



**State of New York
Department of State
Committee on Open Government**

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FOIL AO 19844

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The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence unless otherwise noted.

Dear:

We are writing in response to your request for an advisory opinion relating to the availability of burial permits in response to a Freedom of Information Law (FOIL) request. Your inquiry was prompted by a discrepancy between previously prepared advisory opinions of the Committee on Open Government on the subject and guidance you have received from the New York State Department of Health. Upon receipt of your inquiry, we re-reviewed our old advisory opinions and the relevant statutes and consulted with the Department of Health. The advisory opinion below serves to supersede all previously issued advisory opinions on this topic.

As a general matter, FOIL is based upon a presumption of access. All records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in § 87(2)(a) through (r) of the Law. The question we have been asked to review is whether burial permits are exempt from FOIL disclosure pursuant to the initial ground for denial, § 87(2)(a), which pertains to records that “are specifically exempted from disclosure by state or federal statute.”

New York State Public Health Law (PHL) § 4174(1)(a) sets forth the circumstances under which a “record of any death” may be disclosed. The section closes by stating that “no certified copy or certified transcript of a death record shall be subject to disclosure under [FOIL].” Neither the term “record of death” nor “death record” is defined in PHL.

A separate provision of PHL, § 4147, titled “Deaths, confidentiality of records,” provides:

The death certificate, burial permit or any other record of death or interment, as defined by article forty-one of this chapter, including but not limited to the name, address or telephone number of the decedent, next of kin or surviving relatives of such decedent, shall not be sold or offered for sale for commercial, promotional or profit-making purposes without the written consent of the next of kin or the legal

representative of such decedent or next of kin. The provisions of this section shall not apply to newspapers or newsletters providing general information to the public. A violation of this section shall constitute a violation as defined in the penal law.

This section specifically refers to “burial permits.” In previously advisory opinions prepared before 2009, the Committee opined that only PHL § 4147, and not § 4174, governed access to burial permits. We then opined that PHL § 4147 does not exempt burial permits from FOIL disclosure, but rather prohibits the sale or offer of sale of such records for commercial purposes. After further research, and consultation with the Department of Health, I believe our previous opinions were incorrect.

The opening sentence of PHL § 4147 refers to “[t]he death certificate, burial permit or any other record of death or interment” Based upon this language, it is my view that the legislative intent was to include a “burial permit” as one type of “record of death.” This opinion is supported by guidance provided by the Department of Health which advises that burial permits contain much information which is duplicative of death certificates and to release them under FOIL would undermine the statutory restriction established by PHL § 4174. The guidance we received from the Department of Health is supported by the agency’s regulations that state: “[w]hen a certified copy of a death certificate or a certified transcript of death certificate is issued, the confidential section shall be detached and no information from that section shall be disclosed in any other form or manner” 10 N.Y.C.R.R. 35.4(c). As such, not only is there a prohibition on disclosure of the portions of the death certificate deemed confidential, that prohibition also applies to the information contained in those confidential portions, even if the information is contained within a separate record.

Assuming our opinion is accurate, the burial permit would constitute a death record that shall not “be subject to disclosure under article six of the public officers law.” PHL § 4174(1)(a).

Questions have arisen as to why the Legislature enacted PHL § 4147 prohibiting the *sale* of death records for commercial purposes, when PHL § 4174 prohibits *disclosure under FOIL* entirely. I believe the answer to this question lies in PHL § 4174(1)(d), which states that the Commissioner of Education or person authorized by the Commissioner may “upon request, issue certification of birth or death unless in his judgment it does not appear to be necessary or required for a proper purpose.” Section 4100-a (“Definitions”) sets forth what shall be included in a certification of death:

A “certification of death” shall contain only the name, the date of death, and the place of death of the person to whom it relates, the date of filing in the local registration district, or a statement that the death certificate was filed within one year of the death of the person to whom it relates, and none of the other data on the certificate of death.

The certification of death contains only basic information regarding the decedent and the Commissioner or an authorized representative may issue a certification if they determine it is needed for a proper purpose. In contrast, death certificates and burial permits contain additional detailed information regarding the decedent and manner of death (see *PHL § 4141 “Death Certificate; form and content”*). PHL § 4147 not only prohibits the sale for commercial purposes of death certificates, it also prohibits the sale for commercial purposes of a certification of death.

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In our view, this opinion is supported by regulations promulgated by the Department of Health which state:

A certification of death containing only the name, the date of death and the place of death of the person to whom it relates shall be issued when required for a proper purpose. *A proper purpose shall not exist when the record is requested for commercial or profitmaking purposes or to satisfy idle curiosity.*

10 N.Y.C.R.R. 35.4(d) (emphasis added).

In conclusion, it is our opinion that burial permits constitute death records which are exempt from FOIL disclosure by state statute, specifically, PHL § 4174.

Thank you for your inquiry.

Sincerely,

Kristin O'Neill
Assistant Director