

## **Access to Deceased Person's Records Procedure**

### **At a glance ...**

- There is no automatic right of access by the public to information about the deceased, even though they are not covered by data protection legislation. Other laws and ethical considerations apply.
- Certain exemptions under the Freedom of Information Act can legitimately be applied to such requests to ensure that the privacy of the living as well as the deceased is respected, and their personal information processed fairly and lawfully.
- Requests for access to deceased person's records (usually related to social care) are processed by the Complaints and Information Team.
- Deceased persons' records will only be disclosed to those with an entitlement to them, such as those with Lasting Power of Attorney; the executor or administrator of the person's estate etc or if there is a reason to believe the deceased person would have consented to the disclosure if they were alive.
- The identity of the requestor as well as their right to the information will need to be checked to validate the request.
- Any requests for deceased person's records should be sent to the Complaints and Information Team within 3 working days.
- Requests will be considered on a case-by-case basis and may be refused.
- Only information directly relevant to the purpose for which it sought by the requestor will be disclosed.
- The Council is not able to disclose information that would contravene someone else's rights under the UK GDPR or Data Protection Act.
- There are a range of factors which need to be considered when dealing with requests for information about the deceased including its sensitivity; public availability; confidentiality as well as whether the identity of others would be disclosed.
- Advice will be sought from the Council's Caldicott Guardian where necessary, particularly around the ethical considerations of confidentiality obligations continuing to apply after death.
- Where the requestor cannot prove their entitlement to the records sought, the requestor may ask for the records to be disclosed under the Freedom of Information Act. However, this will limit the information the Council is able to release.

## Purpose

1. This document sets out Nottinghamshire County Council's approach to fulfilling its obligations in respect of the right of access, where it exists, to the records of deceased individuals.
2. It forms part of the suite of documents that comprise the Council's [Information Governance Framework](#) and sits under the [Information Rights Policy](#).
3. It will be of particular relevance to those parts of the Council which actively deal with such requests for information, mainly the Complaints and Information Team.

## Background

4. Nottinghamshire County Council collects and uses information about the people it works with. This may include members of the public, current, past and prospective employees, service users, customers, and suppliers. The personal information the Council collects must be safely handled and dealt with properly, whether it is on paper, in computer records or recorded by any other means.
5. When making a decision about disclosure, the Council is required to assess the privacy of the living as well as the deceased. Requested records often relate to social care and are sensitive nature. Individuals enter social services care arrangements with the expectation that the information they provide (both directly and indirectly) will only be used in connection with the provision of that care and will not otherwise be disclosed to third parties without their consent (except in very limited circumstances).
6. There is no specific exemption under the Freedom of Information Act, 2000 (FOIA) dealing with access to records of the deceased, and the General Data Protection Regulation (GDPR) does not apply directly as it only covers living individuals. However, this does not mean there is an automatic right of access by the public to information about the deceased as it is generally held that confidentiality obligations continue to apply after death.

## Scope

7. This Policy applies to all Nottinghamshire County Council's employees, elected Members, contractors, agents, representatives and temporary staff, working for or on behalf of the Council and to all personal information created or held by the Council, its contractors or agents, in whatever format. For example, paper, electronic, email, microfiche, film and however it is stored, e.g. ICT system/database, folder drives, filing structure, email.

## Responsibilities and Processes

8. All requests for access to deceased person's records (usually social care) are processed by the Complaints and Information Team.
9. There will be an intranet of the Council's website detailing how information may be requested (see [Information about the deceased | Nottinghamshire County](#)

[Council](#)), this will include a request form. The page and form will be maintained by the Complaints and Information Team.

