



Freedom of information technical guidance note

Freedom of information and access to information about the deceased

Aim

This technical guidance aims to help public authorities understand and resolve those areas that are the subject of frequent enquiry and concern that relate to freedom of information and access to information about the deceased. It sets out the Commissioner's approach to dealing with requests of this type. It is arranged in the following sections.

- Cases where section 40 continues to apply because information about the deceased is also information about a living person.
- Cases where a duty of confidence may continue to exist after the death of the person the information relates to, and another person may be able to take action through the courts.
- Cases where the Human Rights Act may operate as a statutory bar on disclosure and where section 44 of the Freedom of Information Act 2000 (FOIA) may therefore apply.
- The special case of medical information relating to the deceased.

Background

The Freedom of Information Act 2000 (FOIA) has no special provisions about information relating to the deceased. Generally this presents public authorities with no difficulties either because the information is not sensitive and can be provided, or because another exemption applies.

A couple of examples illustrate this point.

- Section 30 provides an exemption for information which has been held for the purposes of a criminal investigation. It will not necessarily affect the outcome of a request whether the victim of a crime, the investigating officers or witnesses are still alive or have died.
- Section 35 provides an exemption for the formulation of government policy. Among the exempt categories of information is that relating to Ministerial communications. It is unlikely to make any difference to the application of the exemption whether the Ministers in question are still alive or have died.

However, there are two situations in which public authorities may feel that it is wrong to release information about a deceased person, but have difficulty in identifying a relevant exemption. These are:

- Cases where information would have been exempt under section 40 (personal information). However, this exemption is directly linked to the Data Protection Act 1998 which covers only information relating to living individuals.
- Cases where information was provided in confidence by, and relates to, a person who has subsequently died. Confidential information is covered by section 41 (information provided in confidence). However, the exemption applies to information whose disclosure would lead to 'an actionable breach of confidence'.

Cases where section 40 continues to apply

Some personal data (that is, information which relates to and identifies **living** individuals) is exempt under section 40 of the FOIA. This provides that requests for personal information are subject to the Data Protection Act 1998. After a person has died, information about them is no longer considered personal data and the exemption at section 40 of the FOIA can no longer apply.

However, there are cases where information about a deceased person is also information about a living individual. An example which is often cited is genetic information which may identify and relate to both a person who has died and a surviving relative. Similarly, social work records are likely to contain information not only about a client but also about other members of the client's family, some of whom may have died. In both these cases, the information about the deceased person forms part of the information about a living individual and, as a living individual may be identified from the information and the information may be said to relate to that individual, it will be personal data of which that living individual is the subject.

Once a public authority has established that requested information relating to a deceased person is also the personal data of a living individual, it must then consider whether disclosure would constitute a breach of one or more of the data protection principles. If disclosure would, for instance, be unfair to the living person, it will be exempt under section 40 of the FOIA. The Commissioner's general approach to this question is given in [Awareness Guidance No 1](#).

Section 41 – Information provided in confidence

This is what the exemption says:

“Information is exempt information if:

- (a) it was obtained by the public authority from any other person (including another public authority); and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute of breach of confidence actionable by that or any other person.

The Commissioner’s general approach to this exemption is explained in [Awareness Guidance No 2](#). In summary, the Commissioner advises that the exemption involves a two stage approach. First, public authorities must decide that the disclosure would be a breach of confidence. Then, they must establish that such a breach might give rise to action through the courts by the provider of the information or another person. The Commissioner’s guidance recognises that by no means all breaches of confidence are actionable.

In relation to confidential information provided to a public authority by or relating to a person who has subsequently died, public authorities must consider whether in principle such a breach may be actionable. There is case law to suggest that, where action for a breach of confidence was initiated by a person before their death, the courts may allow that action to be continued by the legal representatives of the deceased person¹.

There is no definitive case law as regards the rights of any living person to initiate action after the death of the person the information relates to. However, recognising the uncertainty experienced by a number of public authorities, the Commissioner sets out in this guidance his views on who might be able to take action and the approach he recommends public authorities to take.

