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**NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH**

**Notice of Opportunity to Comment on the
Amendment of Provisions of Article 207 of the New York City Health Code**

What are we proposing? The New York City Department of Health and Mental Hygiene (“Department” or “DOHMH”) is proposing that the Board of Health (“Board”) amend Article 207 of the Health Code to establish a schedule for making birth and death records public and transferring them to the Department of Records and Information Services (“DORIS”).

When and where is the hearing? The Department will hold a public hearing on the proposed Health Code amendments from 10a.m. to 12p.m. on October 24, 2017. The hearing will be held at:

New York City Department of Health and Mental Hygiene
Gotham Center
42-09 28th Street, 3rd Floor, Room 3-32
Long Island City, NY 11101-4132

How do I comment on the proposed amendments to the Health Code? Anyone may comment on the proposed amendments by:

- **Website:** You may submit comments to the Department through the NYC Rules website at <http://rules.cityofnewyork.us>.
- **Email:** You may email comments to resolutioncomments@health.nyc.gov
- **Mail:** You may mail comments to:
New York City Department of Health and Mental Hygiene
Gotham Center, 42-09 28th Street, CN 31
Long Island City, NY 11101-4132
- **Fax:** You may fax comments to the Department at 347-396-6087.

Is there a deadline to submit written comments? Written comments must be received on or before October 24, 2017, at 5:00 pm.

What if I need assistance to participate in the hearing? You must tell the Office of General Counsel if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at 347-396-6078 or 347-396-6116. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by October 10, 2017. This location is wheelchair-accessible.

Can I review the comments made on the proposed amendments? You may review the comments made online at <http://rules.cityofnewyork.us/> on the proposed amendments by going to the website at <http://rules.cityofnewyork.us/>. All written comments and a summary of the oral comments received by the Department will be made available to the public within a reasonable period of time by the Department’s Office of the General Counsel.

What authorizes the Department to make this amendment? Section 558(b), (c), and (g) of the Charter empowers the Board to amend the Health Code and to include in the Health Code all matters to which the Department's authority extends. Section 558(c) of the Charter authorizes the Board to include in the Health Code provisions related to maintaining a registry of births and deaths. Section 556(c)(1) of the Charter authorizes the Department to supervise and control the registration of births and deaths. Section 17-170 of the New York City Administrative Code authorizes the Board to determine when birth and death records are transferred to DORIS. Section 1043(a) of the Charter grants rulemaking powers to the Department.

Where can I find the Department rules and the Health Code? The Department's rules and the Health Code are located in Title 24 of the Rules of the City of New York.

What laws govern the rulemaking process? The Department must satisfy the requirements of Section 1043 of the Charter when adding or amending rules. This notice is made according to the requirements of Section 1043(b) of the Charter.

The proposed amendment of these provisions were not included in the Department's regulatory agenda for this fiscal year because it was not contemplated when the Department published the agenda.

Statement of Basis and Purpose

Introduction

Birth and death records are protected from access by the general public because they contain individually identifiable information, which is considered private. A birth certificate contains the first and last name of the person whose birth is being registered, date of birth, sex, home address, and mother's maiden name. In addition to information about the decedent, a death certificate contains the first and last name of parents, surviving spouse, and individual reporting the death. All of this information is individually identifiable information within the meaning of Health Code section 3.25, which as the notes accompanying that section's adoption state, "will be treated with the utmost confidentiality." Yet, birth and death records are also important historical documents that at some point should be available to historians and families researching their ancestries. For this reason, Administrative Code section 17-170(b) charges the Board with deciding when the original records of births and deaths filed with the Department, and the indexes to such records, should become public records and transferred to the Department of Records and Information Services ("DORIS").

The proposed rule amendment would, if approved by the Board of Health, amend the Health Code to establish fixed schedules for making these records public and transferring them to DORIS. Specifically, the Department is proposing that:

- a birth record become a public record on January 31st of the year following 125 years after the date of birth, and

- a death record becomes a public record on January 31st of the year following 75 years after the date of death.

The Department believes that these proposed schedules balance the need to protect the personal information of people who may be alive, especially as it relates to the problem of identity theft as well as other privacy issues, with the public's right to access historically important records, including the specific interests of families, genealogists and other researchers. The proposed schedule would also avoid the transfer of records to DORIS that are, in the Department's experience, still subject to amendment by the individual to whom the record pertains, the Office of Chief Medical Examiner, the courts, or family members.

If the Board adopts this proposal to commence amending the Health Code, the Department is very interested in receiving comments about the appropriateness of these time periods, in particular both from privacy groups and genealogists, and about adopting a 50-year confidentiality period for death records rather than the 75-year period proposed here.

