

Information about the deceased

Freedom of Information Act Environmental Information Regulations

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Introduction

1. The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) gives right of public access to information held by public authorities.
2. An overview of the main provisions of can be found in [The Guide to Freedom of Information](#) and [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the Guides, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to public authorities how to deal with requests for information about the deceased.

Overview

- There are no specific exemptions under FOIA for information about deceased people.
- However, in cases where information about the deceased requires protection, certain exemptions will apply.
- On occasion information about the deceased will contain information about other living individuals and so the exemption for personal information will be relevant.
- In certain circumstances, such as a request for medical records of the deceased, the exemption for confidential information is likely to apply.
- Certain applicants may have rights to access information under Access to Health Records legislation, in which case section 21 will apply.
- In the case of information about the deceased that is environmental in nature, the equivalent provisions of the EIR will apply, such as regulation 13 (personal information) and regulation 12(5)(f) (interests of the person who provided the information to the public authority).

Consideration of requests about the deceased

5. There are no special exemptions in FOIA for information about the deceased. In some cases, such information will not be sensitive and the fact that it contains some details about someone who has died will not be relevant. Where this is so, the request should be considered in the normal way and the information may be suitable for disclosure.
6. However, there are situations where such information is sensitive in nature and consideration of the request will centre on the very fact that the information is about the deceased. For example, these could be situations where a requester wishes to obtain information directly relating to the circumstances in which the person dies, in particular, where the person had been in hospital or another care institution. This could include the health records of the deceased person. In such circumstances, a public authority will want to consider whether there are any exemptions that could be used to prevent the disclosure of such sensitive information.

The exemption for personal information (section 40)

7. The exemption for personal information only applies to living individuals. This means that the exemption cannot be used for information about, and which identifies, deceased individuals. However, there will be cases where a request for sensitive information about a deceased person also relates to personal information about another identifiable living individual.
8. A deceased person's medical and social care records are likely to contain information about other individuals, such as NHS and social services staff. On occasions, information about relatives of the deceased may also be included in such records.

Example

In ICO Decision Notice [FS50153179](#) a request was made for the social care records of a deceased relative.

It was determined that some of the requested information also identified the deceased person's primary carer and several social services and health authority employees. For example, the information included care arrangements, visit reports and inter-agency correspondence. As some of this information

comprised personal data of the third parties, in particular that of the primary carer, under the Data Protection Act, the public authority had to consider whether disclosure of any of the deceased person's records would contravene the Data Protection Principles (by reference to the third party personal data).

9. In the case of requests for the medical records of a deceased person, it is possible that this could include genetic information which may also identify surviving relatives and thereby meet the definition of personal data under the Data Protection Act.
10. For advice on how to deal with requests that involve information about living individuals, see our [guidance pages](#) for more information on how to apply the section 40 exemption.

The exemption for confidential information (section 41)

11. This exemption may apply if the information was originally obtained from the deceased person. This will be particularly relevant for public authorities holding information such as health or banking records.
12. A public authority, on receiving a request for such records, must consider whether the necessary ingredients for a duty of confidence are present, and, if so, whether there is a public interest defence to disclosure. More detail on the approach to take when considering this exemption can be found in our guidance on [information provided in confidence](#).
13. A significant amount of case precedent has been developed regarding the applicability of the exemption for confidential information to requests for medical records of deceased persons. This has established that the information contained in medical records will generally be confidential, whether it is held by the doctor or clinician treating the patient, or has been provided by that person to another person (such as an NHS trust, a court or the police in connection with a criminal investigation). We consider that the duty of confidence will continue to apply after the death of the person concerned.
14. In [Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust \(EA/2006/0090, 17](#)

[September 2007](#)), concerning a request for information about the requester's deceased daughter (including her health record), the Information Tribunal confirmed this position and stated that even though the person to whom the information relates may have died, action for a breach of confidence could be taken by the personal representative of the deceased person. The exemption would therefore continue to apply. This is the position that has been consistently adopted by both the Information Commissioner and the Information Rights Tribunal.

15. The personal representative is defined as the person who is entitled to administer the estate of the deceased person under the law relating to wills and probate. This will be by virtue of either a grant of probate (if the deceased person left a will) or letter of administration (if they died intestate). However, in determining whether disclosure would constitute an actionable breach of confidence, there is no need to be certain that a personal representative exists who would be able to take action. The important thing is to establish in principle that a personal representative might exist who can take such action. A public authority should not lay itself open to legal action simply because at the time of the request it is unable to determine whether or not a deceased person has a personal representative.

Example

ICO Decision Notice [FS50124800](#) provides a good illustration of how section 41 can be applied in such circumstances.

This case involved a request to an NHS trust for a report that had been compiled into the circumstances surrounding the deaths of two patients. Much of the information was drawn directly from their medical records.