10. For the request to be valid identification, proof of address, proof of death, and proof that the requestor is entitled to access the information requested is needed.
11. Once the request is validated, the Council aims to deliver the information requested within 60 days.
12. Requests received directly by service areas must be forwarded to the Complaints and Information Team within 3 working days.
13. The Complaints and Information Team will log and monitor all requests and acknowledge requests within 5 working days of receipt.
14. Where necessary, Complaints and Information Team will liaise with business areas to ensure that all relevant databases and information repositories are checked, will gather all relevant information, and determine what can and cannot be released.
15. Only information directly relevant to the purpose for which it is sought by the requestor will be disclosed.
16. In complex cases the case manager (from the Complaints and Information Team) will arrange for a peer review of the information before release. Advice will be sought from the Council's Caldicott Guardian where necessary, particularly around the ethical considerations of confidentiality obligations continuing to apply after death.
17. Information that is disclosed will be sent via a suitably secure transfer mechanism as outlined in the Council's [Secure Data Transit Guidance | Nottinghamshire County Council Intranet \(nottscc.gov.uk\)](#).
18. The UK GDPR requires local authorities to consider whether providing information would also release the personal data of other parties. The Council is not able to disclose information that would contravene someone else's rights under the UK GDPR. Additionally, information will be withheld if disclosure is likely to prejudice the Council's ability to provide a service should disclosure be considered to cause harm to any individual.

### **Consideration of requests about the deceased**

19. The main elements that will be considered when dealing with requests for information about the deceased are as follows:
  - a) Is the information requested already **publicly available**?
  - b) Is the requester the **personal representative** of the deceased?
  - c) Is the information requested **sensitive or special category** (as defined by the DPA 2018)?
  - d) Was the information being requested originally **provided in confidence**?

- e) Does the information requested contain personal data relating to any **third parties** (i.e., personal information of individuals other than the deceased person)?
20. The exemptions (not limited) listed in Appendix 1 will also be considered, to determine if they apply in cases where information about deceased person(s) is requested.
21. The Council judges each request on a case-by-case basis. In order to protect the privacy of our residents, we will refuse a request where we do not believe there to be enough evidence to support the belief that the deceased individual would have given their consent to the release of their information were they alive.
22. If the requestor cannot prove their entitlement to the information, they may still wish to submit a Freedom of Information Request, however, this will limit the information the Council is able to release.

### **Circumstances under which records may be released**

23. Nottinghamshire County Council will **only** release the records of deceased individuals in the following circumstances:
- a) The request has been made by the deceased person's 'personal representative' (also known as the executor or administrator of their estate).
  - b) The request has been made by an individual who held a Health & Welfare Lasting Power of Attorney (LPA) for the deceased person when they were alive.
  - c) The request has been made by an individual who held a Financial Affairs Lasting Power of Attorney for the deceased person when they were alive (although they would only be entitled to information about paying their bills, collecting their benefits, or selling their home).
  - d) The request has been made by an individual who was a Personal Welfare Deputy for the deceased person when they were alive, providing the request does not go against any decision made by an attorney acting under a Lasting Power of Attorney.
  - e) The request has been made by an individual who has proof that they have a claim arising from the deceased individual's death.
  - f) The information requested is already known to be in the public domain. In which case the Complaints and Information Team will attempt to signpost the requester to the information where possible.
  - g) There is sufficient evidence to support the assumption that the deceased individual would have given their consent to the release of their personal information if they were still alive.
24. If one or more of the above criteria can be met, the request will then be dealt with under the Council's Freedom of Information Procedure [link to be inserted upon completion].

## Compliance with this Procedure

25. Wilful or negligent disregard for information governance policies and procedures will be investigated and may be treated as a disciplinary matter under the relevant employment procedure(s) which could lead to dismissal or the termination of work agreements or service contracts.
26. Accessing or attempting to access deceased persons' records without a legitimate business reason is considered unauthorised access and will be investigated in line with the above paragraph.

## Monitoring and Review

27. This procedure will be reviewed as it is deemed appropriate, but no less frequently than every 3 years in line with legislation and codes of good practice.
28. Its implementation may be monitored by the Information Governance Team through its spot check programme or other mechanisms.

