

## Confidentiality

Confidentiality is a fundamental principle of medical ethics and is central to the relationship of trust between patients and doctors. Without assurances about confidentiality, patients may be reluctant to seek medical advice or treatment or give doctors the information needed to provide appropriate, effective care.

The Medical Council *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (available on the Medical Council website) identifies confidentiality as one of the main elements of good practice (para 5.2) and provides helpful guidance on the duty of confidentiality and disclosure of identifiable patient information (paras 29-32).

### Main principles of the duty of confidentiality

The Guide states in para 29.2:

*You should protect your patients' privacy by keeping records and other information about patients securely. You should guard against accidental disclosures.*

### Disclosure

The Guide confirms that sharing patient information, in appropriate circumstances, is important, both for patient care and for the safety of patients and others. However, before disclosing identifiable information about patients, a doctor must (detailed in para 29.3):

- Take into consideration Freedom of Information and Data Protection principles set out in Appendices A & B the Guide. In addition, doctors should also be familiar with the EU General Data Protection Regulation (GDPR) which came into force on 25 May 2018.
- Be clear about the purpose for disclosure.
- Have the patient's consent or other legal basis for disclosing the information.
- Have considered using anonymised information and you are certain it is necessary to use identifiable information.
- Be satisfied that you are disclosing the minimum information to the minimum amount of people necessary.
- Be satisfied that the intended recipient is aware the information is confidential and that they have their own duty of confidentiality.

### Disclosure with consent (para 30 of the Guide)

If a patient is capable of making their own decisions about their healthcare, you must get their consent before giving confidential information to anyone including the patient's relatives or friends. If the patient does not consent to disclosure of information you should respect that decision except where failure to make the disclosure would put the patient or others at risk of serious harm.

If disclosure of a patient's information to other healthcare providers is necessary as part of a patient's treatment and care, you should explain this to the patient and disclose the information to an appropriate person making sure they are aware of their duty of confidentiality. If a patient objects to the transfer of the information you deem necessary, you should explain you cannot arrange referral or treatment by other healthcare providers without disclosing the information.

The Guide recognises that clinical audit, quality assurance, education and training are essential for providing safe and effective healthcare. If a doctor is providing patient information pursuant to any of these activities, the information must be anonymised or coded before it is disclosed outside the healthcare team. If that is not possible, a doctor must make sure a patient is told about the disclosure in advance and given the opportunity to object. A doctor must respect a patient's wishes in respect of the disclosure.

## Disclosure without consent (para 31 of the Guide)

In certain very limited circumstances, a doctor will be required to disclose patient information by law or in the public interest. A doctor should inform the patient in advance of such an intended disclosure, unless this would cause the patient serious harm or would undermine the purpose of the disclosure.

A doctor must disclose patient information where required by law, for example, pursuant to a court order or infectious disease notification or if a doctor holds a reasonable belief that a crime involving a sexual assault or other violence has been committed against a child or other vulnerable person. Disclosure in the public interest may be made to protect the patient, other identifiable people or the wider community. Before making such a disclosure a doctor must satisfy himself or herself that the possible harm the disclosure may cause to the patient is outweighed by the benefits that are likely to arise for the patient or others. The disclosure should be limited to the minimum information and minimum number of people necessary.

If a patient lacks capacity to give consent and is unlikely to regain capacity, you should consider making a disclosure only if it is in the best interests of the patient. If disclosing without consent, Medisec advises that you document carefully your communications with the patient and the reasons for your decisions.

## Request for medical records (Paras 32 & 33 of the Guide)

Patients have a right to obtain copies of their medical records unless it is likely to cause serious harm to their physical or mental health. If you receive a request from a patient seeking release of a copy of their records, the records should be carefully reviewed and any information relating to other people should be removed, unless those people have given consent to the disclosure.

Patient information remains confidential even after death. If it is not clear if a patient consented to the disclosure of information after death, consider how the disclosure might benefit or cause distress to the family or carers, the effect of disclosure on the reputation of the deceased and the purpose of disclosure. A doctor's discretion may be limited if disclosure of a patient's record is required by law as referred to above.

As a doctor you will be faced with difficult scenarios in relation to requests for records from patients and third parties and requests for records of a deceased patient. Each case should be considered on a case by case basis and you should always act in the best interests of your patient. Medisec recommends having a protocol in place for dealing with requests for records. Please also see the Medisec factsheets available on our website: *Patient Access Requests for Medical Records* and *Request for Deceased Patient's Notes*.

