**Access to Deceased Patients’ Records Policy**

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**Table of contents**

[1 Introduction 2](#_Toc101348250)

[1.1 Guidance statement 2](#_Toc101348251)

[1.2 Status 2](#_Toc101348252)

[1.3 KLOE 2](#_Toc101348253)

[1.4 Training and support 3](#_Toc101348254)

[2 Scope 3](#_Toc101348255)

[2.1 Who it applies to 3](#_Toc101348256)

[2.2 Why and how it applies to them 3](#_Toc101348257)

[3 Guidance 3](#_Toc101348258)

[3.1 Right of confidentiality and disclosure 4](#_Toc101348259)

[3.2 Requester may have a claim arising from the death 4](#_Toc101348260)

[4 Deceased patients’ health records – statutory explanations 4](#_Toc101348261)

[4.1 Access to Health Records Act 1990 (AHRA) 4](#_Toc101348262)

[4.2 Applying for access under AHRA 5](#_Toc101348263)

[4.3 Disclosure in the absence of a statutory basis 6](#_Toc101348264)

[4.4 Refusal of a request 6](#_Toc101348265)

[4.5 Fees for access to deceased patients’ health records 7](#_Toc101348266)

[4.6 Exemptions to disclosures of information relating to deceased patients 8](#_Toc101348267)

[5 Summary 8](#_Toc101348268)

# Introduction

## Guidance statement

This guidance sets out the expectations for employees who manage access to deceased patients’ records.

## Status

The organisation aims to design and implement policies and procedures that meet the diverse needs of our service and workforce, ensuring that none are placed at a disadvantage over others, in accordance with the [Equality Act 2010](https://www.gov.uk/guidance/equality-act-2010-guidance). Consideration has been given to the impact this policy might have with regard to the individual protected characteristics of those to whom it applies.

This document and any procedures contained within it are non-contractual and may be modified or withdrawn at any time. For the avoidance of doubt, it does not form part of your contract of employment.

## KLOE

The Care Quality Commission (CQC) would expect any primary care organisation to have a policy to support this process and this should be used as evidence of compliance against CQC Key Lines of Enquiry (KLOE)**.**

Specifically, Grey Road Surgery will need to answer CQC key questions on “Effective” and “Well-Led”.

The following is the CQC definition of Effective:

*By effective, we mean people’s care, treatment and support achieves good outcomes, promotes a good quality of life and is based on the best available evidence.*

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| **CQC KLOE E6** | Is consent to care and treatment always sought in line with legislation and guidance? |

The following is the CQC definition of Well-Led:

*By well-led, we mean that the leadership, management and governance of the organisation assures the delivery of high-quality and person-centred care, supports learning and innovation and promotes an open and fair culture.*

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| **CQC KLOE W4** | Are there clear responsibilities, roles and systems of accountability to support good governance and management? |

## Training and support

The organisation will provide guidance and support to help those to whom it applies to understand their rights and responsibilities under this policy. Additional support will be provided to managers and supervisors to enable them to deal more effectively with matters arising from this policy.

# Scope

## Who it applies to

This document applies to all employees, partners and directors of the organisation. Other individuals performing functions in relation to the organisation, such as agency workers, locums and contractors, are encouraged to use it.

Furthermore, it also applies to clinicians who may or may not be employed by the organisation but who are working under the Additional Roles Reimbursement Scheme (ARRS).[[1]](#footnote-1)

## Why and how it applies to them

This document has been produced to provide all staff at Grey Road Surgery with the necessary information to ensure that they understand the processes around access to deceased patients’ records in line with appropriate legislation.

# Guidance

Access to a deceased person’s information is not dealt with under [the UK General Data Protection Regulation](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjk6IKd1vz1AhXpQUEAHQWvAE0QFnoECAkQAQ&url=https%3A%2F%2Fuk-gdpr.org%2F&usg=AOvVaw1QCG3_5q9v_bCAKvL0IhIP) (UK GDPR) or the [Data Protection Act 2018](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi83eeN1vz1AhUDiFwKHSK-D4EQFnoECAwQAQ&url=https%3A%2F%2Fwww.legislation.gov.uk%2Fukpga%2F2018%2F12%2Fcontents%2Fenacted&usg=AOvVaw1nLdFiC3yrsnW5qE79iLDw), as these laws refer to data about living individuals. As such, any request for a deceased person’s record is not a subject access request as deceased persons are not covered by UK GDPR or any Data Protection law, past or present.

