Considerable disquiet has been expressed in some quarters at the prospect of records relating to deceased persons being made public, not least because this would lead to the press being able to gain access to the medical records of famous persons after their death.

It is far from clear whether public authorities, notably NHS Trusts and other bodies, are required to disclose information relating to deceased persons.

The loophole in the law occurs because the Data Protection Act 1998—which allows an exemption for FOI requests where the information sought amounts to ‘personal data,’—only applies where the relevant individual is alive. It has no application to records relating to deceased persons, so there is no FOI exemption from disclosure.

Unlike Scottish FOI law, the English Freedom of Information Act does not have a specific exemption for records relating to deceased persons.

Public authorities would naturally prefer not to disclose information relating to dead people, not least due to the potential negative headlines this might generate—but lack of a clear legal basis for refusal remains.

It appears that common law confidence will not apply. According to current guidance from the Department of Health, “Health records relating to deceased people do not carry a common law duty of confidentiality. However, it is Department of Health and General Medical Council policy that records relating to deceased persons should be treated as personal data.”

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