease prevention and control, including tobacco, diabetes, cancer; all of our programs in communicable disease control and immunization; and then also all of our programs in maternal and child health.

I held that position for approximately 5 years, and then I was promoted to be the deputy commissioner for public health, with responsibility for that same large center but also some other large centers of public health programs in New York State, including environmental health, the Wadsworth Center, our public health laboratory, and all of our emergency preparedness activities.

So in that position, which I served in for 5 years, I was the chief public health official in New York State reporting to our commissioner of health.

I often served as the incident commander on emergency responses, including our response to the Zika virus outbreak, large measles outbreak, was very involved in Superstorm Sandy response, and also environmental health crises, including the PFOA

contamination of our village of Hoosick Falls. I served in that position at the outset of the COVID pandemic. I served as the Department of Health's incident commander for COVID response. I stayed in that position, in that role for 9 months, and then ultimately left the Department of Health in August of 2020 and opened up my own public health consulting firm, Hutton Health Consulting, which we're now -- have just completed our 4-year anniversary.

Q Thank you. I appreciate you going over all, especially as deputy commissioner.

Did that role change in any way as a result of the pandemic?

A Not specifically.

Q Thank you.

I think someone's mic may have gone off. Can you just answer that one more time? Did anything within your role change as a result of the pandemic?

A Not specifically.

Q Thank you.

So I want to start by asking if you communicated with any of the following people regarding COVID-19 in nursing homes between January 1st, 2020, and when you left the Department of Health. And for now, you can say yes or no, and we will come back to discuss each one. Do you have any questions regarding that prompt?

A Just to clarify, whether I had communication with any of these persons is the question, correct?

Q Yes, regarding COVID-19 in nursing homes between January 1st, 2020, and when you left the Department of Health.

A So just to further clarify, if I had communication with them but it wasn't regarding COVID-19 in nursing homes, then that's a no, correct?

Q Thank you. And, again, for now, you can answer yes or no, and we will come back and discuss each one.

So first, former Governor Andrew Cuomo?

A No.

Q Ms. Melissa DeRosa?

A No, I don't believe so.

Q Ms. Linda Lacewell?

A Yes.

Q Mr. Larry Schwartz?

A I don't believe so, no.

Q Mr. Gareth Rhodes?

A No, I don't believe anything related to nursing homes.

Q Dr. Jim Malatras?

A No, I don't believe anything related to nursing homes.

Q Mr. Rich Azzopardi?

A No.

Q Mr. Peter Ajemian?

A No, I don't believe anything related to nursing homes.

Q Ms. Beth Garvey?

A No, I don't believe so.

Q Ms. Judith Mogul?

A No.

Q Ms. Megan Baldwin?

A I don't recall. I had frequent communication with Megan.

Q Mr. Robert Mujica?

A No.

Q Ms. Jill DesRosiers?

A No.

Q Ms. Stephanie Benton?

A No.

Q Dr. Howard Zucker?

A Yes.

Q Dr. Eleanor Adams?

A Yes.

Q Ms. Sally Dreslin?

A Yes.

Q Mr. Gary Holmes?

A I don't recall conversations related to nursing homes but another person I had frequent communication with.

Q Mr. Kenneth Raske?

A No.

Q Mr. Lee Perlman?

A No.

Q Mr. Giorgio DeRosa?

A No.

Q Mr. Michael Dowling?

A No.

Q Dr. Anthony Fauci?

A No.

Q Dr. Francis Collins?

A No.
Q Mr. Alex Azar?
A No.
Q Ms. Seema Verma?
A No.
Q Dr. Deborah Birx?
A No.
Q Dr. Robert Redfield?
A No.
Q Dr. Michael Osterholm?
A No.
Q Finally, David Grabowski?
A No.
Q All right. Let's start with Ms. Linda Lacewell. Do you recall the nature of your discussions with Ms. Lacewell regarding COVID in nursing homes?
A There were -- there was a period of time when I was embedded in the New York State Executive Chamber during the acute phase of the initial months of the COVID pandemic, and I reported directly to Linda Lacewell, spent many hours with her throughout the days.
So I don't have any specific conversations that I recall, but we certainly talked about the escalating problem in nursing homes, some conversations related to data and reporting and testing.
So there were certainly numerous conversations with Linda Lacewell that included nursing homes and all aspects of the COVID pandemic response.
Q And just to dissect what your answer, when you say you were embedded

within the Executive Chamber, does that mean that you were working on the second floor of -- or the Governor's office at the beginning of the pandemic?

A There was a time in late February, on or about February 28th, when there was a task force that was created, and Ms. Lacewell was put in charge of the COVID-19 task force.

I recall that myself, Sally Dreslin, and Commissioner Zucker were all officially or unofficially part of that task force and asked to report to the New York State capitol on the second floor.

So, yes, until we began to socially distance, which I believe happened later in April or May, I reported to the second floor of the capitol each and every day and all day.

Q Did you ever have any discussions with Ms. Lacewell regarding the March 25th order?

A No.

Q Did she ever ask where the order originated from?

A No.

Q Did you have any discussions with Ms. Lacewell regarding the July 6th department of health report?

A No.

Q Thank you.

So let's move on, and you said that you don't believe you had conversations with Mr. Schwartz. During the pandemic, did you have any discussions regarding the COVID response with Mr. Schwartz?

A Yes. Quite a few as well.

Q What issue areas related to the response to the pandemic was Mr. Schwartz concerned with?

A The one that was relevant to my work responsibilities was contact tracing. Mr. Schwartz was the Executive Chamber official who oversaw the scale-up of the contact tracing workforce via contract, as well as the development of a information system to manage the contact-tracing effort. And so I interacted a fair amount with him for that, possibly some other items.

Q But to the best of your recollection, you never had any discussions with Mr. Schwartz related to the March 25th order?

A I definitely did not have any conversations with Mr. Schwartz about the March 25th order.

Q Did you ever have any conversations with Mr. Schwartz related to possible capacity issues?

A No.

Q Thank you.

Let's focus on Ms. Baldwin's role really quick. What role did she play within the department of health and the Executive Chamber?

A Megan Baldwin was the assistant deputy secretary for health in the Executive Chamber, so she was our main point of contact in the Executive Chamber for all activities. And so before the pandemic, she would've been my main point of contact, and during the pandemic, she also was part of that COVID-19 task force.

And so like myself and Ms. Dreslin and Commissioner Zucker, Ms. Baldwin was embedded in the second floor working on COVID-19 response for several months until we socially distanced.

Q But to be clear, she didn't handle any specific issues related to the COVID response. She was just the point of contact between department of health and the Executive Chamber?

A No, I wouldn't say that's accurate. You know, I think there were so many different independent missions that were going on in parallel, each of us were involved in one or several of those, and I recall that Megan was likely very involved in different aspects, not just serving as the point of contact.

Q Thank you.

Let's talk about Dr. Zucker. Did you ever have any conversations with him regarding the March 25th order?

A I definitely do not recall having conversations with him about the order in its development phase. I may have had conversations with him in the months that followed when there began to be media coverage or controversy about the memo.

Q Do you recall what -- if he ever asked where the order originated from?

A I don't recall.

Q Did you ever have discussions with Dr. Zucker related to the July 6th department of health report?

A Yes.

Q To the best of your recollection, can you describe the nature of those conversations?

A He had approached me about the report and expressing the difficulty he was having in navigating the feedback input process from folks in the Executive Chamber.

I had previously resisted being pulled into the review and editing of that document, and I recall that Dr. Zucker would occasionally come back and share his displeasure about the process in bringing that report to conclusion. But I also recall he respected the fact that I was not part of the editing process.

Q And we'll return to the July 6th report more specifically, so I'll have more follow-up questions on that. But was it just process that Dr. Zucker was concerned with

as far as the July 6th report or were there specific areas of the report that he was most concerned with?

A I don't recall having that level of detailed conversation with him.

Q Did you ever have any discussions with Dr. Zucker related to the numbers of nursing home fatalities occurring both in nursing homes and at hospitals? I guess, let me scratch -- or scratch that.

Did you have any discussions with Dr. Zucker related to the number of nursing home fatalities that the administration was reporting to the public?

A I don't recall having a conversation with him about that specific item, no.

Q What were the nature of your conversations with Ms. Dreslin?

A Sally was my supervisor, and so I had too many conversations with her to list.

Q Did you have any discussions with her related to the development and issuance of the March 25th order?

A I don't recall any.

Q Was she involved in -- or was she involved in the issuance of the March 25th order?

A I believe that she was involved in the review and approval process, but I don't recall her being involved in the discussions that were the genesis of the memo, at least not ones that I was party of.

Q And we'll return to the memo shortly, get into more specifics.

What about Dr. Eleanor Adams, do you recall the nature of your conversations with her?

A Dr. Adams was one of our key physician epidemiologists, an incredibly talented person who was one of our points on helping provide support to nursing homes.

So I also had numerous conversations with Dr. Adams, too many to recall briefly.

Q To the best of your recollection, do you recall her having any involvement with the March 25th order?

