

# Maximising access to health records

## Legal and practical perspectives

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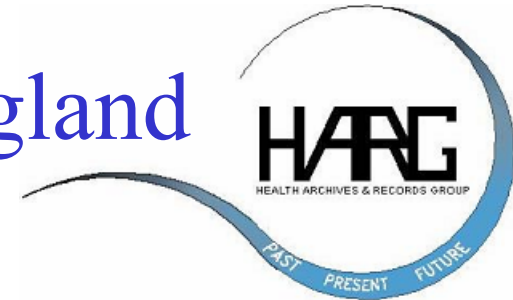
*York Hospitals NHS Foundation Trust*



*A representative body for  
archivists and records  
managers working in the health  
sector in the UK and Ireland*

13 December 2007

# Access to public records in England



- The hundred year rule on third-party access
  - In force until 31 December 2004
- After the hundred year rule
  - Access now governed by the provisions of the English Freedom of Information Act (FoIA)
  - Responsibility for deciding how to respond rests with the record-holding repository

# Rule of thumb on access



The medical records of adults, considered as a class, are protected from disclosure by FoIA

- data protection exemption (s. 40),

and possibly also by FoIA exemptions re:

- confidentiality (c. 41)
- health and safety (s. 38), and
- any other enactment (s. 44)

until (but not beyond) a period of 84 years.

# Commissioner's guidance on access to records of deceased



*Link available under 'News and events' at  
[www.healtharchives.org](http://www.healtharchives.org)*

## Point 1

- information about living people may be contained in records of deceased, and may be protected by data protection exemption (s. 40).

# Commissioner's guidance on access to records of deceased



*Link available under 'News and events' at  
[www.healtharchives.org](http://www.healtharchives.org)*

## Point 2

- private and family life might be adversely affected by release of information concerning deceased, so may be protected by any other enactment exemption (s. 44).

# Commissioner's guidance on access to records of deceased



*Link available under 'News and events' at  
[www.healtharchives.org](http://www.healtharchives.org)*

## Point 3

- confidentiality might be actionable by personal representative of deceased, so may be protected by confidentiality exemption (s. 44).

# Commissioner's guidance on access to records of deceased



*Link available under 'News and events' at  
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## Point 3

– See Information Tribunal decision of 17 September 2007 re: Epsom and St Helier University NHS Trust available at  
[www.informationtribunal.gov.uk/Documents/decisions/mrspbluckvinformationcommissioner\(17sept2007\).pdf](http://www.informationtribunal.gov.uk/Documents/decisions/mrspbluckvinformationcommissioner(17sept2007).pdf)

# Commissioner's decision notice on disclosure of 1911 census

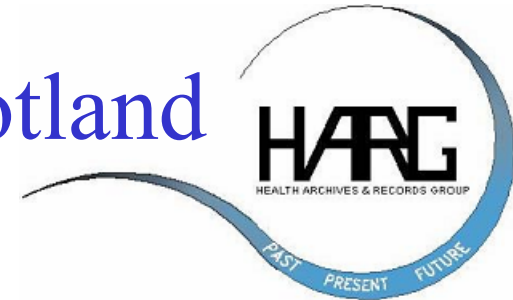


*Available at* [www.ico.gov.uk/upload/documents/  
decisionnotices/2006/101391\\_dn\\_rt\\_changes.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/101391_dn_rt_changes.pdf)

Contains information on everyone alive in 1911.  
*Ergo* it is protected from disclosure until 2012 by

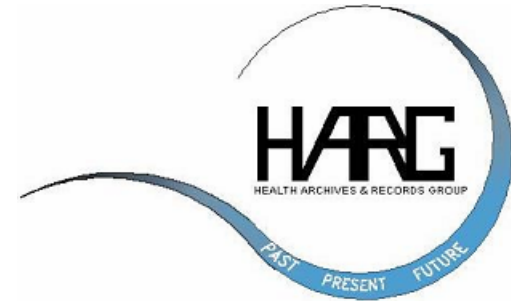
- FoIA confidentiality exemption (s. 41), and
- FoIA information intended for publication exemption (s. 22).

# Access to public records in Scotland



- Data Protection Act applies to England and Scotland equally, but
- Scotland has its own Freedom of Information Act
  - Section 38 exempts access to health records for 100 years, but
  - does not actually prevent access.