If there is anyone who can take action, the Commissioner considers that this will be the personal representative of the deceased. This approach is consistent with the approach taken by the courts in cases involving alleged breaches of intellectual property rights. In many cases a public authority will not know whether a personal representative exists. The FOIA allows only 20 working days for a response to a request for information. The Commissioner does not think that it is reasonable within this period that public authorities should be expected to establish positively whether there is such a person. The important thing will be to establish in principle whether disclosure would give rise to the right to take action.

¹ Craxi (case No. 0002533/94) European Court of Human Rights

The effect of the Human Rights Act 1998

The Human Rights Act incorporates the European Convention on Human Rights in UK law. Article 8 of the Convention provides that:

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence; and
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Where information relating to a deceased person is also personal data about a living individual, a public authority must consider disclosure in the context of the Data Protection Act 1998. However, there are also situations in which the information in question identifies only a deceased person, but whose disclosure would affect a living person, most commonly a member of the deceased person's family. In these cases, a public authority must consider the implications of the Convention. If disclosure would involve a breach of Article 8, then the information is exempt under section 44 of the FOIA because it is information subject to a statutory bar on disclosure. The statutory bar in this case is provided by the Human Rights Act 1998.

The Commissioner's general advice is that public authorities should first assess whether or not disclosure would constitute an unjustified interference with the right contained in Article 8(1). In principle the Commissioner accepts that:

- the disclosure of information about a deceased individual **may** constitute an interference with the right of the living to respect for their private or family life; and
- the more recent the death and the more sensitive the information, the more likely that disclosure would have an adverse effect on the rights of surviving people closely connected to the deceased.

Public authorities should then consider whether, in any particular instance, Article 8(2) would allow disclosure. The Commissioner's view is that the FOIA can provide a legal basis for the disclosure of information about the deceased. However, the public authority must consider all the other requirements of Article 8(2) including whether or not the disclosure would be proportionate in relation to the harm that may be caused.

In taking the approach set out above, the Commissioner does not suggest that the Human Rights Act or the Convention confer rights on deceased individuals.

Medical records

The general legal position of confidential information relating to the deceased is not certain. However, there are some particular legal provisions relating to medical information which public authorities should be aware of.

It is worth remembering that some medical information about the deceased is routinely put into the public domain. It would be wrong, therefore, to assume that all medical information relating to the deceased cannot be disclosed. For instance, the cause of death recorded on a death certificate. Information may also be made public by an inquest or coroner's court. Otherwise, access to medical records may be subject to confidentiality which has already been considered above.

Although obligations of confidence or the Human Rights Act may act as a bar to disclosure of information in medical records, there may be a limited right of access for particular individuals to the medical information of the deceased under the Access to Health Records Act 1990 (AHRA)².

The AHRA gives the personal representatives of the deceased, or those who may have a claim arising out of the death of the individual, a right to access health records of the deceased. This right is for the personal representative of the deceased person and not simply a surviving family member. The applicant must prove to the public authority that they have a right of access under the AHRA.

Where the applicant for medical records **is** the personal representative, the information they are entitled to under the AHRA will be exempt from disclosure to them under section 21 of the FOIA which applies when reasonable access to information is available by other means.

The right of access under the AHRA does not apply in cases where:

- the patient has requested a note be made that they did not wish access to be given; or
- in the opinion of the holder of the record, this would disclose:
 - (i) information likely to cause serious harm to the physical or mental health of any individual; or
 - (ii) information relating to or provided by an individual other than the patient, who could be identified from the information; or

² The Access to Health Records Act 1990, does not extend to Northern Ireland (see s.12 of the Act) but there is equivalent legislation namely, the Access to Health Records (Northern Ireland) Order 1993. The Data Protection Act 1998 (Schedule 16, Parts I and II) amended both pieces of legislation with regard to living individuals but the legislation is still valid for deceased persons.

(iii) information that was provided by the patient in the expectation that it would not be disclosed to the applicant; or

(iv) information obtained as a result of an examination or investigation the patient consented to in the expectation that the information would not be disclosed.

More information

If you need any more information about this or any other aspect of freedom of information, please contact us.

Phone: 08456 30 60 60
01625 54 57 45

E-mail: please use the online enquiry form on our website

Website: www.ico.gov.uk