

## 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*, 9<sup>th</sup> edition 2024 (available on the Medical Council website) identifies confidentiality as central to the doctor-patient relationship (para 25.1) and provides helpful guidance on the duty of confidentiality and disclosure of identifiable patient information (paras 25-30).

### Main principles of the duty of confidentiality

The Guide states in para 25.4:

*You should protect your patients' privacy and you must ensure that patient information in your control is protected against improper disclosure, access or loss.*

## Disclosure

The Guide acknowledges that most patients understand that their information needs to be shared with others involved in their healthcare. Doctors should ensure that there is a justifiable basis for doing so and to only share such information as is necessary. It states that patients should be informed that such sharing of information is commonly required to arranged and provide interventions and treatment/care. However, before disclosing identifiable information about patients outside of the healthcare team, a doctor must (detailed in para 28.1):

- Comply with applicable data protection legislation.
- Be clear about the purpose for disclosure.
- Have the patient's consent or other legal basis for disclosing the information.
- Consider that it is not possible to use anonymised 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

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 where relevant, that a referral may not be possible without disclosing necessary 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 should 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 29 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. The Guide acknowledges that there can be a public interest in disclosing information where the benefits to another individual or society outweigh the duty of confidentiality. The Guide notes that this may occur in exceptional circumstances to protect individuals or society from risks of serious harm, such as from serious communicable diseases or serious crime. It states that a doctor must carry out a balancing exercise of individuals rights and the public interest. It advises that a doctor may consider legal advice before making disclosure in such circumstances. A doctor should only disclose the information to an appropriate person or authority and include only the information needed to meet that purpose.

The Guide states that in circumstances where the patient lacks decision-making capacity to consent to disclosure, the provisions of the Assisted Decision-Making (Capacity) Act must be followed.

## Request for medical records

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 persons close to them, 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 you should inform the patient that you have a duty to the third party as well as to the patient and that you cannot omit relevant information from 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 31 and 32 in the Guide)

The Guide states that where you determine that making audio, video or photographic recordings of a patient is necessary and appropriate for patient-care and/ or beneficial for education and training purposes, you must explain this to the patient and obtain their consent to both the making and any proposed sharing of a recording. You should keep these recordings confidential as part of the patient's record. If they are being used for education and training purposes beyond the patient's healthcare team, you must ensure that the patient is neither identified nor identifiable, unless they have given consent to being identified.

The Guide confirms that you should be aware of security when sharing information by electronic means, including text, other electronic messaging or emailing, and you should take all reasonable measures to protect confidentiality.

## Confidentiality - Children and Young People under 18 years

Paragraph 26.1 of the Guide provides:

*You have the same duty of confidentiality to children and young people as you have to adults.*

Paragraph 26.4 of the Guide states:

*Parents may be entitled by law to access their child's medical records. You should tell children and young people that you cannot give an absolute guarantee of confidentiality.*

We recommend that doctors always consider if the person requesting information on a child is a legal guardian who could be entitled to such information (as not every parent is automatically a guardian). Please see our separate Factsheet on Guardianship for more detailed guidance on this topic.

## 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, practice managers 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 having attended or registered with a doctor.

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.**

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**January 2024**