

The MDU's guide to confidentiality

Introduction and principles

Confidentiality is an essential part of the bond of trust that exists between doctor and patient.

Patients must be certain that information they divulge will be kept confidential. Without this assurance, they may be reluctant to reveal private or sensitive information a medical practitioner needs to provide full and appropriate care.

From time to time, the duty to preserve confidentiality can present doctors with an ethical or legal dilemma, commonly when a third party requests information about the patient or their treatment.

The development of electronic and mobile communication also raises questions of the security of patient information stored on computer or transmitted by fax, email or via the internet.

The duty of confidentiality is defined and protected by common law and an increasingly complex body of statute law.

General principles

- Confidentiality is a patient's right and must be respected by the entire health care team (European Convention on Human Rights (Article 8); Human Rights Act 1998).
- Express consent is required before disclosing information about an identifiable patient to third parties, unless the law allows otherwise. Express consent is given orally or in writing.
- To give consent, the patient needs to understand:
 - to whom the information will be disclosed
 - precisely what information will be disclosed
 - the purpose of the disclosure
 - the significant foreseeable consequences
 - that in certain circumstances, relevant information cannot be withheld (eg to an employer or insurance company).
- When a patient gives consent, you must only disclose information the patient has agreed can be disclosed and only to the third party that requested it. No other use can be made of the information without seeking further consent from the patient.
- Competent patients, including children who are competent to make decisions, can give consent.

Defining competence

To show capacity to consent (competence) to the disclosure of confidential information, the patient must be able to:

- understand in simple language what is to be disclosed and why it is being disclosed
- understand the main benefits of disclosure
- understand, in broad terms, the consequences of disclosure
- understand that they have the right to refuse
- retain the information long enough to make an effective decision
- make a free choice (ie free from pressure).

- Patients who lack the capacity to give consent (eg patients with a mental disorder or young children) require special consideration. You may wish to consider the view of a parent or carer, though the overriding principle is the patient's best interests. Best interests here will include consideration of the patient's own wishes and values where these have previously been expressed, or the course of action that will provide likely benefit to the individual.
- When medical practitioners are responsible for patient information they must make sure that it is effectively protected from improper disclosure, including unintentional disclosure, at all times.
- The duty of confidentiality continues after a patient has died (Access to Health Records Act 1990).

Patient information should not be disclosed to third parties without consent except in limited circumstances. You should be prepared to justify your decision to disclose information without consent.

Before disclosing information you will need to consider any legal duty, GMC guidance and the Department of Health's *Confidentiality: NHS Code of Practice*. You may also wish to seek expert advice from an MDU medico-legal adviser.

Where disclosure (with or without consent) is appropriate, only the minimum relevant information necessary should be disclosed. Disclosure should be carried out promptly as circumstances dictate.

Disclosure of confidential information without consent or ethical or lawful justification carries the risk of legal action by the patient and/or investigation by the relevant regulatory body which may lead to a finding of impaired fitness to practise. NHS guidance¹ makes it clear that misuse of patient information within the NHS should be treated as a serious disciplinary matter.

What is confidential information?

All information about a patient is confidential. This includes any information that could be used to identify an individual, for example:

- medical records
- current illness or condition and its ongoing treatment
- personal details – name, address, age, marital status, sexuality, race, etc
- record of appointments
- audio or audio/visual recordings
- the fact that a person is or was your patient.

Confidentiality checklist

1. Fully acquaint yourself and your colleagues with up-to-date legal requirements and GMC and NHS guidance on confidentiality.
2. Nominate a person to be responsible for practices and procedures for handling confidential data.
3. Train all staff to keep information confidential and reinforce the message regularly. Write a confidentiality clause into contracts of employment.
4. Keep discussion about clinical management of patients private and out of earshot of the public.
5. Ensure patients cannot read another patient's details on computer screens.

6. Check the identity of telephone callers asking for information about a patient, if necessary by calling them back via directory enquiries.
7. Take professional advice before connecting your computer to a network, and keep a record of the advice.
8. Ensure electronic means of communication such as fax and email are secure before sending information.

The legal and ethical basis of confidentiality

The duty of patient confidentiality is enforced through four principal mechanisms:

- common law
- statute
- contract of employment
- regulatory bodies.

Common law

Patients alleging breach of confidentiality may seek redress in the civil court. However, it is rare for this to be the sole cause of action in a civil court case.

Statute law

The main statute governing patient confidentiality is the Data Protection Act 1998 (DPA).

This regulates the processing of information about individuals, including the obtaining, use or disclosure of information. It covers paper and computer records, without time limit. A breach of the DPA can result in civil or criminal proceedings.

The DPA sets out the rights and responsibilities of data subjects and data users.

Rights

Data subjects are entitled to:

- be told that data is held about them and of the purposes for which their data will be processed
- have access to the data
- have the data corrected when inaccurate.