This will be an access request under the [Access to Health Records Act 1990](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjcgNuB1vz1AhUUi1wKHcL9DeoQFnoECA4QAQ&url=https%3A%2F%2Fwww.legislation.gov.uk%2Fukpga%2F1990%2F23%2Fcontents&usg=AOvVaw3RQBwl_SbHwh9r4MP3qdSP). This provides certain individuals with a right of access to the health records of a deceased individual. However, there is still an ethical obligation to respect a patient’s confidentiality beyond death,

Individuals who may gain access to a deceased person’s records are defined under Section 3 (1) (f) of the Access to Health Records Act 1990 as “the patient’s personal representative and any person who may have a claim arising out of the patient’s death”. A personal representative is the executor or administrator of the deceased person’s estate.

The BMA recently gave advice that it was “BMA’s opinion that under section 5 (4) of the Access to Health Records Act, no information which is not directly relevant to a claim should be disclosed to either the personal representative or any other person who may have a claim arising out of the patient’s death.”2

## Right of confidentiality and disclosure

Deceased patients retain the right of confidentiality. There are a number of considerations to be taken into account prior to disclosing the health record of a deceased patient. Under the terms of the Access to Health Records Act 1990, this organisation will only grant access to either:

* A personal representative (the executor of the deceased person’s estate); or
* Someone who has a claim resulting from the death

The medical records of the deceased will be passed to Primary Care Support England (PCSE) for storage. This organisation can advise who needs to be contacted in such instances. PCSE will retain the GP records of deceased patients for 10 years, after which time they will be destroyed.

PCSE has provided an [application form](https://pcse.england.nhs.uk/media/1268/application-form-and-guidance-notes-v17.doc) which can be used to request copies of a deceased patient’s record.

For providing a copy of a deceased patient’s medical records, a fee not exceeding the cost of making the copy and postal costs may be charged. This fee must be reasonable and fully justifiable.[[2]](#footnote-2)

## Requester may have a claim arising from the death

If it is believed the requestor has a claim arising from the death, the basic rule is that minimal information should be released to satisfy the claim, checking that the clinician would be happy with the requestor receiving this data, and if this balances with the rights of confidence.

# Deceased patients’ health records – statutory explanations

## Access to Health Records Act 1990 (AHRA)

The Access to Health Records Act 1990 (AHRA) provides a small cohort of people with a statutory right to apply for access to information contained within a deceased person’s health record.

There may be circumstances where individuals who do not have a statutory right of access under the AHRA request access to a deceased patient’s record. Current legal advice is that the Courts would accept that confidentiality obligations owed by health professionals continue after death. The Department of Health, General Medical Council and other clinical professional bodies have long accepted that the duty of confidentiality continues beyond death, and this is reflected in the guidance they produce. In these circumstances, the general rules that apply to the disclosure of confidential patient information should determine whether a disclosure is appropriate and lawful. Requests should be considered on a case-by-case basis and not simply rejected.

There is also a range of public bodies that have lawful authority to require the disclosure of health information. These include the Courts, legally constituted Public Inquiries and various Regulators and Commissions e.g., the Audit Commission and the Care Quality Commission. In these cases, the common law obligation to confidentiality is overridden.

The Access to Health Records Act (AHRA) 1990 provides certain individuals with a right of access to the health records of a deceased individual. These individuals are defined under Section 3 (1) (f) of that Act as, “the patient’s personal representative and any person who may have a claim arising out of the patient’s death”. A personal representative is the executor or administrator of the deceased person’s estate.

The personal representative is the only person who has an unqualified right of access to a deceased patient’s record and need give no reason for applying for access to a record. Individuals other than the personal representative have a legal right of access under the Act only when they can establish a claim arising from a patient’s death.

There is less clarity regarding which individuals may have a claim arising out of the patient’s death. Whilst this is accepted to encompass those with a financial claim, determining who these individuals are and whether there are any other types of claim is not straightforward. The decision as to whether a claim actually exists lies with the record holder. In cases where it is not clear whether a claim arises, the record holder should seek legal advice.

Record holders must satisfy themselves as to the identity of applicants who should provide as much information to identify themselves as possible. Where an application is being made on the basis of a claim arising from the deceased’s death, applicants must provide evidence to support their claim. Personal representatives will also need to provide evidence of identity.

## Applying for access under AHRA

A request for access should be made in writing to the data controller ensuring that it contains sufficient information to enable the correct records to be identified. Requestors may wish to specify particular dates or parts of records that they wish to access. This may help to reduce the fee that is payable in certain circumstances as given in [Section 4.5](#_Fees_for_access). The request should also give details of the requestor’s right to access the records.

Once the data controller has the relevant information and fee, they should comply with the request promptly and within 21 days where the record has been added to in the last 40 days and within 40 days otherwise.

