

Deceased patients and their medical records



Quick guide

- Keep the medical records of your deceased patient secure and for at least seven years from the date of the last entry in their record.
- The executor or administrator of the deceased patient's estate may request access to the patient's medical records.
- There are circumstances, such as compassionate grounds, where you may be in a position to disclose limited health information of your deceased patient to people who are not the executor or administrator.

After a patient dies, your duty of confidentiality continues, and you have ongoing obligations to manage their medical records. For the most part, you should manage the medical records of your patients who have died in the same way you would if they were alive. There are also specific state and territory laws that cover the disclosure of deceased patient medical records.

Storing and retaining records

The medical records of deceased patients should be stored in the same manner and with the same protections as when the patient was alive, including keeping the records secure and maintaining confidentiality.

This means that, whatever the form or type of medical record you hold for that patient, you must protect it from unauthorised access, disclosure or modification. Public hospitals and facilities may have specific policies to manage and retain the records of deceased patients.

How long do I have to retain the medical records of adult deceased patients?

New South Wales, Victoria and the Australian Capital Territory have legislation relating to medical records and health information. In these jurisdictions the legislation requires doctors to retain records for 7 years from the last occasion on which a health service was provided to the patient or the date of the last entry in the medical records. There is no distinction made for deceased patients. For doctors and practices in states and territories without specific legislation, we recommend using the NSW, Victoria and ACT requirements as a guide and keeping records for the same minimum period.

What if your patient is under 18 years when they die?

We recommend that you retain the medical record of a patient who was under the age of 18 at the time of the last entry, until that patient would have turned 25 years old. NSW, Victoria and ACT privacy legislation requires records created when a patient was under the age of 18 to be kept until that patient has turned 25 years old. We recommend that doctors in all states and territories follow the same minimum period even where the patient has died before they turn 18 years old.

Who can access the deceased person's medical records?

The duty of confidentiality that you owe to your patients is paramount and survives their death. Before you disclose

their medical records to anyone you must ensure that the person seeking access is authorised to do so.

In Victoria and the ACT, the person authorised to access the deceased patient's medical records is the executor or the administrator of the deceased patient's estate where probate of the will or Letters of Administration have been granted. In all other states and territories, the executor or administrator may request access to the deceased patient's records, being a legal representative of the patient. An executor of the patient's estate is named in their will, while an administrator is appointed by the court where a person does not have a will or the named executor has died. The executor or administrator may be able to provide authority for another person (e.g. insurer, lawyer) to access the records.

If there is no will access may be requested on other grounds. In the ACT and NSW an immediate family member of the patient can request access. If you are uncertain or faced with this situation, please contact Avant for advice.

Do not assume the patient's next of kin, substitute decision maker or guardian will be the executor or administrator. Enquiries or requests for records held by a public hospital should be made to that hospital's records department.

If there is a dispute about who is the executor, for example, if there are two versions of the will, you should ask for a copy of or to sight the grant of probate or administration, the legal document issued by the court that will specify the name of the executor or administrator.

Requests for records from the coroner

The coroner has a legal right to access a patient's records. A request from the coroner may be made by the coroner's officer or a police officer investigating the patient's death. You may also be asked to write a statement about the care you provided to the patient before their death. You should ask for the request for medical records or a statement to be confirmed in writing. If you receive a request from the coroner to provide a statement in relation to a private patient you should notify Avant as soon as possible and before you submit your statement.

If the patient was a public patient the hospital may engage lawyers to assist staff with the preparation of statements, but you may also wish to seek advice from Avant.

Check the identity and authority of the person requesting the records

Before giving a person access to the medical records of your deceased patient, you must be satisfied with the identity of the person and their authority to request access to the records. Legislation in NSW, Victoria and the ACT requires you to take reasonable steps to acquire proof of the identity of the person seeking the records. As there is no equivalent legislation in other states and territories, Avant recommends that all doctors adopt this practice. You should sight, and where possible, make a copy of the person's identification and attach it to the patient's record along with a copy of any relevant documents such as the will (at least the page that names the executor), the grant of probate (if relevant) and details about the request.

What form should the request be in?

NSW, Victoria and ACT legislation states that the request for the deceased patient's medical records should be in writing and include:

- the name of the person making the request
- the address of the person making the request,
- how they would like to receive the records (for example a printed copy or just sight it)

We recommend all doctors and practices follow these requirements. The request should also specify the part of the medical records which the person would like to access. If this is unclear, you should ask the person, to ensure you are not handing over the entire medical record when it is not needed or being requested. You should file the request in the patient's medical record.

Relatives requesting records

Relatives of your deceased patient may request access to the medical records to help them understand the circumstances of the death. You may be able to disclose information to an immediate family member of the deceased patient for compassionate reasons. In these circumstances the disclosure should be limited to meet those compassionate reasons. For example, if a child of a deceased patient requests health information to understand a parent's death you may consider providing limited information.

In NSW, Victoria and ACT, legislation permits disclosure in these circumstances. In other states and territories, doctors may be guided by the Medical Board of Australia's code of conduct which states that good medical practice includes the ability and willingness to explain the circumstance of the death of a patient to their family and carers. However, this request should be considered carefully against your legal obligations to maintain patient privacy and keep records securely.

Are there situations I shouldn't disclose information?

You are not required to disclose health information about your deceased patient if that access would pose a serious threat to the life or health of any other person or if providing that access would unreasonably impact another person's privacy. It may also be necessary to withhold information if you know that the patient would have specifically objected to that disclosure. You should contact Avant for further advice if you are uncertain about disclosing information.

For more information or immediate medico-legal advice, call us on 1800 128 268, 24/7 in emergencies. avant.org.au/mlas



avant.org.au/avant-learning-centre