While in most cases a patient has a right to have access to the information that you hold about them, there may be rare cases where there may be grounds for believing that access to that information would be likely to cause serious harm to the physical or mental health or condition of the individual or any other person.² This may provide a reason for refusing disclosure, but you should seek advice before invoking this exception to the general rule.

The healthcare professional most directly involved in the patient's care should be consulted to advise whether an exemption to this order can be applied.

Responsibilities

Personal data shall:

- be obtained and processed fairly and lawfully
- be held only for specific purposes
- not be used or disclosed in any other way or for any other purpose
- be adequate, relevant and not excessive in relation to the purpose for which they are held
- be accurate and kept up to date
- not be kept for longer than is necessary
- be processed according to the right of data subjects
- be held secure.

For further guidance see *Use and Disclosure of Health Data*, published by the Information Commissioner.

Other statutes governing confidentiality are listed on our website and cover a range of areas including:

- notifiable diseases (see our Medico-legal Guide 3.7)
- human fertility
- genito-urinary infections
- public security issues
- road traffic accidents
- cancer registries
- abortion
- computer misuse.

Contract of employment

Confidentiality of patient information is a requirement of employment under NHS and many independent sector contracts. GPs working within their contract of employment are required to follow Department of Health guidelines on confidentiality.³ All staff employed by the NHS may be disciplined following a breach of confidentiality.

The Standard General Medical Services Contract (2005, clause 437) requires the contracting GP to designate a person to be responsible for practices and procedures relating to the confidentiality of patient information.

Arrangements for keeping patient information confidential may be scrutinised and monitored during a trust inquiry, an external review of clinical performance or under GMC performance review procedures. Confidentiality arrangements may also be audited locally or by the Healthcare Commission.

Registration bodies

Professional registration bodies are responsible for regulating healthcare professionals, including setting out ethical duties in respect of confidentiality.

The registration bodies' vigour in pursuing and, where required, imposing sanctions because of a breach of confidentiality should not be underestimated. A breach of patient confidentiality could result in a finding of impaired fitness to practise, which carries with it a range of sanctions, including erasure from the register.

The MDU regularly advises members on a wide range of medico-legal questions regarding confidentiality. If you are in any doubt about circumstances in which patient information may be disclosed, seek expert advice from the MDU's 24-hour advisory helpline.

Questions and answers

Q A few days ago I gave a patient a work certificate for four weeks for backache. Today the human resources director at his workplace rang me up and asked me to confirm that I had signed him off for 14 weeks. He faxed a copy to me and it's clear that someone has added a one in front of the four. What information can I provide?

A It is not a breach of confidentiality to tell a person who has been properly given a document by a patient that it is a document you signed. In this case you can confirm that you did not sign the certificate as faxed through to you. You may then wish to contact your patient directly to discuss the matter with him.

Q A newborn baby was found abandoned outside our local church. A social worker has asked me to give him a list of all the names and addresses of any pregnant patients with expected delivery dates of around this time. We are a small, rural community and I suspect I know the mother concerned. Should I pass on this information?

A Your duty of confidentiality prevents you from releasing a blanket list of the names of all your pregnant patients. In relation to the individual patient, even if you can identify the mother, the fact that she is your patient is confidential. You may think you know her, and it may be appropriate to arrange to see her and to offer counselling and treatment. To justify breaching the presumed mother's confidentiality, you would have to argue that failing to do so would put her or someone else at risk of serious harm or death.

Q A hospital porter slipped on a wet floor and was treated for a fracture in the hospital's A&E department where I work. He is now pursuing a claim against the hospital (his employer) alleging that the floor cleaner was negligent by failing to put up a sign warning of the wet floor. The hospital management have asked for the records to deal with the claim. The patient has not given his consent to the release of the records. Should I, as the A&E consultant, agree to release them?

A Had this patient been treated in another hospital's A&E department, his consent would have been needed for the disclosure of his records from that hospital to his employer and the same principle applies in your hospital. Hospital managers have a right to look at documents in the custody of their hospital only for the ordinary administration of health care and this includes records of a patient who is pursuing a claim against the hospital alleging that the treatment provided by a member of their healthcare team was negligent. But, your hospital's managers cannot use their power to ask for his records just because he was treated in your hospital's A&E department. You need to seek the patient's consent to disclosure in the same way that you would if the request came from any other employer.

¹ Department of Health. 2003. *Confidentiality: NHS Code of Practice*.

² Data Protection (Subject Access Modification) (Health) Order 2000 SI 2000/0413.

³ General Medical Council. 2004. *Confidentiality: Protecting and Providing Information*.

For individual medico-legal advice:

24-hour advisory helpline
0800 716 646

Email: advisory@the-mdu.com

Web: www.the-mdu.com