In order to satisfy the first element of section 41(1) information must have been obtained by the public authority from another person. Information in medical records is considered to be provided by the patient, whether this is information given to medical staff during consultations with medical staff or other information recorded by health professionals concerning the medical care and treatment of the patients.

It is well established that medical records have the necessary quality of confidence and in this case it was confirmed that the information was imparted in circumstances importing an

obligation of confidence. The next stage was to consider whether the duty of confidence survived the death of the patients concerned. In line with the Tribunal's findings in the Bluck case, the Commissioner decided that the duty of confidence continued to apply as it would be unconscionable for the public authority to disclose the information to the public. Moreover, there was no binding authority against such an argument of principle.

The Commissioner determined that there was no public interest in disclosing the information that outweighed the public interest in maintaining the duty of confidence. He therefore considered that a breach of confidence as a result of disclosure would be actionable. Although it was not realistic to consider the awarding of damages to a deceased person, the Commissioner decided that it would be possible for the personal representatives of the deceased to bring an injunction preventing publication.

Consequently, the Commissioner reached the conclusion that the information was exempt under section 41.

Social care records

16. Information contained in social care/social services records can also continue to be subject to a duty of confidence after the death of the individual concerned, and so be exempt under section 41. They too will usually be very personal and sensitive in nature.
17. As with medical records, all the requirements of section 41 must be met, including that it must have been "*obtained by the public authority from any other person.*" In general, this requirement will be met because social care/social services records concern the care of an individual, and the information can be considered to be obtained from the individual receiving the care, and will include assessments and notes of the professionals involved in providing the care as well as information provided directly by the individual.
18. If the other requirements of section 41 are met, the exemption can be applied to the disclosure of social care records of a deceased individual.

Example

In [Brian Redman v Information Commissioner and Norfolk County Council \(EA/2012/0182, 13 November 2012\)](#) the First-tier Tribunal considered a case concerning a request for the social care records of the appellant's late mother. The Tribunal concluded that section 41(1) was engaged on the following basis:

- The information was obtained by the public authority from others such as the NHS and Mrs Redman herself;
- Actions for breach of confidence can survive an individual's death and be taken by personal representatives of the deceased person;
- The information had the necessary quality of confidence and that there was an obligation of confidence;
- There would be detriment to the deceased person if there was an unauthorised use of the information; and
- There was no public interest defence available to the public authority had it disclosed the information as there was no evidence of wrongdoing during the period of the authority's caring role.

Public information

19. Although the presumption is that most information in medical and social care records is confidential, the section 41 exemption may not apply if the information has already been made public. For example, the cause of a person's death will be recorded on a death certificate, which is a public document. Similarly, the cause of death and other medical information may have been put in the public domain by the surviving family or as a result of an inquest or court case. If the requested information has been put into the public domain before the request for information is made, section 41 cannot apply.

Information accessible to the applicant by other means (section 21)

20. In general terms, subject to exceptions set out in the legislation, the Access to Health Records Act 1990 (AHRA) and the Access to Health Records (Northern Ireland) Order 1993

give a right of access to health records of the deceased to the personal representatives of the deceased, or to persons who may have a claim arising out of the death of the individual.

21. The reference to "personal representative" is very specific; the right of access can only be granted to such a person, rather than any surviving family members or next of kin. In order to gain access to the records under the Access to Health Records legislation, it is for the applicant to prove to the public authority that they have the right of access as a personal representative.
22. If the applicant does have access rights under the Access to Health Records legislation, the information to which they are entitled in this way will be exempt from disclosure to them under FOIA by virtue of section 21, because it is reasonably accessible to them by other means. Access to the records should therefore be dealt with under the AHRA or equivalent.
23. It is also necessary to consider whether the information itself is subject to the Access to Health Records legislation. If the information was prepared by social care professionals, and not health professionals as required under the AHRA, an applicant would have no right of access under AHRA in which case section 21 cannot be applied. This was confirmed by the First-tier Tribunal in the case of [*Julia Martyres v Information Commissioner and NHS Cambridgeshire \(EA/2011/0209, 11 January 2012\)*](#).

Environmental Information Regulations 2004

24. The same principles will apply to the EIR, for example in relation to personal data where the exception at regulation 13 would apply. As regulation 13 is the direct equivalent of section 40 of FOIA, see our guidance on [the exemption for personal information](#) for further information.
25. Where information about the deceased is subject to the EIR, public authorities should in most cases consider regulation 12(5)(f) as the 'equivalent' to section 41 of FOIA. Although this exception makes no direct reference to confidentiality, in practice the tests that have to be met in order to satisfy the requirements of this exception will be the same as the components required to satisfy the confidentiality 'test' in section 41 of FOIA.

26. Further detail can be found in our guidance on the [Interests of the person who provided the information to the public authority \(regulation 12\(5\)\(f\)\)](#).

Other considerations

27. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.

More information

28. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
29. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
30. If you need any more information about this or any other aspect of freedom of information, please [contact us](#): see our website www.ico.org.uk.