# Medical Ethics and Law: Confidentiality

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*The original source of a doctor's duty of confidentiality is the Hippocratic Oath. Regarding confidentiality Hippocrates said: 'Whatever, in connection with my professional practice or not in connection with it, I see or hear in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.' The obligation of confidentiality spoken of here is not absolute; it is up to the doctor to decide what information 'ought not to be spoken abroad.' Another Oath of confidentiality is the Declaration of Geneva which says: 'I will respect the secrets confided in me, even after the patient has died.' Here, however, the obligation is absolute. These are two sources of a doctor's duty of confidentiality which, although they differ in extent, both highlight the importance of respecting the confidentiality of patients.* **J NI Ethics Forum 2006, 3: 146-153**

### What is the source of a doctor's duty to maintain patient confidentiality? What is its nature and extent?

Today a doctor's duty of confidentiality is outlined by the GMC. With regard to confidentiality they say 'Patients have a right to expect that information about them be held in confidence by their doctors. Confidentiality is central to trust between doctors and patients. [1] The principles of confidentiality in modern medical practice are ethical. In order to maintain trust in the doctor-patient relationship confidentiality should be maintained unless disclosure can be justified [2] by an interest which outweighs the patient's interest in confidentiality being maintained. [3] Confidentiality is at the heart of the code of ethics for medicine. The GMC is predominantly concerned with a doctor's ethical duty of confidentiality but deals with breaches of confidentiality and determines whether they amount to serious professional misconduct. Common law and statues such as the Data Protection Act 1998 and the Human Rights Act 1998 jointly define a doctor's legal duty of confidentiality. [4]

### What are the exceptions to this duty and are the exceptions justifiable?

The most straightforward situation when a doctor can breach confidentiality is when he is required to do so by law. This means that the breach of confidentiality is lawful, and the doctor need not fear legal proceedings, but it does not necessarily mean the breach is ethical.[5] A doctor may be compelled by law to breach confidentiality by a court order, when giving evidence in court or by a statutory requirement such as notification of certain serious communicable diseases.[6] With regard to disclosures required by law the GMC says 'You must disclose information to satisfy a specific statutory requirement…. You should inform patients about such disclosures, wherever that is practicable, but their consent is not required. [2] Another unambiguous situation when doctors can disclose confidential information about a patient is with their explicit consent to do so. [1]

Doctors can also disclose confidential information about a patient if he believes it to be in the patient's best interests. This situation is less straightforward and it is more difficult to justify a breach for these reasons. These decisions generally occur in situations involving a patient who is incapable of making their own decisions. If a doctor believes a patient to be incapable of

making decisions, temporarily or permanently, the law allows doctors to do whatever necessary to promote the patient's welfare. If a patient is very sick but not incapacitated, however, and they do not consent to disclosure of confidential information, the doctor must respect that wish even if he believes it to be contrary to the patient's best interests. [1] In cases where the patient is incapacitated and asks you not to disclose information, the GMC advises that you try to persuade the patient to allow a third party to be involved in the consultation. If they still refuse the doctor is justified in disclosing the information, without consent, if he believes it to be in the patient's best interests. He should inform the patient before doing so. [2]

Finally, a doctor can breach confidentiality of a patient, without consent, if he believes it to be in the interest of the public. [1] This is possibly the most controversial exception to the doctor's duty of confidentiality. A doctor is not compelled by law to volunteer information to the police about criminal conduct in the part of any of his patients but may be compelled by specific statutes to do so if asked. When deciding whether to disclose information about his patient a doctor must balance the public interest in knowing the confidential details against his patient's interest in them being kept confidential. Are the public at significant risk if he does not disclose the information? If he does disclose the information how will it affect his doctor-patient relationship and is the patient less likely to seek help due to lack of trust? The question is which of these is the more significant risk.

In situations such as these the GMC advises that the doctor must be sure that the public interest outweighs the patient interest in keeping the information confidential. The doctor should be satisfied that the inclusion of identifiable data is necessary and it is not practicable to anonymise the data. The doctor should seek consent from the patient unless it is not practicable to do so. If the patient refuses consent the doctor can disclose information without it only if 'there is serious risk to the patient or others.' The doctor should inform the patient of his intentions. Doctors are also warned they may be required to justify their decisions in court or to the GMC should a complaint be made about his actions. [2]

An example of a case in which disclosure was held to be in public interest is *W v Egdell*. In this case a prisoner detained in a mental hospital applied for conditional discharge. For the purposes of deciding whether to grant the application Dr Egdell was asked to write a report on W's current condition. Dr Egdell's report was not favourable as he found that W was still a dangerous man with a morbid interest in explosives. W withdrew his application but Dr Egdell forwarded his report to the medical director of W's hospital and to the Home Secretary (the person who would have the final say on W's release) nonelessness. W sued Dr Egdell for breach of confidence. The Court of Appeal held that Dr Egdell's duty of confidence to W was not absolute and that in the interests of public safety disclosure to the medical director of W's hospital and the Home Secretary were justified as they had a legitimate need to know the details of the report.

