

# **THE HAWTHORNS SURGERY**

## **Access to a Deceased Patients Record Policy**

**Version: 1.1**

**Date: 16 May 2023**

## Document History

Document Reference:	
Document Purpose:	This policy sets out the practice [The hawthorns Surgery] expect from all staff, including those working on behalf of the Practice, when complying with request for a deceased patients record
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Developed by:	Paul Couldrey – IG Consultant
Policy Sponsor:	Practice Manager
Target Audience:	This policy applies to any person directly employed, contracted, working on behalf of the Practice or volunteering with the Practice.
Associated Documents:	All Information Governance Policies and the Information Governance Toolkit, and Data Security and Protections Toolkit 2022/23
DS&P Toolkit Standard	

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## Introduction

As outlined in the updated general practice contractual arrangements for 2022/23, from 1 August 2022, the management of applications made under the Access to Health Records Act 1990 (AHRA) for deceased patient records has changed. The patients last registered GP as the holder of the record is responsible for responding to access requests under AHRA.

Therefore, From **Monday 1 August 2022**, GP practices are required to respond to Access to Health Records Act (AHRA) requests for deceased patients however, PCSE will process the Access to Health Records request if:

- the deceased patient was unregistered at time of death or
- the last registered GP Practice has now closed

In these circumstances, if the request for a medical record is under the Access to Health Records Act 1990, PCSE will process the access application within 40 days.

In certain circumstances, this may not be possible (for example, where the record cannot be traced, or is held by a third-party storage provider outside of the control of PCSE.)

## Practice Responsibilities

As the last registered GP Practice, the practice will be responsible for managing applications for access to deceased patients' records made under the Access to Health Records Act 1990 (AHRA). See below

As the patient's last registered GP, the practice will be required to own the AHR requests for deceased patients and must store the record for the required **10 year retention period**.

For further guidance on how to keep records, including how long to keep different types of records, please see the NHS **Records Management Code of Practice 2021**.

## What if the practice can't find the health record for the patient?

Where a request is received for the health record of a deceased individual that the practice does not hold a copy for, you can submit a request to PCSE using their **Contact Us** form. The request will be one of the following; a Subject Access Request which can take up to 28 days, an Access to Health Records request takes up to 40 days, or an Information Disclosure request which is also 40 days.

To download an overview of the access to health record process, please click **here** and for instructions on how to submit an online application form please visit our **website**.

**Please note** - PCSE do not have access to the patient's digital record and can only provide copies of a Health Record which we hold in storage.

## Managing Requests

Access to a deceased person's information is not dealt with under GDPR or the Data Protection Act 2018, as these laws refer to data about living individuals. As such any request for a deceased person's record is NOT a SAR as deceased persons are not covered by the UKGDPR or any Data Protection law past or present.

Therefore, before the Practice give access, we need to understand the role the requestor is playing when requesting the deceased records, are they a personal representative or a person having a claim arising from the death? As their rights of access differ dependant on role, Next of Kin has no bearing on this process.

The BMA guidance clearly states Drs would not normally provide full access to a deceased person record.

This is an Access request under the Access to Health Records Act 1990. The Access to Health Records Act (AHRA) 1990 provides certain individuals with a right of access to the health records of a deceased individual, interestingly the act only covers records created after 01/11/1991.

There are two distinct groups who have rights of access to information within the deceased's record: –

1. Personal representatives; (A personal representative is the executor or administrator of the deceased person's estate, evidenced by a copy of the will or by a Grant of Representation). If your requestor is a personal representative move to the bottom of this email:-
2. and – anyone who may have a claim arising out of a patient's death.

So, the first action for the practice is to establish if the request is from a personal representative, who will be able to produce evidence of such or anyone who may have a claim arising out of a patient's death.

## Personal Representatives

A personal representative is the executor or administrator of the deceased person's estate. A High Court judgment in 2020 held that a personal representative does not need to have a claim arising out of the death to access the deceased's medical record and this right of access extends **to all information within the record with limited** exceptions (listed below). Personal representatives do not need to provide a reason for seeking access to the record, although the record-holder must be able to establish that the requestor is indeed the personal representative.

The legal rights of personal representatives to access the medical records of deceased patients are set out above. The legislation does not mean, however, that doctors are prevented from adopting an ethical approach to handling requests from personal representatives so that a balance can be achieved between the duty of confidentiality to the deceased and compliance with the legal duty to provide access.