Background and New Requirements

Birth and death records

In New York City, as in most vital records jurisdictions nationwide, the certificate of birth collects a wealth of information, pertaining both to the person registered on the record and their family members. On the birth record, this includes: the registrant's date of birth, location of birth, and sex; the mother's and father's names prior to first marriage, places of birth, and dates of birth; as well as the number of children delivered at the time of birth, and a home address. Death certificates, in addition to presenting date and cause of death, include date of birth, location of death, names of parents, as well as information on the surviving spouse and the living person known as the informant, including their name, relationship to decedent and mailing address. This type of personal identifying information ("PII") is protected in other contexts under multiple federal,¹ State,² and local³ privacy laws.

Necessary and appropriate use of birth and death certificates and information

¹ See, e.g., the Privacy Act of 1974 as amended (5 U.S.C. § 552a); the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)) Privacy Rule (45 C.F.R. Part 160 and Subparts A and E of Part 164); the Driver's Privacy Protect Act (18 U.S.C. § 2721 *et seq.*); and the Identity Theft and Assumption Deterrence Act of 1998 (18 U.S.C. § 1028).

² See, e.g., the Personal Privacy Protection Law (NYS Public Officers Law Article 6A) and 10 NYCRR §§ 35.2 and 35.4 making birth and death records maintained by NYS agencies confidential except in limited circumstances. Also see NYS Public Officers Law §§ 87(2)(b) and 89(2)(b), which protect date of birth information from public release.

³ See, e.g., NYC Charter § 2604(b)(4) prohibiting City employees and officials from disclosing any confidential information obtained as a result of his/her official duties and NYC Administrative Code Title 10, Chapter 5 concerning disclosures of security breaches.

Information included in birth records and actual copies of birth certifications are required by multiple governmental agencies and private entities to receive a benefit or service, or to support the issuance of other documents often used for identity purposes such as obtaining a driver's license. Birth records are considered "foundational documents," meaning they are often the first document obtained that enables the holder to then obtain other important documents. For example, the information contained in a birth certificate can also be used as part of the process to get a U.S. passport or Social Security card and to access public benefits such as Medicaid.

Death records and the PII included in them are used to open or close decedents' bank accounts, notify federal agencies such as the Internal Revenue Service and the Social Security Administration of a death, and to start the probate process in court. They are also needed to access payments such as life insurance and various survivor's benefits in pensions and other programs.

Fraudulent and inappropriate use of birth and death certificates and information

The PII found on birth and death certificates has the potential to be used in various fraudulent ways, including identity theft. Identity theft involves appropriating PII and, in the name of that person, incurring debt, taking money from financial accounts, opening new accounts, accessing medical information or services, or receiving a tax refund, among other things.⁴ Indeed, birth certificates are often referred to as "breeder documents" because they can be used to obtain other valid forms of identity.⁵ Information from death certificates can be used in a similar manner, sometimes referred to as "ghosting."⁶

Amendment and correction of birth and death records/issuance of new birth certificates

Birth and death certificates are considered "living" documents in that their content can be changed in certain circumstances. Pursuant to Article 207 of the Health Code, their contents may be amended or corrected, or a new birth certificate issued, to correct errors made in the originals or to reflect changes in circumstances, such as adoption or change in gender. These are common requests from Vital Records customers. During the five-year period from 2012 to 2016, the Department processed 1,030 birth record corrections and amendments for individuals born in 1940 and earlier, including 24 delayed registrations of birth and amendments for individuals

⁴ See, e.g., NYS Penal Law Article 190; Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, "Identity Theft," accessible online at <https://www.bjs.gov/index.cfm?ty=tp&tid=42>; U.S. Federal Trade Commission Consumer Sentinel Data Book for January – December 2016 ("FTC 2016 Data Book"), accessible online at https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/esn_cv-2016_data_book.pdf.

⁵ *Birth Certificate Fraud*, U.S. Department of Health & Human Services, Office of Inspector General (OEI-07-99-00570 September 2000).

⁶ See, e.g., NYS Department of State, Division of Consumer Protection, "After Death" accessible online at <https://www.dos.ny.gov/consumerprotection/scams/afterdeath.html>.

aged 90 and above. During the same five year period, the Department also processed 257 death record corrections and amendments for individuals who died in 1970 and earlier. These are legal changes to records requested by living New Yorkers or their survivors. Pursuant to Health Code § 207.01(a), only the Commissioner of Health or his or her designee may make these changes. Similarly, death certificates may be changed by the Office of Chief Medical Examiner when a cause or manner of death is amended, an important function as new facts come to light.

When such changes are made to birth certificates, Administrative Code section 17-167(c) requires the substitution of the new birth record for the one on file. The Department must place the original birth certificate under seal, which may not be broken except by order of a court of competent jurisdiction, and must provide the new birth certificate when a certified copy of the record is issued. Amending a birth certificate after it has been released into the public domain undermines the Department's ability to fully substitute the amended certificate for the original and effectively seal the prior records, as the law describes. Over time, multiple versions of the same birth records could even be circulating in the public domain, diminishing the reliability of these records and creating confusion around authenticity. For these reasons, as well as similar risks to death certificates, it is important the Department not make these documents publically available while they are likely to still be amended.