A I don't remember her having -- let me be clear. I don't remember any conversations with her, but she was definitely part of the email process and was sent the memo to review and provide comment, along with many others.

Q We'll return to the process shortly.

Mr. Hutton, since January 2023, have you had any conversations with any former members of the Cuomo administration about this select subcommittee's investigation?

A No.

Q Have you had any conversations with anyone other than your counsel about this interview?

A Yes, my spouse and close family.

Q Thank you.

Now I want to ask if you had any interactions with any of the following institutions related to COVID-19 in nursing homes between January 1st, 2020, and present.

A The dates again were?

Q January 1st, 2020, and present.

A Thank you.

Q So first, U.S. Centers for Medicare and Medicaid Services?

A No.

Q U.S. Department of Health and Human Services?

A No.

Q U.S. Centers for Disease Control and Prevention?

A I don't recall any.

Q The Office of the New York State Attorney General?

A No.

Q The Manhattan District Attorney's Office?

A Yes. I believe that -- I'm sorry, I need to clarify something with counsel.

Mr. Emmer. We can go off the record.

Mr. Hutton. Thank you.

[Discussion off the record.]

Mr. Emmer. We'll go back on the record.

BY MR. EMMER:

Q Mr. Hutton, I'll ask again whether you had any interact -- or any interactions with any of the following institutions related to COVID-19 in nursing homes between January 1st, 2020 and present, and I am asking about the Manhattan District Attorney's Office?

A I don't recall. I was previously interviewed by a law enforcement investigatory group, but I don't recall if it was specifically that office or not.

Q The investigatory group, was it a New York State investigatory authority or was it a Federal authority?

A I recall it was Federal, the U.S. Attorney.

Q Okay. We're just getting there.

So next, the New York State Controller?

A No.

Q The New York State Assembly Judiciary Committee?

A No.

Q Northwell Health?

A No.

Q McKinsey & Company?

A No.

Q Greater New York Hospital Association?

A No.

Q And finally, the U.S. Depart -- or U.S. Department of Justice?

A Yes.

Q Can you describe the nature of the discussions that you had with the U.S. Department of Justice?

A I was interviewed, I understood, as part of their investigation as to whether or not there were any criminal violations related to the handling of the response and specifically related to nursing homes.

Q Was it related to the March 25th order?

A I was asked questions about the March 25th order. I don't know what their specific intent was.

Q We'll return to that later.

So at this time I'd like to ask you some general operational questions. First, while you were at the department of health, did you have a State-issued phone?

A Yes.

Q More than one?

A No.

Q Did you have a State-issued email?

A Yes.

Q Again, more than one?

A No.

Q Did you ever conduct business via personal email?

A No.

Q Did you ever conduct official business by a personal cell phone?

A No.

Q Did you ever instruct anyone to conduct official business by personal email or phone?

A No.

Q Did you ever use PIN messaging through Blackberry to conduct official business?

A No.

Q How did you typically communicate with other members of the health department?

A Work email.

Q What about members of the Executive Chamber?

A Also work email, if not in person, or telephone.

Q And you already -- sorry. You already mentioned that you, at the beginning of the pandemic, that you were met -- or meeting with Ms. Lacewell frequently. Was there anyone else from the Executive Chamber that you typically communicated with?

A For the time from late February through April and May, there were numerous individuals in the Executive Chamber that I communicated with. Dozens.

Q Are there any that you can think of off the top of your head that you would've communicated more frequently with?

A Gareth Rhodes was somebody who was embedded in the same room with myself and Ms. Lacewell. Certainly there was a time period when Ms. Beth Garvey and some of her staff I communicated with. We already mentioned Megan Baldwin. Nobody else really comes to mind as being more prevalent than others.

Q Thank you.

Mr. Hutton, did you ever instruct anyone from the administration to delete emails or other official records?

A No.

Q Are you aware of whether the administration had a retention policy?

A Yes. I remember that there was a State agency record retention policy. I can't say that I know whether or not the administration had one for the Executive Chamber.

Q Did the Governor or anyone else from the Executive Chamber ever request that you delete emails or other official documents?

A No.

Q Are you aware of any Executive Chamber or task force officials deleting official documents?

A No.

Q Did you ever delete emails or official documents?

A No. Besides just normal email cleaning.

Q Thank you.

At this time I'd like to talk about health department guidance. Mr. Hutton, did you ever play a role in developing health department guidance.

A I frequently played a role in reviewing and approving public health guidance.

Q Can you explain how health department guidance was developed and issued during the pandemic?

A Yes. At any given time there could be dozens of different documents, guidance, for different entities that were in development by different units and lead authors. Then when they were in a final draft form, they would begin to go through a

clearance process that typically included multiple different individuals, depending on the subject area.

Ultimately, many of those guidance documents, if they had a public health aspect to it, would be something that I reviewed, and then other executives in the department of health, like Ms. Dreslin and Dr. Zucker and others, would review before then sending it over to the Executive Chamber to go through their clearance process, which had also different components to it, more of a counsel or legal review and more of a programmatic review, until we would then learn that a document received final approval and could be disseminated to the parties that had been identified.

Q Thank you.

What role did the Governor play in issuing guidance?

A I don't know.

Q Do you know what role the COVID-19 task force played in the development of guidance during the pandemic?

A So in those early weeks when I was embedded in the second floor of the capitol, I would frequently have verbal communication with Ms. Lacewell about guidance that was needed and get endorsement to work on a plan to develop that guidance. And then oftentimes I would have conversations with Ms. Lacewell when guidance had proceeded through the clearance process and it was at or above her level on the status of guidance.

So she definitely played an important role, for at least a couple months, in the clearance process of guidance. And I also understood that Beth Garvey and her legal team also played an important role in reviewing guidance from a legal perspective before it received clearance.

Q As far as the task force, since we're talking about it right now, do you know if

there was any member of the task force that was specifically responsible for the nursing home-related issues?

A I don't recall anyone in the task force being specifically related to nursing home issues.

Ms. Lacewell certainly was very involved in discussions about death data as it related to nursing homes. It seems like she was not involved in the implementation of the requirement to test staff in nursing homes. I remember, I believe it was Beth Garvey playing a more prominent role in some of those items. So I think it did evolve over time.

Q Did you ever work with outside groups to develop health department guidance?

A I assume you're asking during the pandemic?

Q Right.

A We certainly had a lot of discussions with outside groups, and they might have told us of the need for guidance. So they often would've been the initiators or the catalyst for guidance, and we certainly would've had an extensive initial conversation to be sure we understood the need that they were expressing.

I don't recall at the later stage of the formation of guidance in the pandemic sending guidance out for external audience review. I don't recall that being something that we did during the pandemic like we may have done pre-pandemic in normal operating mode.

Q You mentioned external review, but do you recall outside groups asking the health department or the Executive Chamber to issue specific guidance?

A I don't have any specific recollections at this time of specific guidance that we were asked for.

Q Are you aware of health department guidance ever being issued

independently from the department of health, that is, without their knowledge or consultation prior to issuance?

A Jack, your first two words broke up. Do you mind just repeating that?

Q Certainly. Are you aware of guidance ever being issued independently from the department of health, that is, without their knowledge or consultation prior to issuance?

A No, not guidance being issued, but I do remember guidance being announced and then the department being directed to prepare guidance.

Q Do you recall specifically what guidance was announced and then -- or can you give an example of when that occurred?

A I do have one example that I remember well. I was driving one weekend in, I believe, May, when I received a call from Commissioner Zucker, who asked whether I had heard the Governor's press conference for that day. I said I did not. He said that the Governor had announced that high schools were going to be allowed to have in-person graduations and that the department of health -- he specifically said the department of health is issuing guidance relating to the holding of in-person graduations.

And Dr. Zucker asked if I had any involvement or knew anything about that, and I said no, I did not, and I asked if he knew, and he said, no, I did not. So we were both very frustrated to learn that that reopening announcement had been made without any public health input.

And then I was asked to prepare guidance that weekend to be issued to high schools to explain how they could hold in-person graduation ceremonies safely.

Q And to be clear, that was one example. There are other instances that occurred during the pandemic of the Governor announcing a specific policy and then the health department having to rush and implement that policy?

A Yes, that would frequently happen.

Q Do you have any -- do you have any other brief examples of that occurring?

A I don't.

Q Mr. Hutton, it's been reported that agencies, including the health department, needed permission from the Executive Chamber to issue guidance. Is that true?

A Yes. All guidance had to be -- for COVID, you're asking, correct?

Q Yes.

A All COVID guidance had to be cleared through the Chamber before it could be issued by agencies.

Q Thank you.

I would now like to pivot to the beginning of COVID-19 in New York. When did you learn about COVID-19?

A I first learned in December about an unexplained cluster of respiratory virus, patients who were infected with a respiratory virus in the Hunan province of China, and it was rumored to be caused by a coronavirus. We began monitoring that outbreak throughout the months of December and January.

Q Can you generally describe the initial acts that the administration took to protect nursing homes?

A I assume you mean the New York State administration?

