1. Are deceased patients owed a duty of confidentiality?

The ethical obligation to respect a patient’s confidentiality extends beyond death. The Information Tribunal I England and Wales has also held that a duty of confidence attaches to the medical records of the deceased under section 41 of the Freedom of Information Act. The Freedom of Information Act in Scotland contains an exemption to the disclosure of deceased patients’ records. However, this duty of confidentiality needs to be balanced with other considerations, such as the interests of justice and of people close to the deceased person. Health professionals should therefore counsel their patients about the possibility of disclosure after death and solicit views about disclosure where it is obvious that there may be some sensitivity. Such discussions should be noted in the records.

2. Are there any rights of access to a deceased patient’s records?

Statutory rights of access are contained within the Access to Health Records Act 1990 and the Access to Health Records (Northern Ireland) Order 1993. Unless the patient requested confidentiality whilst alive, a personal representative or anyone who may have a claim arising out of a patient’s death has a right of access to information directly relevant to the claim. Disclosure may take place unless it may cause
‘serious harm’ to an individual, or if it relates to a third party other than a health professional. Prior to disclosure, advice should be sought from the health professional who last treated the patient. If this health professional is not available, a suitably qualified and experienced health professional must advise. (See also Card 1: ‘Access’.)

3. Are relatives entitled to information about the deceased’s last illness?
Whilst there is no legal entitlement other than the limited circumstances covered under the Access to Health Records legislation, health professionals have always had discretion to disclose information to a deceased person’s relatives or others when there is a clear justification. A common example is when the family requests details of the terminal illness because of an anxiety that the patient might have been misdiagnosed or there might have been negligence. Disclosure in such cases is likely to be what the deceased person would have wanted and may also be in the interests of justice. Refusal to disclose in the absence of some evidence that this was the deceased patient’s known wish exacerbates suspicion and can result in unnecessary litigation. In other cases, the balance of benefit to be gained by the disclosure to the family, for example of a hereditary or infectious condition, may outweigh the obligation of confidentiality to the deceased.