Privacy concerns

In addition to the financial and security concerns discussed above, simple privacy concerns argue for maintaining the confidentiality of birth and death certificate PII during a person's lifetime and for an appropriate period after. For example, a teenage mother named on the death certificate of an infant may still be alive 75 years after her infant had died or the birth certificate of a transgender person may reveal information that person may prefer to keep private, especially if the certificate has not been amended.

New Yorkers are living longer

New Yorkers are living longer than ever before. The 2010 US Census shows that almost a half-million New Yorkers are over the age of 75.

Age	Total
75 – 79	178,019
80 – 84	142,272
85 – 89	90,375
90 – 94	37,270
95 – 99	11,665
100+	2,096
Total	461,697

Another half million were between the ages of 65 and 74.⁷ Since 2010, the American Community Survey estimates that the total number of New York City residents age 75 and over had increased to more than 492,000, with more than 1.25 million over the age of 65.⁸ In 2005, 585 New Yorkers died between the ages of 100 and 114. In 2014, that number rose to 806 deaths between the ages of 100 and 114, a 38% increase, and in 2015 the number rose to 901. Birth and death data should be protected to adequately reflect these trends to guard against identity theft and fraud.

Model State Vital Statistics Act and Regulations (2011 Revision)

The Model State Vital Statistics Act and Regulations (“Model Law”)⁹ were developed to serve as models for vital records jurisdictions in preparing their own laws and regulations. Now in its sixth revision, the Model Law is a cooperative effort among state governments and the federal National Center for Health Statistics of the Centers for Disease Control and Prevention. In 2011 the Model Law was revised to reflect the increase in life expectancy since the prior revision in 1992. In order to ensure that no person’s PII becomes public prior to a person’s death, the Model Law now recommends that birth records not be released until 125 years after the date of birth and death records not be released until 75 years after the date of death.

Proposed transfer of records

The Department proposes to adopt the Model Law as it applies to birth and death records: death records that are in the possession of the Department would be transferred to DORIS 75 years after death, and birth records in the possession of the Department would be transferred 125 years after birth. Previously, these documents had been made public and released to DORIS at inconsistent intervals. The earliest death records in the possession of the Department that have not been transferred to DORIS are from 1949 and would be made public beginning in 2024. The earliest birth records in the possession of the Department that have not been transferred to DORIS are from 1910 and would be made public beginning in 2035. The Department’s proposal is not intended to effect birth and death records already at DORIS, even if these records would not have been transferred had this proposed Health Code provision been in effect at the time of their transfer.

Statutory Authority

Pursuant to section 556(c) of the Charter and section 17-166 of the NYC Administrative Code, the Department is responsible for supervising and controlling the registration of births and deaths that occur in the City of New York. Section 558(c) of the Charter requires the Board to include in the Health Code provisions related to maintaining a registry of births and deaths, as

⁷ <http://www1.nyc.gov/site/planning/data-maps/nyc-population/census-2010.page>

⁸ <http://www1.nyc.gov/site/planning/data-maps/nyc-population/american-community-survey.page>

⁹ Accessible online at <https://www.cdc.gov/nchs/data/misc/mvsact92b.pdf>.

well as provisions related to changes or alterations of any birth or death certificate upon proof satisfactory to the Commissioner of Health and the manner in which these certificates may be issued and otherwise examined. Administrative Code section 17-169 and Health Code sections 3.25 and 207.11 make birth and death records confidential and restrict access to these records beyond certain classes of specified people. Section 17-170(b) of the Administrative Code authorizes the Board to determine when birth and death records are transferred to DORIS. And finally, section 558(b) of the Charter specifically authorizes the Board to add to, alter, and amend the Health Code.

RESOLVED, that a new section 207.21 of Article 207 of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, be adopted, to be printed together with explanatory notes, to read as follows:

§ 207.21. Birth and death records to be public records; transfer to the department of records and information services

Notwithstanding any other provision of this Code, a birth record in the Department's possession and control becomes a public record on January 31st of the year following 125 years after the date of birth and a death record in the Department's possession and control becomes a public record on January 31st of the year following 75 years after the date of death. The Department shall transfer to the City's department of records and information services all public birth records, death records, and index books.

NOTE: This provision was adopted on _____, 2017, to establish fixed schedules for making birth and death records accessible to the public. Prior to this adoption, a Board of Health vote was required for every transfer of documents to the City's department of records and information services.

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Transfer of Vital Records to Municipal Archive (Health Code Article 207)

REFERENCE NUMBER: DOHMH-82

RULEMAKING AGENCY: Department of Health and Mental Hygiene

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Francisco X. Navarro
Mayor's Office of Operations

September 1, 2017
Date

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Transfer of Vital Records to Municipal Archive (Health Code Article 207)

REFERENCE NUMBER: 2017 RG 071

RULEMAKING AGENCY: Board of Health

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: August 31, 2017