



Steven Dickinson

[Policy Delivery knowledgebase](#)
[About](#)
[Contact team](#)
[ICON](#) > [Policy Delivery knowledgebase](#) > **FOI knowledgebase**

**FOI/EIR**   **FOI**   **Section/Regulation**   **s21 s41 s44**   **Issue**   Access to medical and social care records of the deceased

### Line to take:

Medical records of deceased people will generally be exempt from disclosure under the Act by virtue of s41 (information provided in confidence).

Social care type records will be treated similarly.

Information to which the personal representative\* of the deceased person is entitled under section 3 of the Access to Health Records Act 1990 will be exempt from the FOIA by virtue of s21, because it is reasonably accessible to them by other means.

### Further Information:

Where the applicant for medical records of a deceased person has no rights of access under s3 of the Access to Health Records Act 1990 (AHRA), the information contained within them will generally be exempt from disclosure under the FOIA by virtue of the exemption provided by s41.

These issues have been considered by the Tribunal in *Bluck v IC and Epsom & St Helier University Hospitals NHS Trust*. In this case the appellant was seeking the disclosure of her deceased daughter's medical record, but the daughter's next of kin, her widower who was also her personal representative, had objected.

The Commissioner has also decided that social care records can be exempt under section 41 on the basis that they are as sensitive and relevant to the deceased as their medical records (*East London & the City Mental Health NHS Trust* and *Barnsley MBC* cases)

### Section 41

#### Medical records

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).

In *Bluck* the Tribunal confirmed the ICO's position, 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 that person, and that therefore the exemption continues to apply. The Tribunal stated that:

"In these circumstances we conclude that a duty of confidence is capable of surviving death of the confider and that in the circumstances of this case it does survive" (para 21).

Although these issues did not come up in *Bluck* it is the Commissioner's view, supported by Counsel's opinion, that this action would most likely be by way of an application to the court for an injunction seeking to prevent disclosure of the information. It should be noted that there is no relevant case law in support of this position.

Furthermore it is the Commissioner's view that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish that, as a matter of fact, the deceased person has a personal representative who would be able to take action. This is because it should not be the case that a public authority should lay itself open to legal action because at the time of a request it is unable to determine whether or not a deceased person has a personal representative.

Although the presumption is that the information contained in medical records is confidential, there are exceptions, such as in cases where the cause of a person's death is given on a death certificate, which is a public document. 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. The important issue is whether or not the requested information has been put in the public domain before the request for information is made. If before, section 41 cannot apply.

#### Social care records

It is the Commissioner's view that information contained in social care type records can also engage section 41. As in the

case of medical records, the information must meet the requirements of section 41, including that it must have been "obtained by the public authority from any other person". He has applied this view in the following cases:

FS50101567 East London & the City Mental Health NHS Trust: request by a non-family member for reports into the circumstances surrounding the death of a patient of the Trust. The Commissioner was satisfied that a large proportion of the information in the reports had been drawn from the deceased's medical records and from interviews with health professionals engaged in the deceased's care. He considered that the information was of the same sensitivity and relevance to the deceased as his medical records and had been obtained in connection with the provision of health services. Therefore in the circumstances of the case, section 41 was engaged.

FS50273422 Barnsley MBC (informally resolved): request by non-family member for information about an investigation into the care of his neighbour immediately prior to her death. The information included medical information as well as that relating to care by social services. The Commissioner decided that both were exempt under section 41.

#### **Section 44 – Human Rights Act**

The Human Rights Act 1998 incorporates the Council of Europe Convention on Human Rights into UK Law.

Article 8 of the Convention provides that there shall be no interference with the right to family and private life. Although the Convention gives rights to the living and not to the deceased, in Bluck the NHS Trust argued that as the disclosure of medical information about a deceased person would constitute an interference with the right of a surviving family member or close friend to family or private life, then there may be a breach of Article 8. The issue is sometimes referred to as "survivor privacy". Therefore the Trust argued that the Human Rights Act operated as a statutory bar prohibiting the disclosure of the daughter's medical records.

The Tribunal considered the Trust's arguments but as it had already decided that the information was exempt under s 41 it did not make a decision in relation to s44. It did however give a clear indication of its approach to Article 8.

The Tribunal indicated that it:

"would not be in favour of translating the general principles laid down in Article 8 into the form of specific legal prohibition to which we believe section 44 is intended to apply." It continued "...we do not believe that the effect of the Human Rights Act is to elevate to the level of a directly enforceable legal prohibition the general terms of Article 8" (para 31).

We do not agree with these comments by the Tribunal. It should be noted that the comments were obiter, as the Tribunal made its decision on the basis of s41, not s44, and in any case an Information Tribunal decision is not a binding precedent. Our view is that Article 8 can be a statutory prohibition in terms of s44(1), although there are limited circumstances in which it will be necessary to consider it. This is explained further in [CWAN007](#).

#### **Access to Health Records Act 1990**

In broad terms, and subject to exceptions set out in the legislation, the AHRA 1990 gives 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.

The right of access is for the personal representative of the deceased person rather than simply a surviving family member. We should be wary of advising a family member that he or she has a right of access when, in fact, it is only the personal representative who has this right. It is for the applicant to 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 to which they would be entitled under the AHRA will be exempt from disclosure to them under FOIA by virtue of s21 because it is reasonably accessible to them by other means.

\*The personal representative of the deceased is the person (or persons, though no more than four) who is entitled to administer the deceased person's estate by virtue of a grant of probate (if the deceased person left a will) or letter of administration (if they died intestate).

<b>Source</b>	<b>Details</b>
Tribunal,	
Counsel's opinion (provided 25 September 2006)	Pauline Bluck v IC and Epsom & St Helier University Hospitals NHS Trust (17 September 2007)
Decision Notice	East London & the City Mental Health NHS Trust
	Barnsley MBC
Informally resolved case	

#### **Related Lines to Take**

[LTT 98](#), [LTT93](#), [LTT94](#), [LTT95](#), [LTT96](#), [LTT97](#).

#### **Related Documents**

[EA/2006/0090, FS50101567, Technical guidance](#)**Contact**

RM LA VA CW

**Date**

15/05/2013

**Policy Reference****LTT37**

- 
- Information Commissioner's Office intranet