Q Correct.

A Initially, there were a series of guidance documents to inform nursing homes about infection-control practices that they should take to protect their staff and their residents. There were policies that were announced, like restrictions of visitors. There was the provision of personal or protective equipment and tracking of the infections and

deaths.

There were numerous staff who were involved in initially visiting but then doing phone calls and video consultations with nursing homes to try and limit exposures of both parties, to provide them real-time consultations on infection-control strategies that they could take.

So from the activities that I was involved in, there was a fair amount going on to support nursing homes from an infection-control perspective.

Q Thank you.

At this time, I would like to introduce what will be marked as majority exhibit 1. It is the March 25th order, entitled, Advisory hospital discharges and admissions to nursing homes issued by the New York State Department of Health on March 25th, 2020. And I'll give you a moment to find that document.

[Hutton Majority Exhibit No. 1.
was marked for identification.]

Mr. Hutton. Yes, all set.

BY MR. EMMER:

Q And I'm specifically looking at the guidance itself, not the email on the front. Mr. Hutton, do you recognize this document?

A Yes.

Q Did you play any role in the development of this guidance?

A Yes.

Q Can you describe what role you played in the development and issuance of this guidance?

A I was involved in some of the initial conversations that resulted in the development of the guidance, and I was part of the process to review and approve the

guidance.

Q Who was involved in the initial conversations regarding this guidance?

A I recall a conversation with Mark Kissinger late one night.

Q Do you recall anyone else being involved in those discussions?

A I don't recall anyone specifically in that initial late-night conversation.

Q What prompted the guidance to be drafted?

A Mark approached me late one evening and explained that he had received an urgent phone call from the CEO of a hospital in the Hudson Valley. I believe it was St. Luke's in Newburgh.

The hospital reported receiving a van-load of nursing home residents in their emergency room who were reportedly COVID-positive, but as the CEO explained, did not at all require a hospital level of clinical care. And the CEO was very concerned, given that at the time we were all very worried about preventing a surge that would overwhelm our acute care facility capacity. He was worried that if this continued to happen, he would not have the beds to be able to treat patients who required urgent treatment for COVID-19, and asked that we urgently deal with this.

I recall that he shared that he had had some tense conversations with the operator of the nursing home who was not going to budge and had basically just left those residents at the emergency room.

Q In December, Dr. Zucker testified to the select subcommittee that he recalled being in a meeting with the Governor and members of the task force, in which the Governor received a call from the Greater New York Hospital Association asking him to do something about residents of nursing homes and long-term care facilities that were being discharged. Are you aware of this phone call occurring?

A No.

Q You never discussed the Greater New York Hospital Association's interest in doing something about this issue with Dr. Zucker?

A I don't recall that.

Q So you said that you had the initial conversations with Mr. Kissinger. The order was issued on March 25th. Do you have any recollection of when those initial discussions occurred?

A I recall that it was a pretty rapid phase from the initial genesis to the issuance, so I would estimate maybe 2 to 5 days.

Q And during that time, did you have any discussions with the Executive Chamber regarding the need for the guidance?

A Not that I recall.

Q So who was involved in the drafting of the guidance?

A I believe it was drafted by staff who reported to Mark Kissinger, which was in another office that was not within my line of supervision, a woman by the name of Val Dietz. Either her or her staff were involved in the drafting.

Q Did you ever see red lines of the guidance prior to issuance?

A I personally reviewed and had some red line edits to the guidance document. I don't recall seeing anyone else's red line edits.

Q Do you recall whether you had any concerns with the guidance or how the guidance was drafted while you were reviewing it?

A I had minor improvements to the guidance, but I don't recall any broader concerns with how the guidance was drafted.

Q At this time I'd like to introduce what will be marked as majority exhibit 2. I'll give you a moment to retrieve that document. This is an email thread in response to a press inquiry from The Wall Street Journal on August 12th, 2020, asking for comment

on, among other things, the chain of events leading to the March 25th order.

[Hutton Majority Exhibit No. 2.
was marked for identification.]

Mr. Hutton. Yeah, all set.

BY MR. EMMER:

Q Do you recall this press inquiry?

A Yes, I do.

Q The top email on the exhibit from August 12th, 12:36, from Mr. Bruno (ph), writes, Hi all, everyone, please stand down. I spoke to Brad. I'm going to recommend providing an oral statement with respect to the 3/25 inquiry. Is it okay?

Do you recall discussing this inquiry with Mr. Bruno?

A Barely.

Q I want to direct your attention to the inquiry itself on the second to last page. And I'll give you a moment to read the paragraph over, starting with, "Mr. Cuomo made it official on March 23rd." Just take a moment to read that paragraph, please.

A Okay.

Q Just to ensure the record is clear, I know that we already went through a series of events, but the characterization that Wall Street Journal had regarding Mr. Raske and the Greater New York Hospital Association's involvement, you have no knowledge of that?

A That's correct.

Q And I just want to focus on the bullet point that starts, "On March 23rd, Deputy Commissioner Hutton told health department officials to draft language that would prevent nursing homes from denying residents who were ready for discharge."

Do you disagree with The Wall Street Journal's characterization there?

A Yes, I do.

Q Can you briefly explain why?

A I don't recall issuing any directives to any staff to draft. While I was involved in some of the initial conversations about the problem and there was a conversation about potential solutions, it certainly was not me issuing any directive.

Mr. Emmer. All right. I see that our time is up. We will go off the record. Thank you.

[Recess.]

[11:22 a.m.]

[redacted] We can go back on the record.

BY [redacted]:

Q Good morning, Mr. Hutton. I want to echo the thanks of my Republican colleagues for you agreeing to speak with us today.

As I said earlier, my name is [redacted], and I am chief counsel for the select subcommittee, Democrats.

As an initial matter, a lot of what we're going to be discussing today revolves around politicizing science and public health. So I just wanted to ask you, as a public health expert, for your opinion on some of the drawbacks of politicizing science and public health issues, particularly during a public health crisis.

Does the politicizing of public health lead to a disregard for public health safety measures?

A Yes.

Q And can it lead to a distrust of scientists and public health experts?

A Absolutely.

Q And can it lead to specific things such as vaccine hesitancy?

A Yes. It absolutely contributes to vaccine hesitancy.

Q And are there any other issues or drawbacks you've seen as a result of politicizing public health?

A I've seen a huge negative impact on the State and local public health workforce.

Q Can you be more specific?

A The pandemic was physically and mentally exhausting for people who worked in public health, and the politicization of that really greatly contributed to poor

morale, increased departure from employed positions, acceleration of retirement of those who were retirement-eligible in public health.

Q Thank you. I appreciate your thoughts on that.

And losing those employees or public health experts who had been in their roles for a long time, what does that do to the way -- I mean, we can use New York as an example, but what -- how did that lead to issues with New York's response, or did it lead to issues with New York's response to the COVID-19 pandemic?

A It eventually led to a huge loss of decades of expertise in key positions throughout the Department of Health, and, I think, similarly at the Centers for Disease Control and Prevention.

Q Thank you. I'm going to change topics and touch on the Department of Health -- New York Department of Health's data collection process during the COVID-19 pandemic.

Starting in April 2020 through the end of your time with the Department of Health -- which I believe you said was August of 2020 -- are you aware of if the Department of Health publicly reported the number of deaths related to nursing homes?

A Yes, I do recall that the Department did.

Q And were you aware that the Department of Health posted a daily PDF to its website that counted the number of deaths related to nursing homes?

A Yes, I do recall that.

Q Do you know how -- do you know if there was any involvement of Executive Chamber in determining the number of deaths that the Department of Health publicly reported?

A Yes. I recall a fair number of discussions about some of the policy decisions that needed to be made with respect to deaths in the general population, and I recall

conversations with respect to nursing home residents as well.

Q So were these decisions being made by Department of Health employees or by Executive Chamber employees?

A Ultimately, I recall the final decision being made by the Executive Chamber, but with a fair amount of discussion with individuals in the Department.

Q We have seen emails, and we are aware that, over the course of, you know, several months, DOH received many press inquiries regarding the total number of deaths related to nursing homes.

Do you recall if it was DOH or Executive Chamber who would take the lead in responding to these press inquiries regarding nursing home deaths?

A I recall that all press inquiries were managed out of the Executive Chamber in COVID regardless of the topic.

Q Thank you. And are you aware of any instances where DOH employees believed that different information should be publicly released than what Chamber wanted, and Chamber prevented DOH from doing so?

A Yes, I do.

Q Can you explain that to us, please?

A Yes. And let me be clear. Your question was worded not specific to nursing homes. So the example that I recall relates to death reporting in the general population.

Q Okay.

A There is an issue across the country about whether or not to include only confirmed deaths due to COVID in mortality counts or also to include probable or presumed deaths, the issue being, oftentimes, an individual would need to be lab-tested positive in order for it to be confirmed. There was differences by jurisdiction as to

whether or not a respective jurisdiction included the broadest number or not.