**From the individual's viewpoint, and indeed that of society, how desirable is it to encourage a respect for confidentiality?**

From an individual point of view it is extremely important to maintain confidentiality. If confidentiality is not maintained the individual may be subjected to discrimination due to certain details of their past medical history, for example by insurers or employers.[1] Aside from this confidentiality is at the heart of medical ethics and is essential in maintaining trust in the doctor-patient relationship. [2] If patients are able to trust their doctors they are more likely to seek medical help when they need it. [1]

Society's interest in maintaining confidentiality is mainly for the same reasons as for individuals. The courts have recognised the public need for confidentiality to be maintained in a number of cases. The judge in *W v Egdell* recognised medical confidentiality to be central to good healthcare. [4] In the case *X v Y* a health authority sought an injunction to stop a tabloid publishing the names of doctors who had HIV. The judge granted the injunction saying that:

'In the long run, preservation of confidentiality is the only way of securing public health… future individual patients will not come forward if doctors are going to squeal on them. Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled…' [1]

This quote highlights some very important public interests in confidentiality. Namely if confidentiality is not encouraged and maintained, patients will lose faith in their doctors and will not present when they are ill. This could create serious public health problems in terms of communicable diseases, which if left untreated could spread easily from person to person. [1]

**How do recently enacted statutes on data protection impact in doctor/patient confidentiality?**

The Data Protection Act 1998 is the most recent statute relating to this. When it was brought out it largely overruled former legislation on how data is processed. It controls how personal data is used and processed; this personal data includes health records. In order to process data contained in health records regarding a person's physical or mental wellbeing, data which could potentially harm them if not adequately protected, there are a set of conditions, one of which must be met. The conditions set out in the Act are:

(1) the patient explicitly consents
(2) in order to protect the vital interests of a patient who cannot consent or where consent cannot reasonably be obtained or to protect the vital interests of a patient who has unreasonably withheld consent
(3) processing for medical purposes where disclosure is from health professional to another person bound by same duty of confidentiality. [1]

Additionally the Secretary of State has said that processing should be allowed in professional disciplinary proceedings or to allow NHS authorities to investigate malpractice or mismanagement. There is also a general allowance for processing when there is substantial public interest, for example in cases of dishonesty, malpractice or service failure, in order to protect the public. [1]

It can be seen from theses conditions that they are largely similar to the exceptions in common law previously discussed. Thus the Act does not place any greater restrictions on breaches of confidentiality. It does, however, ensure that any processing of data is done in conformity with the Act and so doctors may have to give extra care to processing information. This will include alteration, retrieval, use, disclosure and erasure of patient's records. Additionally the Act provides remedies for patients who are suspicious of misuse of their medical records and concerned disclosure will cause damage or distress. They can now request that the data controller stop processing the records. A person who has suffered such damage or distress from violation of the Act has a right to compensation. [1]

Moreover, section 7 of the Act establishes the right of a patient to see his or her f medical records. Thus the way in which doctors keep their notes must be able to withstand scrutiny. There are some restrictions on this right, however, the records cannot be accessed if they are for historical, statistical or research purposes. Additionally, if the doctor believes that it is in the patient's best interests not to see the records because the disclosure of this information to the patient is likely to harm them, the patient can be refused access. In cases where the patient does not agree with such a decision it is the responsibility of the court to decide what is in the patient's interests. [1]

**Some examples of situations when a doctor might consider breaching confidentiality.**

*A colleague has confided in you that he has a drink problem.*

In this situation I would consider whether my colleague's problem was affecting his work. For example, if he was turning up to work drunk or couldn't complete a shift without having a drink, I would consider that the problem was affecting his work. In this case I would breach his confidentiality because his condition could be putting patients at risk. Before doing so I would tell him that is what I was going, to do and give him the opportunity to inform the GMC himself. The GMC handbook *Good Medical Practice* says, 'The safety of patients must come first at all times. Where there are serious concerns about a colleague's performance, health or conduct, it is essential that steps are taken without delay to investigate the concerns…'[1][i]

*A 3 year old patient has a broken wrist and several bruises. You think her stepfather may have caused these, but you are not sure.*

This would depend on exactly how unsure I am of my suspicion. If I had investigated as fully as I could and was convinced my suspicion was legitimate I would breach confidentiality by reporting it to the police. I think this would be in the best interests of the child. The GMC booklet on confidentiality advises that, 'if you believe a patient to be a victim of neglect or physical or sexual abuse and that the patient cannot give or withhold consent to disclosure, you must give information promptly to an appropriate responsible person or statutory agency, where you believe disclosure is in the patient's best interests.' [2]

*Your patient has recently diagnosed with HIV and refuses to give her consent to you revealing this to her husband.*

In this situation I would first try to persuade my patient to tell her husband herself, and inform her of the risks involved to him. I would also try to explore the reasons why she did not want to disclose the information. If, after doing this, I was still convinced she would not disclose the information to her husband, and that she would not insist on using condoms during intercourse with him, I would have to conclude that he was at serious risk of harm. In this case I would breach confidentiality because, as described in common law, it is in public interest to protect individual security. [1] By telling the patient's husband I would be enabling him to take adequate precautions to protect himself from infection. Before disclosing this information to her husband I would inform the patient of my intentions and my reasons for doing so. The GMC says, 'you may disclose information to a known sexual contact of a patient with HIV where you have reason to think that the patient has not informed that person, and cannot be persuaded to do so.'

*Katherine undertook the 1st Year SSC 'To Err is Human: Medicine and the Law' co-ordinated by Dr Melissa McCullough, Division of Medical Education, School of Medicine and Dentistry, in spring 2006.*

**References**

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[4] W v Egdell [1990] 1 All ER 835
[5] GMC. Good Medical Practice. (2001)
[6] GMC. Serious communicable diseases. (1998)

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