# Impact of FOI



Re-thinking responses to requests

Burden or opportunity?

- ✓ decision making
- ✓ procedures and processes
- ✓ maximise access
- ✓ achieve balance with confidentiality needs

# Determining Open Access

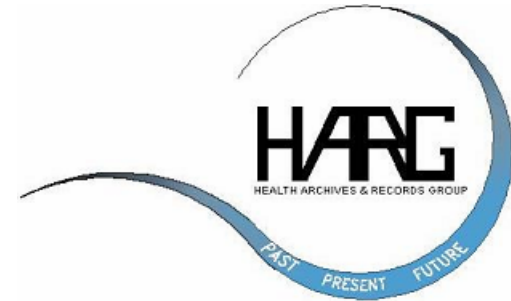


Records freely available to all  
100 years or 84 years?

- 84 years: more access in theory – problems in practice?
- 100 years: safely separates adult and child records

What difference does it make for access?

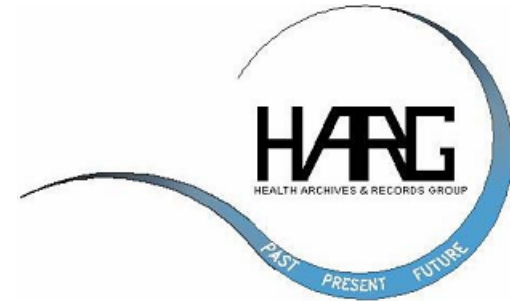
# FOI Requests in Practice



Most FOI requests from relatives

- Family history: ancestor died in asylum
- Investigating birth origins
- Story of why parent in psychiatric hospital

# In Practice (1)



- FOI purpose blind
- Should information be out there in public?
- See *After the Hundred Year Rule*
- A number of FOI exemptions to be considered (s. 40; s. 44; s. 41; s. 38); s. 40 most common
- Confidentiality lessens with time
- The living protected by DPA

# In Practice (2)



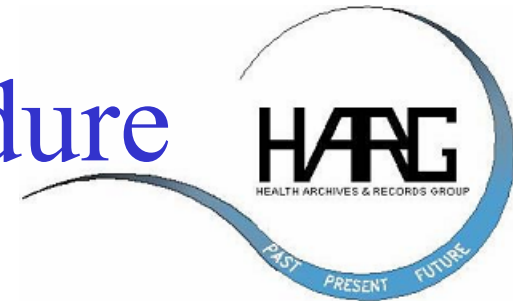
- May need to redact information for living third parties
- Ask for as much information as possible
- Use common sense
- Proof of decease
- Case by case basis

# In Practice (3)



- As much information as possible
- Fully explain in plain language
- Don't hide behind the legislation
- Help others to understand the context
- You can make a difference