So this was one issue that there was a fair amount of discussion about, and it was especially problematic, because other States that were being reported prominently in the media as having lower death counts or lower death rates sometimes would really just have more restricted definitions of who were included, and even a difference between New York City that did -- which did its own reporting to the Centers for Disease Control and New York State.

There was also, I recall, a fair amount of discussion about the fact that data are fluid. Counts change over time. And so, I recall an instance where this came to light and resulted in a fair amount of conversation with the Executive Chamber.

There was a death due to COVID reported in a small rural county in New York State, and the local health commissioner immediately called us and said, We don't know anything about this. This is not us. And as we explored it, we found that it was a data reporting error and, in truth, was not a death that belonged in that local jurisdiction but another one.

And so, we pressed to be able to revise and update and correct data, and there was a reluctance and a concern on the part of folks in the Executive Chamber to have to revise death counts that had already been announced by the governor in a press conference.

And so, we were increasingly uncomfortable with the fact that we weren't able to continue to manage a public health surveillance system that was very fluid and dynamic -- to make sure that it was always in real time as accurate as possible -- because of a political desire to not be perceived as changing numbers.

Q Understood. And was one of those issues with confirming COVID deaths -- early on in COVID, was the issue that there was an insufficient supply of tests

available to local communities?

A Yes, absolutely. There were many resident deaths that certainly appeared extremely likely to be due to COVID, whether in nursing homes or in the community, but because there was greatly diminished test capacity, or even when capacity was expanded, there would be great delays in getting the results of COVID PCR tests -- that deaths would go reported as not being specifically related to COVID that were likely due to it.

And then there's even a real gray area. I recall having a conversation -- I don't remember whether it was in the Department or with the Chamber -- about a hypothetical situation where if you have an older nursing home resident who maybe had a lot of comorbidities and illness and who had made a really informed decision to have a do-not-resuscitate who maybe got a fever, and the nursing home appropriately did not take any measures to provide treatments, and then when that resident would die -- potentially due to COVID -- it would never be tested or accurately recorded as being due to COVID. And, you know, that's just one of the difficult nuances of using mortality data to track an outbreak or any cause of disease.

Q I'm sure this question I'm about to ask you could have a very long and complicated answer, but just briefly, if you can explain to us, as a public health expert, what would be the best way to collect the COVID fatality data and report it publicly?

A Do you mind repeating that one more time? The COVID-19 fatality data?

Q Yeah. As a public health expert, what, in your opinion, would be the best practice for reporting COVID mortality numbers, both for internal tracking and then potentially publicly as well?

A To transparently report all of those different categories, confirmed, presumed, probable, with sometimes difficult conversations to explain what those different categories represent and to monitor all of them; it allows for more accurate

comparisons within a State or a locality or across States or within the Nation -- and to standardize the approach as opposed to allowing jurisdictions to choose which of those categories they are or are not going to report.

Q Thank you. I'm going to turn our attention to the Department of Health report from July 6th, 2020. I believe that was brought up a little bit earlier, but just to delve into a little more detail, are you familiar with this report? The full title was, "Factors Associated With Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis."

A Yes, I'm familiar with that report.

Q Thank you. Can you please tell us your involvement with that report?

A I didn't have any involvement in the report. I did have some conversations when the report was initially being conceived about potentially being part of the effort to create the report.

I had, previous to that, had some tense conversations where I had to clarify that I -- my responsibilities did not include hospitals and nursing homes, but instead, public health, and had really resisted the effort to be point on nursing homes in the absence of a person in our department because of the key vacancy there.

And so when this report was conceived, I was approached by some to be involved, and I just firmly resisted. I said I had, you know, way too much that I was involved in, and I did not want to be part of that.

Q Were you aware of what was going on with the drafting of the report? Did you hear from anybody who was drafting the report anything about it?

A Yes.

Q And I assume there were multiple people at DOH who were involved in pulling this report together, not a single person?

A I was only involved in two at DOH.

Q Okay. Were there people outside of the Department of Health who were involved with drafting the report?

A Yes. My understanding is that there was.

Q Who do you understand outside of DOH was involved in drafting the report?

A I understand Jim Malatras. I don't specifically recall any others, but I -- my sense was that there was a smaller team that was involved outside of DOH.

Q We have spoken to other people about this report. So I'm just going to fill you in on what some of them have told us, and see if that's consistent with what you know about the report.

We spoke to Dr. Eleanor Adams who was involved with drafting the report, although she told us that she worked on a version of the report, and worked on it with others at DOH and that their version was data-driven and academic, and intended for some sort of scholarly publication -- a journal, or something like that -- and it was very data-focused.

Then there was a second version of the report -- which is the one that was ultimately released, which she says was not data-focused and she did not have very much involvement on.

Are you aware of that scenario that she outlined for us?

A Yes. Dr. Adams approached me with those concerns at the stage when she had submitted that report for review and then later approached me out of concern that the report had changed greatly.

Q Do you have any knowledge of why these changes were made to the report?

A No.

Q Did DOH object to the changes to the report?

A I know that Dr. Adams did, and I certainly got the strong impression that Dr. Zucker did. What I don't know is who -- whether or not they voiced those concerns and, if so, to whom.

Q We also spoke with some staff from the Executive Chamber, this included Dr. Jim Malatras, and he told us that there was a phone call on June 27th, 2020, where Melissa DeRosa instructed people on what numbers should be included in the report. Are you aware of that phone call?

A No.

Q Are you aware of his allegation that Ms. DeRosa instructed staff on what numbers to include in the report?

A I recall hearing that in a media report.

Q But you have no internal knowledge of that decision coming from Ms. DeRosa?

A That's correct.

Q And just to be clear, Dr. Jim Malatras and Ms. Melissa DeRosa were not DOH employees, correct?

A That's correct.

Q And to your knowledge, did they have public health backgrounds?

A No.

Q Dr. Malatras also told us that Governor Cuomo himself reviewed a draft of the DOH report prior to its release. Do you have any knowledge of that?

A No.

Q Do you know who had final approval of the report before its release?

A No.

Q In standard practice -- I guess, first of all, standard practice outside of COVID,

so pre-COVID, would Executive Chamber be involved with agency reports to this degree?

A Not to this degree.

Q Was it normal during COVID for the Executive Chamber to be made -- to be this involved with agency reports?

A I don't remember any other reports that would be analogous to this. It was certainly very customary that this Executive Chamber was very involved in agency guidance during COVID.

Q Do you have any knowledge about why this specific report garnered such attention from the Executive Chamber?

A I don't specifically.

Q Okay. This happened after you left the Department of Health, but you may still have some knowledge of it.

So I'm going to ask you about -- the New York attorney general issued a report on January 28th, 2021, titled, "Nursing Home Response to the COVID-19 Pandemic."

Are you familiar with that report from the New York attorney general?

A Yes, but barely.

Q Okay. And just to your knowledge, in New York, the attorney general does not report to the governor, correct?

A That's correct.

Q Okay. The report found -- and I'm going to quote here -- "Discrepancies remain over the number of New York nursing home residents who died of COVID-19. Data obtained by OAG shows that DOH-publicized data vastly undercounted these deaths," end quote.

It continued and it recommended that DOH, quote, "ensure public reporting by each nursing home as the number of COVID-19 deaths of residents occurring at that

facility and those that occurred during or after hospitalization of residents in a manner that avoids creating a double-counting of resident deaths at hospitals and reported State COVID-19 death statistics," end quote.

Were you aware of those issues with the July 6th DOH report?

A Barely.

Q Do you agree with the OAG's assessment of the July 6th DOH report?

A I don't know that I have enough of familiarity with the OAG's assessment to answer that.

Q Okay. Thank you. With your expertise in public health, can you explain why it is important to report accurate public health data to the public?

A Yes. In order to truly understand the pathogen, the infection, the severity, strategies for how you can prevent it, reduce transmission, mitigate severe effects, it's imperative that you have accurate data so that you can use that data to make informed decisions and to evaluate your efforts.

It also is extremely important to maintain the public's trust. If the public believes that the data that you are reporting are not accurate, then they are not likely to believe other very important recommendations that you're making about things that they can do to protect themselves and others.

Q And while that's important all of the time, is it particularly important during a public health crisis?

A It is vitally important during any acute public health emergency that you have the public's trust and that you communicate transparently about uncertainty and about things that you're working to resolve.

Q Thank you. Switching to a different topic, there have been public allegations that in the early days of the COVID-19 pandemic, those close to Governor

Cuomo received preferential access to the limited supply of COVID tests available at that point.

While we appreciate that it's important to ensure that individuals close to the Governor and key officials test negative to minimize disruptions to the continuity of government operations, particularly during a crisis, there is a distinction between prioritizing tests for that reason and the suggestion in public reporting that allies, friends, and family of the former Governor were given preferential access to tests.

Do you have any knowledge of a priority testing program for individuals with personal relationships with Governor Cuomo?

A Yes.

Q Were COVID-19 tests given to individuals who were prioritized by the Cuomo administration?