## Medical reports

A doctor can only prepare a medical report on a patient with the patient's consent. The Guide states that if the report is requested by a third party such as an employer, insurance company or legal representative, a doctor should explain to the patient that the report must be factual, accurate and not misleading (para 40.5). The doctor should be satisfied that the patient understands the scope and purpose of the report and that you cannot omit relevant information.

Ensure your patient is aware of your duty of care to them and to the third party who has requested the report. You should take the patient through the report before you release it, so they appreciate the extent of the information you are reporting upon. Please see our factsheets on: *Drafting Medico-legal reports* and *Private Medical Attendant Reports*, available on our website.

## Recording (para 34 in the Guide)

The Guide states that any audio, visual or photographic recordings of a patient or relative of a patient, in which the person is identifiable, should only be made with express consent of that person. The recordings should be kept confidential as a part of the patient's records. You should be aware of security when sharing information by electronic means and do all you reasonably can to protect confidentiality which could include encryption measures. You should also get consent before sharing such videos, photos or other images of a patient.

You should only take images of patients on your personal mobile device when necessary for the patient's care. Such images must not identify a patient and should only be kept for the minimum time necessary.

## Confidentiality - Children and Young People under 18 years

Paragraph 18.8 of the Guide provides:

*Children and young people have a right to confidential medical treatment set out in paragraph 29. However, parents and guardians also have a legal right to access medical records of their children until they are 18. You should tell children and young people that you cannot give an absolute guarantee of confidentiality.*

## Case law

In a recent case (Child and Family Agency and A and C 2018 IEHC 112) the High Court considered whether it was appropriate for Tusla to breach confidentiality of a service user in order to inform his potential sexual partner of his HIV status. The court decided that a breach of confidentiality was not permitted in the circumstances. It determined that the appropriate test to apply is whether:

*On the balance of probabilities, the failure to breach patient confidentiality creates a significant risk of death or very serious harm to an innocent third party.*

This effectively means that a breach of patient confidentiality will be permitted only where it can be proved that the risk to the third party will result in either death or very serious harm.

## How to avoid accidental breaches of confidentiality

Standards of confidentiality apply to all health professionals, students, administrative and ancillary staff including receptionists, secretaries, and cleaners. It is therefore important that all staff members working in a healthcare setting are aware of and understand the rules of confidentiality. All patient information is confidential, from the most sensitive diagnosis to the fact of the patient has attended a consultation.

It might be helpful to consider the following factors when trying to avoid inadvertent confidentiality breaches:

- **Physical environment** - be mindful of room design such as proximity of waiting room to reception, positioning of computer screens and telephones or seating.

- **Medical records-** be mindful of safety in your system for filing records or transferring or disposing of records securely. Do not leave patients' records on paper or screen unattended or where they can be seen by other patients, unauthorised staff or the public.
- **IT systems-** be sure that your IT System is robust in terms of backing up files, audit logs, firewalls, virus protection and appropriate encryptions. Do not share login details.
- **Training and education-** it is recommended that all staff members be trained in confidentiality issues and the message should be regularly reinforced. All staff members should be encouraged to work together to ensure that standards of confidentiality are upheld, improper disclosures avoided and a 'no gossip' culture is adopted.
- **Confidentiality agreement-** ensure that all staff including students and temporary staff sign a confidentiality agreement which includes reference to the use of social media sites.
- **Communication by fax/text/-** Medisec advises having a policy in place to manage the disclosure of confidential information about patients by electronic means. Please see Medisec's Factsheets on *Communication with patients by SMS text, email and fax*, available on our website.

Complaints and claims against doctors for breaches of confidentiality are thankfully relatively rare. Most breaches occur inadvertently and can be avoided. If a breach of confidentiality does occur in a healthcare setting, depending on the circumstances, it is usually best to inform the patient as soon as possible and depending on the circumstances, it may require notification to the Data Protection Commissioner.

Please contact Medisec if you have any specific queries regarding confidentiality.

"The contents of this publication are indicative of current developments and contain guidance on general medico legal queries. It does not constitute and should not be relied upon as definitive legal, clinical or other advice and if you have any specific queries, please contact Medisec for advice".