## Disclosure in the absence of a statutory basis

Disclosures in the absence of a statutory basis should be in the public interest, be proportionate and judged on a case-by-case basis. The public good that would be served by disclosure must outweigh both the obligation of confidentiality owed to the deceased individual, any other individuals referenced in a record and the overall importance placed in the health service providing a confidential service. Key issues for consideration include any preference expressed by the deceased prior to death, the distress or detriment that any living individual might suffer following the disclosure and any loss of privacy that might result and the impact upon the reputation of the deceased. The views of surviving family and the length of time after death are also important considerations. The obligation of confidentiality to the deceased is likely to be less than that owed to living patients and will diminish over time.

Another important consideration is the extent of the disclosure. Disclosing a complete health record is likely to require a stronger justification than a partial disclosure of information abstracted from the record. If the point of interest is the latest clinical episode or cause of death then disclosure, where this is judged appropriate, should be limited to the pertinent details.

This document is not intended to support or facilitate open access to the health records of the deceased. Individual(s) requesting access to deceased patient health information should be able to demonstrate a legitimate purpose, generally a strong public interest justification and in many cases a legitimate relationship with the deceased patient. On making a request for information, the requestor should be asked to provide authenticating details to prove their identity and their relationship with the deceased individual. They should also provide a reason for the request and, where possible, specify the parts of the deceased health record they require.

Relatives, friends and carers may have a range of important reasons for requesting information about deceased patients. For example, helping a relative understand the cause of death and actions taken to ease the suffering of the patient at the time may help to aid the bereavement process, or providing living relatives with genetic information about a hereditary condition may improve health outcomes for the surviving relatives of the deceased.

In some cases, the decision about disclosure may not be simple or straightforward and the organisation’s Caldicott Guardian or the SIRO should be consulted in the first instance. In complex cases, the Data Protection Officer should be contacted for appropriate legal advice and guidance.

## Refusal of a request

You can refuse the request if, in the view of your clinician, exemptions apply. Cases where right of access may be partially excluded:

Access shall not be given under Section 3 (2) to any part of a health record which, in the opinion of the holder of the record, would disclose:

* + - 1. Information likely to cause serious harm to the physical or mental health of any individual
      2. Information that identifies a third party without that person’s consent unless that person is a health professional who has cared for the patient
      3. Information that in life the patient asked to be kept confidential.

This includes the harm to the deceased person and the requestor. Therefore, it is up to the discretion of the clinician to either uphold patient confidence after death based on the fact disclosure of the records would cause harm or release the data. The clinician should balance the benefit gained by disclosure to the requestor (such as family asking about a cause of death or last illness) against the duty of confidence owed to the deceased.

## Fees for access to deceased patients’ health records

Legislative changes[[3]](#footnote-3) to the Data Protection Act 2018 has amended the Access to Health Records Act 1990 which now states the fee structure under the AHRA is:

* **Records held manually**

Where an applicant is permitted to view a record which is held manually and has been added to in the 40 days preceding the application, access is free of charge.

* **Records held wholly or partially on computer**

Where an applicant is permitted to view a record which is held wholly or partially on computer, this is also free of charge.

* **Hard copies of information**

If an appropriate applicant wishes to obtain a copy of the record, this is provided free of charge.

Where health information is to be disclosed for the deceased in the absence of a statutory basis, e.g., when a solicitor or insurance company requests a medical report or information to confirm death or an interpretation of what is in the records, this is classed as private work over and above that which is already available in the record.

Any fees charged should be reasonable and proportionate to cover the cost of satisfying a request.

## Exemptions to disclosures of information relating to deceased patients

If the deceased person had indicated that they did not wish information to be disclosed, or the record contains information that the deceased person expected to remain confidential, then it should remain so unless there is an overriding public interest in disclosing this.

In addition, the record holder has the right to deny or restrict access to the record if it is felt that disclosure would:

* Cause serious harm to the physical or mental health of any other person
* Identify a third person who has not consented to the release of that information

# Summary

Staff who are involved in handling medical records at this organisation are to be aware of the process that governs the accessing of deceased patients’ records and how this differs to those patients who are living.

1. [Network DES Specification 2022/23](https://www.england.nhs.uk/publication/network-contract-directed-enhanced-service-contract-specification-2022-23-pcn-requirements-and-entitlements/) [↑](#footnote-ref-1)
2. [BMA Guidance – Access to health records Jan 2020](https://www.bma.org.uk/advice-and-support/ethics/confidentiality-and-health-records/access-to-health-records) [↑](#footnote-ref-2)
3. [BMA Guidance - Access to Health Records November 2019](https://www.bma.org.uk/media/1868/bma-access-to-health-records-nov-19.pdf) [↑](#footnote-ref-3)