A I think I would frame it slightly differently. I think in the early weeks when we had small numbers of cases in New York and the rest of the Nation, any potential suspect case was somebody who we wanted to, very quickly, expedite the collection of samples and perform testing. And in the early weeks, it was only the Wadsworth Center, our State public health lab, that had an approved test, one of the first in the country, and then soon after that, New York City.

So there was a time for at least a few weeks in March where we were the only test that was available. So I think in those initial weeks, it was more about testing anyone who potentially was a suspect case.

Q How were individuals identified to be given testing in those early weeks?

A Sometimes we would hear from a local health department about a suspect case. There were occasions where I got a call from Dr. Zucker that there was an individual who needed to be tested. You know, we would learn about suspect cases in

different ways.

Q And what about specifically those who had personal relationships with Governor Cuomo, how were they identified for testing?

A I would typically get a call from Dr. Zucker about somebody who needed to be tested, and then I would coordinate with others to find a way to obtain a sample from that individual and to have it transported to the Wadsworth Center for testing.

Q Did tasking DOH staff such as yourself or others with administering COVID tests divert them from their responsibilities as part of New York State's COVID response?

A Yes.

Q How so?

A For one example, Dr. Eleanor Adams -- who was one individual who, as a clinician, had the experience to be able to collect a nasopharyngeal swab and to appropriately don and doff protective equipment -- would be detailed to collect specimens from these high-profile suspect cases. Yet, Dr. Adams was one of our key subject matter experts on nursing homes. And so any time that she was spending collecting specimens from individuals was time that she was not able to spend supporting our nursing homes.

Q And was it your sense that these individuals were receiving COVID tests for reasons other than ensuring continuity of government operations?

A On occasion.

Q In your assessment, did the preferential distribution of COVID tests or sending people to collect samples for COVID tests for friends and allies of the Governor inappropriately divert the limited supply of tests from being administered to healthcare providers, patients, and others who needed them?

A I don't remember the volume being such that that became a supply issue.

Q Did you have concerns about preferential treatment for allies of Governor Cuomo?

A Certainly.

Q Did you voice these concerns?

A If I did, it would have been to Dr. Zucker, and possibly to Dr. Adams, when I was involved in communicating with either of them about this.

Q And what were those concerns?

A And maybe -- and the lab. Certainly, I would have communicated that to the lab.

Q And what concerns would you have been sharing with them?

A You know, frustration that we were having to add to our overwhelming list of duties and tasks and activities that we had to do this.

Q Thank you. We're going to leave the testing issue aside.

We've spoken a bit about the issues that New York State faced early on in the COVID-19 pandemic, lack of testing being one of them, trying to get everything together. I understand this was a very chaotic time for you all.

But we're going to look back. You've spoken a little bit to our Republican colleagues about the March 25th order, and I would just like to look at the Federal policy that was released at that time and discuss with you how it may have impacted the orders that you all were issuing in New York State.

So, first, in your view as a former State public health official, how does Federal guidance, such as guidance from the Centers for Medicare and Medicaid Services, inform State-level policymaking?

A It's most often very important in helping to shape and establish the standards which States should use in developing or issuing similar guidance, especially

guidance from the Centers for Disease Control which, for public health, would typically have been our Federal agency that we worked more closely with.

Q Great. On March 4th, 2020, the Trump administration's Center for Medicare and Medicaid Services issued nonbinding guidance regarding infection control and the prevention of COVID-19 for nursing homes.

I believe this has been provided to you as Minority Exhibit A, and I would like to turn our attention to that document. I'll give you a moment to find it.

A All set.

[Minority Exhibit A.
was marked for identification.

BY [redacted]

Q Okay. Great. Towards -- let me just find the note.

On page 3, under the second bolded heading, this guidance reads, "A nursing home can accept a patient diagnosed with COVID-19, and still under transmission-based precautions for COVID-19, as long as it can follow CDC guidance for transmission-based precautions. If a nursing home cannot, it must wait until these precautions are discontinued."

Mr. Hutton, when looking at this Federal guidance from the Trump administration, do you agree that it does not bar the readmission of COVID-19-positive patients to nursing homes?

A I agree it does not bar the readmission.

Q And on the flip side, do you agree that this Federal guidance establishes a premise that COVID-19-positive hospital patients could be readmitted to nursing homes under certain circumstances?

A Yes, I agree.

Q And would this have been the type of guidance that the Department of Health would have looked at when crafting its own State-level guidance?

A Yes.

Q Thank you. Now, as a former public health official -- or former State public health official, I would like to get your perspective on the working relationship between the Federal Government and the New York State government during times of crisis such as COVID-19 and how things played out in March, April of 2020.

During a public health crisis, what role should the Federal Government play in working and coordinating with State governments?

A It should provide leadership, and it should help identify guidance that's needed and provide the best science and subject matter expertise to develop guidance working in partnership with States and localities.

Q And in the early weeks of COVID -- of the COVID-19 public health crisis, did the Federal Government fulfill those responsibilities as a partner to State governments?

A Yes. With the exception of the lab testing debacle, I think in the early weeks, they did a very good job.

Q In our examination of successes and failures during the COVID-19 pandemic, we've come to understand that the Federal Government's initial response caused many issues downstream for States. We spoke about testing issues. Another issue that we're aware of that lacked Federal coordinated response was assisting and providing States with adequate amounts of PPE to help reduce the threat of COVID-19 spread and infection.

Are you aware of issues with New York State having an adequate supply of PPE?

A Yes. I'm aware of New York State not having adequate supplies of PPE. I guess I did not view the provision of PPE as a CDC responsibility, but more of as an

emergency response.

You know, I recall there being a really important point of departure. There was this very critical conference call that I know has been well reported where Dr. Nancy Messonnier, who had been having frequent briefings with State health departments that I believe were open to the public -- where she had a really open, honest statement about how things were going to change really soon. And she was then pulled from all of those briefings, and it seemed like, at that point, there was a real change in the level of support and the guidance that we were able to receive from the CDC.

Q And were you aware that there's a national stockpile for pandemic responses of supplies?

A Yes. The Strategic National Stockpile, yes.

Q And was that used efficiently to get supplies to the States in an expeditious manner as needed?

A No. That was a real problem.

Q And did issues with adequate supply of PPE -- or we're aware that issues of adequate supply of PPE led to competition between the States in privately securing these supplies. Was that an issue that New York State faced?

A Yes. And it wasn't limited to PPE, but also ventilators and pharmaceuticals like hydroxychloroquine and other supplies.

Q And just from my memory, I remember seeing all those images on the news early in the COVID-19 pandemic within New York facilities of doctors, nurses, other caregivers wearing, you know, garbage bags and reusing masks and things to do whatever they could to stem infection and spread.

Can you expand any more on that -- the early days of the pandemic and what facilities were doing?

A Yes. You know, I think that there were numerous challenges that come out of that experience, including some supply chain serious issues. There were -- there was a real disparity between facilities that seemingly had ample PPE for their own health system and others that did not.

There was a real challenge in being able to have accurate, real-time estimates of PPE, for example, because we received -- I believe it was daily reports, if it wasn't daily, it was very frequent from nursing homes and other facilities about their current stock of PPE, and a facility -- a hypothetical nursing home could go several weeks with an ample supply, and then all of a sudden, with their new daily report, have none because they could get one case and then their burn rate would go up tremendously.

And so, they would go out of, you know, maybe a panic or maybe just a true increased level of usage -- they would go from having an ample supply to being out. And so, it was a really -- it was difficult, even if there were no supply issues, to manage that problem.

Q Thank you. And specifically thinking about nursing homes and other congregate care facilities, the issue of lack of PPE was particularly acute in those facilities, correct?

A Yes.

Q Since the start of the COVID-19 pandemic, scientific and medical researchers have been working to uncover what drove the spread of the disease. There has been great focus on nursing homes in particular, as they were so highly impacted across the country.

An article published in the Journal of American Geriatrics Society found, quote, "The most significant and consistent predictors of a skilled nursing facility's outbreak, case count, and case fatality rate to be larger bed size and higher SARS-CoV-2 prevalence in

the county where the skilled nursing facility is located," end quote.

One of the authors of this article, Vincent Mor of Brown University, has also said, quote, "Presumably, staff were vectors early in the pandemic, too, but there was more trouble getting tested then. Bigger facilities and facilities in areas with high community prevalence are at the greatest risk for COVID-19. It's about the staff coming and going every day," end quote.

Is this consistent with your understanding of COVID-19 spread within nursing homes?

A Yes.

Q Since it is a bit of a public health term of art, could you explain just, for the record, what the term "community spread" means?

A So when a disease, in particular, a respiratory virus, goes from person to person, there might be a period of time where there is transmission that's occurring that's not yet manifested itself as people being infected or having severe enough illness to be in a hospital. And so, oftentimes, several different incubation periods and rounds of transmission have occurred, such that there is widespread community transmission occurring even though it has not yet appeared in hospital discharge data, death data, et cetera.

