

GUIDANCE NOTE

Information about the Deceased

The Freedom of Information (Jersey) Law, 2011



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INTRODUCTION

1. The Freedom of Information (Jersey) Law, 2011 ('the **Law**') gives right of public access to information held by scheduled public authorities ("SPAs").
2. An overview of the main provisions of can be found in The Guide to Freedom of Information.
3. This is part of a series of guidance, which goes into more detail than the Guide, to help SPAs to fully understand their obligations and promote good practice.
4. This guidance explains to SPAs how to deal with requests for information about the deceased.
5. Guidance issued by the Information Commissioner may include references to cases and decisions linked to operation of the Freedom of Information Act 2004 ("the **U.K. Act**"). Such references are provided as additional context to relevant areas given the lack of case law regarding the interpretation of the Freedom of Information (Jersey) Law 2011 ("the **Law**"). It should be noted, however, that judgments from the Courts of England and Wales (which includes any decisions from the Information Tribunal) are not binding in Jersey (albeit that they may be viewed by the Royal Court as being persuasive). There are, however, differences between the Law and the UK Act and so the judgments which have flowed following an interpretation of the UK Act may not be directly applicable in this jurisdiction.



OVERVIEW

- There are no specific exemptions under the Law 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.



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CONSIDERATION OF REQUESTS

ABOUT THE DECEASED

5. There are no special exemptions in the Law 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 an applicant 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 SPA 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 (ARTICLE 25)

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 hospital and social services staff. On occasions, information about relatives of the deceased may also be included in such records.



Example 1

In Decision Notice FS50153179 issued by the UK Information Commissioner, 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 1998, 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 (Jersey) Law, 2005 ("the **Data Protection Law**").



THE EXEMPTION FOR CONFIDENTIAL INFORMATION (ARTICLE 26)

10. 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.
11. A SPA, 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.
12. A significant amount of case law has been developed in the UK 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 are not bound by decisions made in the UK courts but consider those cases to be useful and likely highly persuasive should similar matters fall to be resolved by the Royal Court in Jersey. We consider that the duty of confidence will continue to apply after the death of the person concerned.
13. The UK case of *Pauline Bluck v. Information Commissioner and Epsom & St Helier University Hospitals NHS Trust* (EA/2006/0090, 17 September 2007), concerned a request for information about the applicant's deceased daughter (including her health record). The Information Tribunal (a non-Jersey tribunal established under the UK Act) confirmed this position and stated that even though the person to whom the information relates may have died, an 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 UK Information Commissioner and the Information Tribunal.
14. The personal representative is defined as the person who is entitled to administer the estate of the deceased person under the laws 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 SPA 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 2

Decision Notice FS50124800 issued by the UK Information Commissioner also provides a good illustration of how this exemption 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) (which is the UK equivalent of Article 26(1) of the Law) 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 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 Information Tribunal's findings in the Bluck case, the UK Information 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 UK Information 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 UK Information Commissioner decided that it would be possible for the personal representatives of the deceased to bring an injunction preventing publication.

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



SOCIAL CARE RECORDS

15. 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 Article 26. They too will usually be very personal and sensitive in nature.
16. As with medical records, all the requirements of Article 26 must be met, including that it must have been "obtained by the scheduled public authority from another 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.
17. If the other requirements of Article 26 are met, the exemption can be applied to the disclosure of social care records of a deceased individual.



Example 3

In Brian Redman v. Information Commissioner and Norfolk County Council (EA/2012/0182, 13 November 2012) the Information 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) (which is the UK equivalent of Article 26(1) of the Law) 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

18. Although the presumption is that most information in medical and social care records is confidential, the Article 26 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, Article 26 cannot apply.



INFORMATION ACCESSIBLE TO THE APPLICANT BY OTHER MEANS (ARTICLE 23)

19. If an applicant has access rights to information which is “reasonably available” to them under any other arrangement or by virtue of provisions contained in any other piece of legislation, then the SPA will be entitled in this way will be exempt from disclosure to them under the Law by virtue of Article 23. Access to the records should therefore be dealt with under those other arrangements.
 20. A SPA that refuses an application on this basis however must “make reasonable efforts to inform the applicant where the applicant may obtain the information”.



OTHER CONSIDERATIONS

22. Additional guidance is available on our guidance pages if you need further information on the public interest test or other exemptions.



MORE INFORMATION

23. This guidance has been developed with assistance of the Office of the Information Commissioner in the United Kingdom. The guidance will be reviewed and considered from time to time in line with new decisions of the Jersey Information Commissioner and the Royal Court.
24. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
25. If you need any more information about this or any other aspect of freedom of information, please contact us:

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