# Access Policy and Procedure

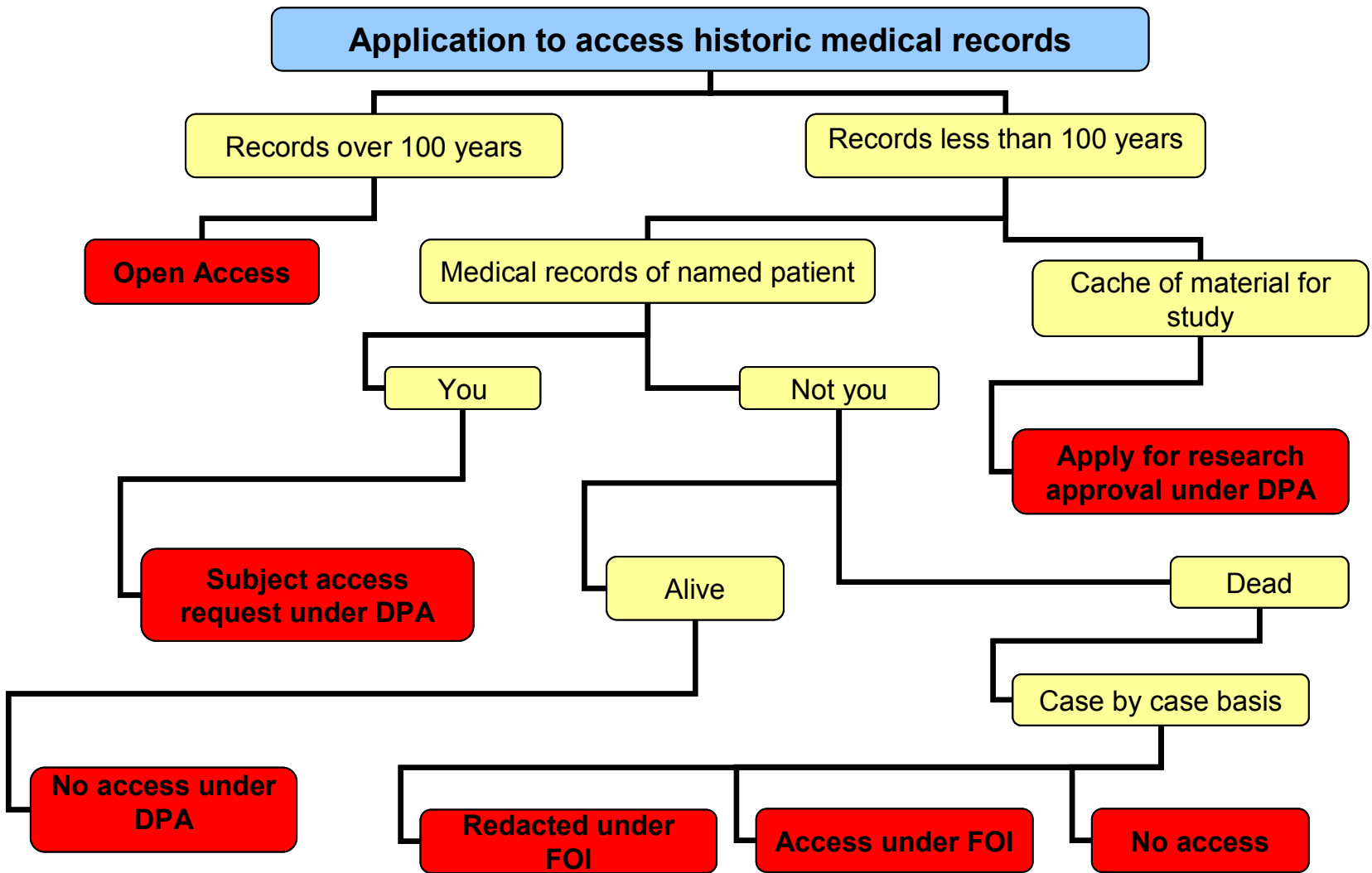


- Clearly worked out so everyone knows – staff and applicants
- Consider the different types of access requests
- Subject access request (SAR) under DPA
- Researcher request under DPA

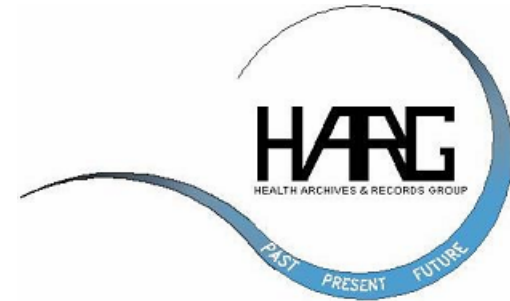
# Access Documentation



- Access protocol for access requests under FOI and DPA
- DPA research application form
- Access procedure flowchart



# FOI and private archives held by public bodies



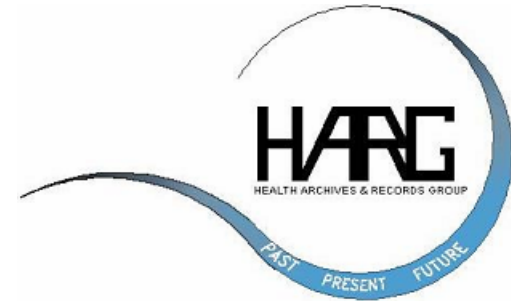
- Guidance from TNA on assessing whether private archive collections caught by FOI
- Document the decision

# Non Public Bodies and Access (1)



- FOI impacts on independent bodies working closely with public authorities eg NHS, Department of Health, higher education
- Subject to DPA
- Otherwise, access policy in non public bodies a matter for individual decision

# Non Public Bodies and Access (2)



- A variety of factors might determine access
- Wide variety of practice
- Might be special arrangements for access to deposited collections – or not
- After FOI: a cultural change, change in expectations

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