And so, because of what we now know about this virus and that there's asymptomatic transmission and that some of the most infectious times are actually in the day before symptoms occur, we very likely had massive community transmission and community spread occurring in the New York City and surrounding area that got into nursing homes through visitors, through staff, through admissions before it became apparent that there were actually infected residents in the nursing home.

And so it, in a sense, was -- mirrored what was happening in the community,

which was that there was rapid spread, you know, that then eventually just, you know, continued unabated.

Q Thank you. And when we're examining the phenomenon of community spread, particularly in settings where there are medically vulnerable individuals such as nursing homes and other assisted-care facilities, what is the role of tools like PPE in protecting the patients?

A Well, we do have an important set of standard precautions to prevent transmission from one resident to the next, and PPE would have been a barrier protection to limit an individual serving as a vector by actually contaminating a person's room or their body, and then by wearing appropriate respirators, it could also limit the amount of respiratory particles or airborne transmission of the virus. So PPE would have been very important.

Q And how did the Federal Government's failure to ensure an adequate supply of PPE in New York and other States contribute to the threat of community spread posed to nursing home residents?

A I think the lack of PPE -- I don't know that I have enough information to know if that's the Federal Government or supply chain or whose responsibility, but the lack of PPE certainly played a really important role, but I still believe that community transmission and community spread was pretty wide, you know, early on.

Q Thank you. You may or may not be aware, but in 2019, so prior to the COVID-19 pandemic, the Trump administration proposed to relax a Federal requirement that nursing homes employ on-site infection prevention specialists, and according to public reporting, Trump's proposal led some facilities to cut corners when it came to infection control measures.

Is the maintenance of firm infection control standards and compliance with those

standards important to preventing viral infection and spread in nursing homes?

A Absolutely.

Q And does relaxing infection control standards in nursing homes better prepare staff and residents for a future pandemic?

A No.

Q What should these types of facilities be doing to improve infection controls?

A They should receive frequent training on the appropriate infection control practices such as hand hygiene and respiratory hygiene. They should have supplies of PPE to use. They should have a point person, whether it's somebody with infection prevention training, like a certification in infection control. They should be well-reimbursed, so that they have the capacity to isolate a resident in a single room or maybe several different residents in a single room, you know, to prevent spread or an outbreak of any number of diseases in their facility.

Q Thank you. And are there ways that Federal and local government policies can aid these efforts?

A Yes, absolutely; to have policies that support those practices or incentivize or require them.

[redacted] Thank you very much.

At this point, that is the end of our questions for this round. So we can go off the record and take another 5-minute-or-so break.

[Discussion off the record.]

Mr. Emmer. We'll go back on the record.

BY MR. EMMER:

Q Mr. Hutton, in the previous hour, we discussed the process for issuing guidance. To summarize that process or the conclusion of it, it was your testimony that,

ultimately, the Executive Chamber signs off on all Health Department guidance that was issued. Is that right?

A In the pandemic, yes.

Q So, for the record, the March 25th order did receive sign-off from the Executive Chamber?

A Yes, absolutely.

Q And do you know who from the Executive Chamber would have signed off on the March 25th order?

A I have a broad understanding of the clearance process for guidance because of the time that I spent embedded there and interactions that I had with Ms. Lacewell, but I don't specifically know for the March 25th memo.

Q And I believe I asked you this in the last hour, but you do not recall having any discussions related to the issuance of the March 25th order with Ms. Lacewell?

A That's correct. I don't recall any.

Q And you do not recall having any discussions with -- regarding the issuance of the March 25th order with Dr. Zucker?

A Correct. I don't recall any.

Q Dr. Zucker testified to us this past December that he did not know where the order originated from.

Is it your testimony today that you've never discussed the origins of the order with Dr. Zucker?

A That's correct. If I did discuss it with him, it would have been in the months afterwards. I don't recall any conversations with him in the process to create, approve, and disseminate that order guidance.

Q Are you aware that, in August of 2020, Dr. Zucker testified to the New York

Assembly on the nursing home response?

A Yes, I am aware. That was around the time where I had announced my departure and was in my final weeks. So I recall that it was maybe happening in one of those final weeks that I was with New York State.

Q Dr. Zucker testified to us that Ms. DeRosa instructed him to testify that the order originated from the Department of Health and that the Executive Chamber was not involved. Dr. Zucker, again, told us that he did not testify to that effect.

Did he ever discuss his testimony with you or this incident?

A No.

Q Finally, as far as the origins of the order, we discussed the drafting process. In the previous hour, you said that you reviewed red lines.

Do you have any recollection of how many versions of the order you would have reviewed?

A I only recall reviewing one.

Q Do you have any recollection of how many people were involved in the drafting of the order?

A In the drafting, I don't know that I know specifically who actually drafted the original guidance document.

Q Thank you.

A Typically, it would have been one to two people.

Q Thank you. So, at this time, I would like to return back to the guidance itself. Please let me know when you have it in front of you.

A Yes. Your Exhibit 1.

Q Thank you. So the first sentence of the fifth paragraph that was underlined says, "No resident shall be denied readmission or admission to the nursing home solely

based on a confirmed or suspected diagnosis of COVID-19."

Can you briefly explain to us how nursing homes were to interpret this requirement?

A The intent was that purely being positive for COVID should not preclude a resident from gaining admission or readmission to a nursing home. That was the intent.

Q The next sentence says, "Nursing homes are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission."

I want to dissect that sentence or a few parts of it, but first, why were nursing homes prohibited from testing admitted and readmitted residents?

A My recollection was that the intent was that a test could identify somebody who was positive -- PCR positive but not necessarily infectious. And so, using testing inappropriately could serve as a barrier to individuals being placed in the appropriate setting which could cause a problem for hospitals at that time.

Q To be clear, are you saying that the concern was false positives? Or can you just elaborate more, please?

A Yes. The test that was available at the time was a PCR test. It wasn't until later in the summer that we had rapid antigen tests available.

PCR tests test for viral RNA in this case, and you can have viral RNA present in your bodily fluids or your respiratory cavity for several weeks after you are infected, and for certainly at least 2 weeks after you are infectious, because the test is so sensitive for finding any remnant of viral RNA. So that's a limitation of the PCR test when it's used for this purpose. It happens to be a strength of the test when you're using it to find people who are at the initial stages of infection because it's incredibly sensitive.

But yes, to use your term, it is a false positive when you're using it for the

purposes of determining whether somebody remains infectious.

Q Can you define what "medically stable" meant for the purposes of this order?

A I recall that the intent there was that they -- that a resident did not require an acute level of care. You know, obviously, a lot of nursing home residents have comorbidities and require ongoing medical treatment and support. So this was intended to mean they're medically stable such that they don't require care at an acute care facility.

Q Could a medically stable resident transferred to a nursing home still be contagious for the virus?

A Yes, potentially, which is why there were recommendations that nursing homes use certain standard transmission precautions to limit spread among all residents, but especially somebody who had been recently infected.

Q The transmission precautions that you're referring to, is that explicit within the March 25th order?

A Yes. I think the intent was for that next paragraph that includes the sentence, "As always, standard precautions must be maintained and environmental cleaning made a priority during this public health emergency."

And we had issued, I remember, multiple different guidance documents to nursing homes and other facilities on the infection control practices that should be used during the COVID-19 pandemic.

Q For the purposes of the March 25th order, can you explain the difference between admission and readmission?

A Yes. You know, I take admission to mean the very first placement in a nursing home and then readmission to mean the return after spending time in a hospital.

Q Are you aware of whether the administration was collecting data related to admissions and readmissions?

A I don't recall.

Q Who determined if an individual would be sent to a nursing home as a new resident?

A I'm not sure I understand the question.

Q So, if there was an individual that was determined medically stable at a hospital and was admitted to a nursing home, who would have been involved in the decision to admit a new resident to a nursing home as opposed to readmitting a returning resident?

A So if I'm understanding correctly, we're talking about an individual who, upon discharge from a hospital, is determined maybe the first time to need a nursing home placement? Is that what you mean?

Q Yes.

A Yes. Certainly, the discharge planner and the medical team providing care at the hospital, I would think also the family and caregiver and the individual, to reach the conclusion that this person would not be appropriate to be returned to a home or other community setting, but instead, need a higher level of care in a nursing home.

Q Did the Department of Health play any role in the facilitation of new admissions?

A Not that I'm aware of at the individual patient resident level like that, no.

Q How was the March 25th order --

A Sorry. You broke up there. How was --

Q How was the order enforced?

A I don't recall any enforcement. I don't know.

Q Thank you. Was the March 25th order intended to be interpreted as mandatory for nursing homes?

A I'm stuck on the word "mandatory." I think that this was an advisory guidance document, but I'm wondering what you mean by "mandatory."

Q For context, the governor as well as administration officials argue that, under 415.26 of the New York rules and regulations, that nursing homes always had the option or obligation to deny patients that it could not handle. Was that your understanding during the pandemic?

A Yes. That was my understanding during the pandemic and prior to the pandemic that if a nursing home was not able to provide care to a resident that -- then, you know, they would not be required to accept that person.