In order to maintain patient confidentiality as far as possible, the BMA advises that when personal representatives request access it is appropriate to enquire why access is required and whether the request **can be satisfied by providing access only to information which is relevant for the purpose. Ultimately, if the personal representative chooses not to provide a reason for access and insists on access to the full record doctors must comply with these requests to comply with the law. Those who do not have the status of personal representative but have a claim arising out of the death of the patient have a right of access only to information which is directly relevant to the claim (as above).**

## Redactions for Personal Representative Requests

Information requested by personal representatives or others with a claim arising out of the death, should not be disclosed if:

- it identifies a third party without that person's consent unless that person is a health professional who has cared for the patient; or
- in the opinion of the relevant health professional, it is likely to cause serious harm to a third party's physical or mental health; or
- the patient gave it in the expectation that it would not be disclosed to the particular individual making the application; or
- it is the result of a particular examination or investigation which the patient consented to in the expectation that it would not subsequently be disclosed; or
- the record includes a note, made at the patient's request, that the patient did not wish access to be given.

## A Person having a claim arising from the death

There is still an ethical obligation to respect a patient's confidentiality beyond death, Individuals who may gain access to a deceased persons 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'. The BMA recently gave advise that in its opinion "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 any other person who may have a claim arising out of the patient's death."

Whilst after death you may have returned paper copies of records to PCSE, any access to electronic records should still be managed by the practice in accordance with AHRA, and NO FEE can be charged for providing copies.

You can refuse the request if in the view of your GP Section 5 below applies.

Cases where right of access may be partially excluded.

- (1) Access shall not be given under section 3(2) above to any part of a health record—
  - (a) Which, in the opinion of the holder of the record, would disclose—
    - (i) Information likely to cause serious harm to the physical or mental health of any individual
    - (ii) Information identifies a third party without that person's consent unless that person is a health professional who has cared for the patient
    - (iii) Information that in life the patient asked to be kept confidential.

This includes the harm to the deceased persons and the requestor -so really, it's up to the Dr to either uphold patient confidence after death based on the fact disclosure of the records would cause harm or release the data. The GP should balance the benefit gained by disclosure to the requestor (such as family asking about cause of death or last illness) against the duty of confidence owed to the deceased, a good example might be if my son asked my GP about my hereditary Muscular Dystrophy after I died, if would be right to balance for disclosure as this is probably what I would have expected and wanted in life and be in the interest of my family.

If you believe the requestor has a claim arising from the death - The basic rule is that you should release minimal information to satisfy the claim, and check that the Dr would be happy with the requestor receiving this data, and if this balances with the rights of confidence.

### **Contested Will**

To contest a will's validity, grounds to challenge need to be established. One such ground is that the person making the will ('the testator') was not able to make a valid will at the material time because of a lack of sufficient mental capacity, known as testamentary capacity.

*"The basic legal requirement for validity is that people are mentally capable of understanding what they are doing when they make their will, and that what is in their will truly reflects what they freely wish to be done with their estate on death"* (Hawes v Burgess [2013] EWCA Civ 74).

The formal legal test as to whether a person has testamentary capacity was set out in the 1870 case of *Banks v Goodfellow*. Under that test, the testator should understand:

- the nature of his act and its effect
- the extent of the property of which he is disposing
- the claims to which he ought to give effect

The testator must also not have a disorder of the mind or insane delusion, which ultimately brings about a disposal of his property which he would not have made if he had been of sound mind.

To consider whether a testator had testamentary capacity, key evidence for a court is the deceased's medical records. Therefore, this should be one of the first pieces of evidence obtained in assessing the merits of any potential claim.

Under the Access to Health Records Act 1990 (AHRA) a person can apply for a copy of those records if they are an executor or administrator (the person(s) responsible for dealing with a deceased's estate), or if they may have a **claim arising from the death**. This means that someone who is concerned about the validity of a will has the right of access and **can apply without the executor or administrator's consent for a copy of the records. Solicitors can apply on the concerned person's behalf with their written consent.**

There is still an ethical obligation to respect a patient's confidentiality beyond death, Individuals who may gain access to a deceased persons 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'. The BMA recently gave advise that in its opinion "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 any other person who may have a claim arising out of the patient's death."