

# Recording consultations



MPS



Advice correct as of January 2016

Modern technology makes audio and video recording of dialogue and behaviour extremely easy. There have been many recent examples in the general media where supposedly private or personal material has been brought into the public domain, causing considerable distress and problems for those involved.<sup>1,2</sup>

Increasingly, Medical Protection is being contacted by members who seek advice in circumstances where recordings have been made or are proposed in clinical settings. Managing the situation depends greatly on who is intending to make the recording, how this is done, and for what purpose. We will look at a range of scenarios below:

## A clinician wishes to make an audio or video recording

The Health Information Privacy Code 1994 (the Code) was established to ensure that health agencies (including individual practitioners) abide by strict rules when handling information about patients. This is in recognition of the confidential and often sensitive nature of health information. If a health provider decided to record a clinical interaction then they must ensure that their actions comply with the Code.

The Code is “technology neutral” and so information in the form of an audio or video recording must be managed by the health agency in the same way as if the information was recorded in a traditional paper record or an electronic medical record. The information collected must be necessary for a lawful purpose or function of the health agency.<sup>3</sup> Patients must know that information is being collected, why it is being collected and what is going to happen to the information. Patients are also entitled to request a copy of any recording that is collected or used on the basis that it is part of their health information.

Health information must not be collected by a health agency by unlawful means or by means that, in the circumstances of the case, are unfair; or intrude to an unreasonable extent upon the personal affairs of the individual concerned.<sup>4</sup> Making an audio or video recording without the patient’s knowledge is an example of where collection would be unfair.

In some circumstances, additional safeguards require that explicit consent is gained from the patient before a video or audio recording is made, such as Section 68 of

the Mental Health (Compulsory Assessment and Treatment) Act 1992 and section 52 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

A successful complaint that a health agency has breached one of the rules of the Code can lead to proceedings in the Human Rights Review Tribunal, with possible penalties including an award of damages of up to \$200,000.

## A patient asks to make an audio or video recording

The Code only applies to health agencies and so does not have any role where a recording has been made by a patient. It is possible that the Privacy Act could apply in circumstances where some personal information of the doctor was included in the recording, though this would be unusual. Patients may ask to record a clinical interaction for a variety of reasons. When the assessment is for a medicolegal purpose, such as an insurance or ACC claim, the patient may wish to have their own record of what occurred.

The Medical Council of New Zealand (MCNZ) refers to this issue in its statement on *Non-Treating Doctors Performing Medical Assessments of Patients for Third Parties Doctors* (Dec 2010):

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11. A patient may want to record the consultation by video or audio tape. You should consider such a request carefully and, if you do not consent, ask the third-party to arrange for another doctor to conduct the assessment.”

The MCNZ refers to the case of *Jackson v ACC*, which upheld the patient’s privilege to record a consultation, though also acknowledged that doctors have a privilege in deciding what way a medical assessment should take place. The doctor must be able to reasonably justify a refusal to allow recording in these circumstances.

Therefore, you should be clear about the reasons why you refuse to permit a patient to record a consultation. The reasons should stand up to scrutiny if the patient complained about your refusal.

Reasons to refuse to consent to recording might include concerns that:

- The presence of a recording device will hinder the open sharing of information and views
- A recording cannot convey relevant non-verbal cues that affect an assessment
- The recording (or a transcript) may be edited in ways that alter its significance
- The subsequent use of the recording will be outside your control and could be used to misrepresent your actions or views.

Medical Protection is aware of cases involving members where each of these problems has arisen. In situations where a doctor agrees to the recording of a consultation, it is suggested that the doctor consider making an agreement with the patient, prior to any recording, to receive a copy of the whole recording from the patient. Alternatively, a doctor could seek the patient's agreement to make his or her own separate recording of the consultation.

## A clinical assessment is covertly recorded by the patient

Occasionally clinicians discover after a consultation that the patient has made a recording without their knowledge. As it is the patient's health information that has been recorded, and it is in the possession of the patient, the doctor has very little influence over what is done with the recording. Medical Protection has been asked to assist members who have discovered audio recordings or transcripts of consultations that have appeared on the internet. This material is usually placed in the public arena by the patient seeking to make a particular point and may be edited or altered in some way.

As it is often impossible to know whether a consultation is being recorded it may be prudent to assume that it is, in a similar way to assuming that all your written entries in a medical record will be read by the patient.

## Material recorded covertly is provided to the doctor

Investigators working for insurance companies or ACC occasionally present covertly obtained video recordings of claimants to doctors; for example, where there are concerns of fraud. The steps required on the receipt of such unsolicited information will differ depending on whether the assessment is purely about the health of the patient or whether it is required for legal proceedings.

If a health assessment, then before considering information obtained in this way, it is important to ascertain from the information provider whether the patient is aware that this information has been provided to you. If the patient is not aware of the material then it may be difficult to form a valid medical opinion on a video or audio recording that has been made without the knowledge of the patient, in non-clinical circumstances and without the opportunity to ask the patient questions arising from examining the recording.

You may decide to return such information as you may need to show why it was necessary to use it without the patient's knowledge and response, if a complaint resulted. If there are legal proceedings in existence or anticipated, different considerations apply. Please consult Medical Protection with any queries.

## A person masquerades as a patient and records the interaction

Medical Protection is aware of cases where individuals have presented to doctors with factitious complaints for the purpose of manipulating and covertly recording the consultation for their own purposes. A member was recently assisted by Medical Protection after a complaint had been made to the MCNZ alleging inappropriate prescribing.

A journalist pretending to be a patient had presented to several GPs seeking to obtain medication with the potential of abuse by deception and, at least in one case, intimidation. This was done to form the basis of a newspaper article. A covert recording of one consultation was used by him in his subsequent complaint to the MCNZ. After considering the response from the doctor detailing the circumstances, the MCNZ took no further action.

The principles of the Privacy Act do not apply to news organisations and so it is unlikely that the Privacy Commissioner would receive a complaint in this type of situation. However, a complaint to the Press Council or Broadcasting Standards Authority could be considered on the basis of a possible breach of their own standards. It is also possible that a trespass order could be sought against the person masquerading as a patient in this way or an injunction preventing the use of the recording by the media.

The therapeutic alliance between patient and clinician is based on mutual trust. Recording of consultations without the knowledge or consent of one party inevitably undermines trust, damaging the relationship and the potential effectiveness of care. As the technology to make recordings is now ubiquitous, it may be best to assume that all clinical interactions are potentially being recorded.<sup>5</sup>

## References

1. Election tea tape leaked online
2. Medical records, Daniel Kerr, NZMJ, Vol. 115 No 1163, 11 October 2002.
3. Health Information Privacy Code 1994, Rule 1
4. Health Information Privacy Code 1994, Rule 2
5. On the record, Alan Doris, *Casebook*, Vol 20 No 3, September 2012

For medicolegal advice please call us on:

**0800 2255 677 (0800 CALL MPS)**

**Overseas: +64 4 909 7190**

**or email us at: [advice@mps.org.nz](mailto:advice@mps.org.nz)**

### Membership enquiries

**T 0800 2255 677 (0800 CALL MPS) – toll free within New Zealand**

**E [membership@mps.org.nz](mailto:membership@mps.org.nz)**

This factsheet provides only a general overview of the topic and should not be relied upon as definitive guidance. If you are an MPS member, and you are facing an ethical or legal dilemma, call and ask to speak to a medicolegal adviser, who will give you specific advice.

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