Q So it was your opinion that, under 415.26, the nursing home -- or excuse me. Was it your opinion as you were drafting this document that the nursing home's obligations under 415.26 was always in effect that they had to deny patients that they could not handle?

Mr. Luibrand. Jack, just to be clear, he didn't draft the document.

BY MR. EMMER:

Q Was it your -- when you were reviewing the document, did you consider section 415.26?

A I played a public health consultation role to this document. So I certainly did not view it with the regulations that govern nursing homes in mind, but more from the public health perspective.

Q Thank you. Do you recall the administration arguing that the March 25th order was consistent with CMS and CDC guidance?

A Yes. I recall that in the months that followed.

Q Mr. Hutton, did you consult with anyone from CMS or CDC prior to the issuance of the order?

A No.

Q Do you know if anyone from the Executive Chamber, New York State task force, or Health Department, consulted with CMS prior to issuing the order?

A I don't know.

Q Do you know if anyone from the Executive Chamber, task force, or Health Department consulted with the CDC prior to issuing the order?

A I don't know, and I'm not aware that anyone did in the Department of Health.

Q Do you know if, after the order was issued -- if anyone from the administration discussed the order with any Federal agency?

A I don't know.

Q Who would have made the determination within the administration or Health Department that the order was consistent with CMS or CDC guidance?

A I believe that the staff in the office that drafted the memo in the Office of Primary Care and Health Systems Management that were involved in the surveillance program of nursing homes and had familiarity with all the CMS requirements -- that that would have been within their purview.

Q Within your review of this document, were you asked to determine whether it was consistent with CMS or CDC guidance?

A I don't recall being asked that.

Q Prior to issuance of the March 25th order, did you review CMS or CDC guidance?

A I did not review CMS guidance. I certainly did my best to stay up on all CDC

guidance, but things were flying pretty rapidly. I do recall maybe having some conversations generally about nursing home infection control standards guidance that was being issued by CDC.

Q If the March 25th order was based on CMS and CDC guidance, is there any reason why it wouldn't be referenced in the March 25th order?

A I don't know that all of our guidance referenced relevant CMS and CDC guidance. I mean certainly, there were many times that we did, but I don't know that that could be said to be the norm.

Q At this time, I would like to introduce what will be marked as Majority Exhibit 3. This is the CMS guidance issued on March 13th, 2020. I will give you a moment to find it.

[Hutton Majority Exhibit No. 3.
was marked for identification.]

BY MR. EMMER:

Q And I won't ask you to go through the entire document. We're just going to focus on a few different paragraphs.

And for the record, in the previous hour, you and [redacted] went through the order -- this previous order issued by CMS -- or guidance issued by CMS on March 5th, and this document is very similar.

Are you able to explain today how the March 25th order was consistent with this guidance?

A I'm really not familiar with this March 13th guidance. I know you did send it late yesterday and I have reviewed it, but --

Q That's fine. So I want to direct your attention to page 5 of the CMS guidance, and we're looking at the note that is all in bold.

[12:35 p.m.]

Mr. Hutton. Yes.

BY MR. EMMER:

Q And I'll just read it into the record. It says, "Nursing homes should admit any individuals that they would normally admit to their facility, including individuals from hospitals where a case of COVID-19 was/is present. Also, if possible, dedicate a unit/wing exclusively for any residents coming or returning from the hospital. This can serve as a step-down unit where they remain for 14 days with no symptoms."

I just -- for the record, the March 25th order does not include any similar language. It doesn't recommend isolating residents or setting up a step-down unit. Is that right.

A It does not mention a step-down unit, but it certainly references those standard universal precautions, which a key one of those would've been isolation of infectious residents.

Q Thank you.

Now I'd like to direct your attention to the fourth page. I'm just going to look at another paragraph here. It says, "When should a nursing home accept a resident who was diagnosed with COVID-19 from a hospital."

And this is a similar -- and I think it's the exact same paragraph as you reviewed with [redacted] in the previous hour, which says, "A nursing home can accept a resident diagnosed with COVID-19 and still under the transmission-based precautions for COVID-19 as long as the facility can follow CDC guidance for transmission-based precautions. If the nursing home cannot, it must wait until these precautions are discontinued."

Mr. Hutton, the March 25th order does not include any similar contingent

language providing that a nursing home can reject a nursing home [sic] if it cannot comply. Is that right?

A Yes, that's correct.

Q And as your counsel pointed out, you weren't involved in the drafting, you were involved in the reviewing of this document. When you look at the last two paragraphs that we reviewed that uses permissive language such as "should" or "can," whereas the March 25th order uses restrictive language such as "shall" or "must," is that -- was the language that was used in the March 25th order ever discussed during your review?

A I don't recall.

Q Did you have any concerns with the language that was used in the orders?

A I didn't, but I guess I would qualify it by saying that it had been established as the norm, that this Executive Chamber preferred that orders be much more directive in their language and that we would commonly receive things sent back if they were perceived as being too soft or suggestive as opposed to directive.

Q And you said that was an executive order -- or Executive Chamber suggestion?

A I would say a norm, yeah, a norm that this Executive Chamber did not react favorably to soft or what they perceived as weak or suggestive language but instead, whether it was local health departments or nursing homes or any other entity, that we be much more directive in our language when we issue guidance.

Q And who from the Executive Chamber would've relayed that message to you, that they wanted stronger language within these guidances?

A You know, it would've been different people depending on the content and the language.

Q Do you have any specific examples of guidance that was sent to the Executive and sent back because they perceived it as not strong enough?

A I don't recall any specific examples.

Q And for the record, you don't recall that occurring with this guidance?

A That's correct. I don't recall that for this guidance.

Mr. Emmer. Do you mind if we go off the record for one moment?

We'll go off the record.

[Discussion off the record.]

Mr. Emmer. All right. We'll go back on the record.

BY MR. EMMER:

Q Mr. Hutton, can you see why a nursing home might interpret the March 25th order as mandatory?

I think you're on mute. I'll repeat the question.

A Sorry about that.

Q I can repeat the question too.

Do you think by the language of the order itself, that a nursing home could interpret the March 25th order as mandatory?

A What I said was I really don't know how this was interpreted by nursing homes. I think there was so much going on at that time, so many different guidance documents, that I really couldn't posit a suggestion.

Q Did you ever have any discussions with nursing homes on how to interpret the March 25th order?

A No.

Q Thank you.

So the CMS guidance references transmission-based precautions. Do you recall

what measures a nursing home needed to take to follow the CDC's transmission-based precautions?

A Yes. It would've included hand hygiene like regular hand-washing, respiratory hygiene, making sure that you cough into your elbow, wearing PPE, which at this time would've included gloves and a mask or other respiratory protection, and then isolation and quarantine practices within the facility.

Q And as far as the transmission-based precautions, was that something that you had been reviewing prior to the issuance of the March 25th order?

A Yes, that would be something that we would frequently cover with nursing homes, even pre-pandemic. You know, those are -- you know, another term for transmission precautions are standard precautions. You know, they're just standard measures that you would take to prevent infections from spreading in a facility.

Q Thank you.

Do you recall CMS Administrator Burma saying that the March 25th guidance was contradicted by Federal guidance?

A I don't recall that.

Q Do you think Executive Chamber employees knew of CMS/CDC guidance prior to the issuance of the March 25th order?

A I don't know.

Q Do you recall whether the administration, including the health department, reviewed -- or whether the health department reviewed other States' orders as far as discharge protocols?

A I don't recall.

Q Do you know if any other States restricted testing as in the context of discharged patients?

A I'm sorry. Restricted testing?

Q Yeah. Do you recall whether any other States restricted the testing of returning residents to nursing homes?

A I don't recall.

Q Were you aware that New Jersey had issued a similar order as to New York?

A That sounds familiar now that you say it.

Q Were you aware that the State of -- or that New Jersey rescinded their order weeks before New York?

A No, I did not know that.

Q We discussed how the nursing homes would've interpreted the order, and you said that you did not have any discussions with nursing homes. Is that right?

A That's correct.

Q Do you recall whether you had any nursing homes reach out and say that they didn't have capacity to cohort COVID-positive, or suspected, nursing home residents?

A At my level I did not have much interaction with individual nursing homes. That would've been other staff.

Q But are you aware of nursing homes transferring residents that they weren't capable of caring for?

A Yes. But I don't have any specifics that I could recall.

Q Thank you.

In the context of transferring residents, why weren't recovering patients sent to US Comfort or the Javits Center?

A I don't know.

Q Thank you.

At this time I would like to introduce what will be marked as majority exhibit 4, but in the context of the documents that you were sent last night it is labeled as exhibit 6.

This is the guidance issued by the New York State Department of Health on April 7th, 2020, entitled, "Advisory hospital discharges and admissions to ACFs." I'll give you a moment to find the document.

[Hutton Majority Exhibit No. 4. was marked for identification.]

Mr. Hutton. Okay.

BY MR. EMMER:

Q Do you recognize this guidance?

A Vaguely.

Q Did you have any role in developing this guidance?

A Not that I recall.

Q Do you know who was involved in the drafting of this guidance?