## Advice, Support & Further Information

29. For advice on please contact: For advice or further information on this document please contact:

The Complaints & Information Governance Team  
 Email: [accessto.reords@nottscc.gov.uk](mailto:accessto.reords@nottscc.gov.uk)  
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## Document Control

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**APPENDIX 1****Exemptions under the Freedom of Information Act****Section 21 (Reasonably Accessible Elsewhere) Exemption**

If the information being requested is already in the public domain (e.g., date and cause of death, anything provided in open session at a court or inquest, or anything otherwise made public) this would not need to be disclosed under the FoIA, but where possible, the requester should be signposted to the appropriate source. In these cases the 21 exemption (reasonably accessible elsewhere) under the FoIA could be applied.

Although the presumption is that the majority of information in social care records is confidential, it is possible that some information may have already been made public. For example, cause of death as recorded on a death certificate (a public document) would already be in the public domain. This would also apply to any information that had been made public via a court case, inquest or had otherwise been made accessible to the public.

**Section 40 (Personal Information) Exemption**

Records may also contain personal data relating to third parties, such as carers, relatives and/or social and healthcare staff. If/when the deceased individual's social care record contains information about living individuals this information is considered to be the personal data of these individuals. Where this is the case, the s40 exemption (personal information) under the FoIA could be applied.

**Section 41 (Information Provided in Confidence) Exemption**

In the majority of cases the information being requested from the Council will relate to special category information about an individual, such as that contained in social care files or medical records. In accordance with guidance from the Information Commissioner (ICO), due to the very personal and sensitive nature of the information contained in social care records, it is likely that they can continue to be subject to a duty of confidence after the death of the individual concerned. Generally, it can be assumed that this information would have been provided in confidence. As such the s41 exemption (information provided in confidence) under the FoIA could be applied.

For the s41 exemption to apply, the Council must be able to show that it did not create the information within the file and that it had been "obtained from another person". In general, this requirement will be met because social care records concern the care of an individual, and the information within them will have been obtained both from the individual themselves, and from the professionals involved in providing their care

If the Council can also show that disclosure of the information would give rise to an actionable breach of confidence (i.e., if the Council disclosed the information it could be taken to court) then the exemption can legitimately be applied to the disclosure of social care records of a deceased individual.

Generally, case precedent developed by the Information Commissioner's Office (ICO) has established that following death, a duty of confidence continues, and can be transferred to the deceased individual's personal representative. Whether a personal representative actually exists, or is known to the Council, is irrelevant, what is important is the ability to establish in principle that a personal representative might exist who could take legal action against any breach of confidence.

## APPENDIX 2

### Other relevant legislation

#### Access to Health Records

The Access to Health Records Act 1990 (AHRA) gives a right of access to the **health records** (generally only Occupational Health records within the County Council) of the deceased to their personal representative(s), or to any person who may have a claim arising out of the death of the individual.

In these cases, the definition of a personal representative is very narrow (see definition below), with the right of access only being granted to such a person, rather than any surviving family members or next of kin. In order to gain access to these records under the Access to Health Records legislation, the applicant must prove to the Council that they are the personal representative, or can substantiate a claim as a result of the individual's death.

#### Environmental Information Regulations 2004

Where information about the deceased is subject to the Environmental Information Regulations 2004, the Council will consider the provisions of regulations 12(5)(f) and 13 if the information being requested is deemed to have been given in confidence or includes the personal information of living individuals.

#### The Common Law Duty of Confidentiality

In addition to any duties conferred by statute, a Local Authority owes a duty of confidentiality to service users and others from whom it obtains personal information in the discharge of its statutory functions. This means that information about an individual may not normally be disclosed to a third party without the individual's consent.

#### Doctrine of Public Interest Immunity

A local authority has a duty to preserve the confidentiality of its records in the interests of public policy. This means that a Local Authority has a duty not to disclose information except when required or permitted to by statute or common law as set out above. This duty is absolute and may only be overridden by a Court order.

#### Crime and Disorder Act 1998

Section 115 permits information to be disclosed to the police, probation service, health and local authorities, for the purpose of reducing and preventing crime and disorder.