A No.

Q Do you know what prompted this guidance to be drafted?

A No.

Q Can you speculate, as far as within the department of health, who would've been involved in the drafting and issuance of this guidance?

A It would've been the -- that same Office of Primary Care and Health Systems Management. I don't know whether they have a different unit that oversees adult care facilities than nursing homes. So I would speculate that it would've been that same division that drafted the prior nursing home guidance.

Q But to be clear, to make sure the record is clear, you had no involvement in the issuance of this guidance?

A That's correct.

Q Thank you.

So we'll return back to March 25th order. While the order was still in effect, do you recall receiving feedback from nursing homes or stakeholders related to concerns with the order?

A No.

Q Do you recall how long the order was in effect?

A I recall 1 to 2 months, but not specifically.

Q So once the Governor and the administration started receiving press inquiries and there was public outcry regarding the order, do you recall whether there were any discussions related to terminating it at that time?

A I don't recall, and I don't remember being party to any of those discussions.

Q On May 10th, 2020, the Governor issued an executive order that mandated that hospitals could not discharge a patient to a nursing home unless that patient tested negative for COVID-19.

Did you have any involvement in the issuance of that executive order?

A Not that I recall.

Q And to be clear, you did not consult any of the executive -- or any Executive Chamber staff as far as the issuance of that executive order, right?

A I don't recall any involvement, nor any communication with the Executive Chamber about that executive order.

Q Do you have any knowledge what prompted the administration to change course?

A No.

Q Do you know why the March 25th order was removed from the department

of health's website on April 29th prior to it being terminated?

A No.

Q Thank you.

Mr. Hutton, I'm going to try to not make you repeat yourself. I'm going to go through the nursing home data that the administration was releasing through -- or throughout the pandemic. I realize the minority already went through a lot of it with you, so I will attempt to not make you repeat yourself.

So yes or no, do you think the administration presented accurate data throughout the pandemic?

A No.

Q Can you elaborate on why your answer is no?

A As I shared in the earlier questions, there was this dilemma whereby public health data, whether it be death or other data, are dynamic and are frequently undergoing data cleaning and corrections and updates. And this was something that the administration was not comfortable with. They perceived it negatively.

And so as a result, there was a discordance between the data that were being reported publicly and the data that the health department was maintaining on some issues.

Q And that answer, does that relate to the nursing home fatality data?

A To my recollection, it specifically relates to the broader mortality data. I don't recall whether we had that similar issue with nursing home deaths, at least that I was involved in.

Q So I want to briefly talk about how the administration collected data specifically related to purge surveys. Can you explain how the administration collected data during the pandemic as it relates to nursing homes?

A Yes. The department had this data system called HERDS, capital H-E-R-D-S. I believe it's Hospital Emergency Reporting -- Emergency Response Data System. It had been developed years earlier for communication with healthcare facilities such as hospitals and nursing homes during an emergency response, but it had already been flagged as something that really needed to be updated to use newer technology.

And so this HERDS system was the platform that the department had available to use to collect reports, reports of information. Whether they be data counts or other survey about information such as their PPE supply or staff testing, HERDS was the platform that was used to collect and receive routine reports from nursing homes and hospitals.

Q Did you have any role or part in the collecting and reviewing of the data?

A It was another group that managed HERDS and that typically did the programming. There were occasions where I might've been consulted about the data variables and the specifics of certain data elements that were being collected to opine from a public health perspective about how those data should be collected. But it was not specifically in my office.

Q Who from the Executive Chamber -- or do you know who from the Executive Chamber was involved in the reviewing and collecting of HERDS data?

A When you say HERDS data, that really can mean several different things, including nursing home deaths, PPE, staff testing. So it certainly could've been different Executive Chamber involvement depending on what data you're referring to that were collected from facilities via HERDS.

Q I'll just dissect the question a little bit. Who would've been involved in formulating what questions would be included in the HERDS surveys that were sent out to nursing homes?

A That were sent out to nursing homes? Okay.

Q Yeah.

A So from the Chamber, did you ask, or were you asking from -- just in general?

Q Both. Both, please.

A Yeah. Certainly, Mark Kissinger and his staff, who had the responsibility for oversight regulation of nursing homes, would've been key in that.

I recall that Linda Lacewell was a little bit involved with that too, but I'm a little fuzzy on whether that was the case or not.

Q Thank you.

I would like to focus on how nursing home-related data, specifically fatality data, was reported throughout the pandemic.

Did you have any role in deciding the methodologies in which that data would be reported publicly?

A No.

Q Do you know who would've made those decisions, as far as the methodology, in which nursing home fatalities would be counted?

A I recall Linda Lacewell being pretty involved in that.

Q It's been documented that from April 15th to May 2nd, 2020, the department added presumed deaths by county as well as both confirmed and presumed deaths by individual facility but only if the facility had five or more deaths.

Why would the number exclude deaths at facilities with five -- or less than five deaths?

A I don't know.

Q From May 3rd, 2020, to February 3rd, 2021, the department excluded

deaths that occurred at other locations, namely hospitals. Do you have any firsthand knowledge who would've made the decision to exclude those deaths from the total number of deaths occurring at nursing homes?

A No.

Q It's also been documented that sometime in April or May of 2020, members of the administration department of health learned that deaths reported after 5 p.m. each day were not included in the totals for the day.

Were you aware of that occurring?

A I recall that.

Q Do you recall who you would've discussed that issue with?

A No. I more recall the issue that there was a daily submission deadline that facilities had to meet in order for those counts to be included in the next day. And I remember that being an issue that came to light.

Q Do you recall whether there was reluctance amongst members of the administration to correct the data to reflect deaths that occurred after 5 p.m.?

A I don't recall that.

Q As we discussed before, Dr. Zucker testified to the New York legislature in August of 2020. The legislature -- while he declined to provide the New York legislature with the number of nursing home residents who died, do you recall Dr. Zucker refusing to provide the total number of nursing home residents that died as a result of COVID-19?

A No.

Q Do you have any idea why he couldn't provide that number?

A No.

Q Are you aware that Mr. Rhodes conducted an audit of the department of health's numbers after that hearing in August of 2020?

A No. And I had left in August of 2020.

Mr. Emmer. We can go off the record.

[Discussion off the record.]

Mr. Emmer. We can go back on the record.

BY MR. EMMER:

Q Mr. Hutton, two quick questions. Were you aware that the Governor was writing a book about his response to the pandemic in spring 2020?

A Yes, I did learn of that.

Q When did you learn that he was writing a book?

A I don't recall the specific month because it's been 4-plus years, but I remember hearing about it when it seemed like it was well underway, and there were Executive Chamber staff who had spent a long weekend at the Governor's mansion either drafting or reviewing or involvement. And so I recall how I learned about it were from some of those Chamber staff who were remarking that they, you know, had been pulled in over the weekend to spend time on that.

Q Did that concern you?

A You know, it didn't because it was the Chamber, and I was glad that it didn't directly impact me. So I didn't think about it at the time.

Q And to be clear, you didn't have -- or you were never asked to contribute anything for the purposes of the drafting of the book?

A No, never.

Q And, again, asking the same question, but as a public health expert, it didn't concern you that the Governor was writing about his response to the pandemic while simultaneously responding to the pandemic?

A Sure, I had that concern, but I also had a similar concern with the 100 daily

press conferences, you know, that really competed for precious public health time for my staff and local health department staff.

Q Do you think that the Governor's response -- that the Governor and his team politicized the response to the pandemic?

A Yes. He wasn't the only one, but, yes, he certainly did.

Mr. Emmer. All right. We'll go off the record.

[Discussion off the record.]

Mr. Emmer. We'll go back on the record.

Mr. Hutton. Thanks. I did just want to clarify some of the organizational structure within the health department. I thought it would come up, but in looking back, it really hasn't.

There were three main offices in the health department: The Office of Health Insurance Programs, Medicaid, which we have not talked about today; the Office of Public Health, which is the one that I oversaw; and the Office of Primary Care and Health Systems Management, which was the regulatory office of the health department that had responsibility for hospitals and nursing homes.

It just so happens that my colleague, deputy commissioner for that office, had coincidentally retired prior to the pandemic, so there was a key vacancy there.

But I wanted to clarify, I did not have any responsibility for nursing homes, hospitals, or any of the staff or policies or regulations of that office. Because it was a pandemic that was an infectious disease and probably also because there was a key vacancy there, I probably was pulled into more conversations than I would've ever been pulled into.

But really myself and all my staff really played a public health consultative role on infectious diseases, infection control, public health, but really didn't have any

responsibility.

So even in our review of guidance that originated from that, you know, I think we really saw ourselves as consulting from a public health perspective. But I do think that that can be blurred because there was a vacancy there and because things were moving so fast and rapid during the pandemic.

Mr. Emmer. Thank you, Mr. Hutton.

We will go off the record.

[Whereupon, at 1:11 p.m., the interview was adjourned.]

Certificate of Deponent/Interviewee

I have read the foregoing ____ pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

_____

Witness Name

_____

Date