

Confidentiality – disclosures without consent

MPS



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Certain circumstances can mean you are obliged to disclose information about a patient, even if you do not have their consent. You may also be asked to provide information from the medical records of patients who are incapable of giving consent; have died; or who are aged under 16. This factsheet gives you further information about these circumstances.

An obligation to disclose

Under certain circumstances, the disclosure of medical information is required by law. In these situations, consent from the patient is not required. You should not disclose any more information than is absolutely necessary. The patient should be made aware of the disclosure, and informed about why you are disclosing the information, unless it is not practicable to do so; for example, if the patient cannot be contacted quickly enough, or if informing the patient would defeat the purpose of the disclosure. It is important to fully document any decisions about the information you disclose.

Disclosures to third parties

Usually, you should obtain a patient's consent before disclosing confidential information to a third party. Before making a disclosure without consent, you must consider the arguments for and against it – and be prepared to justify the decision. It is advisable to document your thought process and the conclusion reached. The Bahamas Medical Council says: "It is the doctor's duty to make every reasonable effort to persuade the patient to allow information to be given."

Coroners' investigations

In certain circumstances, the coroner is required to investigate the circumstances of a death – for example, if a person dies suddenly, by accident or violence, or under suspicious circumstances. You are obliged to disclose any information you may hold about the deceased that is likely to be relevant to the investigation.

Courts or litigation

Both civil and criminal courts have powers to order the disclosure of information in various circumstances. A judge can require you to disclose patient information. You should highlight the lack of patient consent and should object to the judge if attempts are made to compel you to disclose what appear to you to be

irrelevant matters, eg, matters relating to relatives or partners of the patient who are not party to the proceedings. The patient whose information is sought should be told about the order, unless that is not practicable or would undermine the purpose for which disclosure is sought.

Justifiable disclosures in the public interest

The disclosure of information about a patient without their express consent may be justifiable, if the public interest in disclosing the information outweighs the patient's interests in keeping it confidential.

In all cases, you must decide whether or not the possible harm caused to the patient – and the overall trust between doctors and patients – by disclosing this information will outweigh the benefits resulting from the disclosure.

- You should attempt to seek the patient's consent, but there are certain circumstances when this will neither be possible nor advisable. These include:
 - The patient is not competent to give consent. You should consult the patient's welfare attorney, a court-appointed deputy, a guardian, or the patient's relatives, friends or carers.
 - You believe seeking consent would put you or others at risk of serious harm.
 - Seeking consent is likely to undermine the reason for the disclosure – for example, if it prejudices the prevention or detection of serious crime.
 - When action needs to be taken quickly, such as during an outbreak of a communicable disease and there is no time to contact the patient.

It is important to document any decision you make and your reasons for disclosing the information.

Disclosure to protect the patient or others from harm

If it has not been possible to seek the patient's consent, you may disclose personal information without consent if the benefits to an individual or to society of the disclosure outweigh both the public and patient's interest in keeping the information confidential. If the patient has refused consent to the disclosure, you should consider any reasons provided by the patient. If you still consider that disclosure is necessary to protect a third party from death or serious harm, you should disclose information promptly to the appropriate person or authority.

The ultimate decision about whether or not a disclosure was made in the public interest is determined by the courts. Whether you do or don't disclose the information, you need to ensure that your reasons are clearly documented.

Communicable diseases

If a patient refuses to allow you to inform someone outside the healthcare team of their infection status, you must respect their wishes unless you consider that failure to disclose the information will put healthcare workers or other individuals at risk of infection. You should pass information about serious communicable diseases to the relevant authorities for communicable disease control and surveillance, using anonymised information if practicable.

Children and young people with capacity

Many young people have the capacity to consent to the disclosure of their medical records. If the child or young person (under 16 years of age) is able to understand the purposes and consequences of disclosure they can consent or refuse consent to the disclosure. You should discuss disclosing the information with them and release it only with the child or young person's consent.

If a child or young person under 16 refuses consent, you should nevertheless disclose the information if this is necessary to protect the child, young person or someone else from serious harm, or if disclosure is justifiable in the public interest.

Children and young people without capacity

If the child or young person lacks the capacity to consent to the disclosure of information, those with parental responsibility can consent on their behalf. The consent of only one person with parental responsibility is

needed for consent for disclosure. If you do not believe that the decision made by those with parental responsibility is in the best interests of the child or young person, and the disagreement cannot be resolved with discussion and mutual agreement, it may be necessary to seek the view of the courts.

Adults lacking capacity

The overriding principle is that the disclosure of confidential information is made in the best interests of the person lacking capacity. This may involve releasing information about their condition – for example, to their carer, to ensure they receive the best treatment.

Further information

- Caribbean Association of Medical Councils – www.camcweb.org
- Medical Council of Jamaica, *Ethical Care* – www.jamaicamedicalcouncil.org/
- Bahamas Medical Council, *Standards of Professional Conduct in the Practice of Medicine* – www.bahamas.gov.bs/
- Guyana Medical Council, *Code of Conduct and Standards of Practice* – www.medicalcouncil.org.gy
- St Vincent and the Grenadines Medical Association, *Code of Ethical Conduct* – www.svgmeda.com
- Medical Council of Trinidad and Tobago – www.mbt.org/
- The Cayman Islands Medical and Dental Council, *Code of Ethics and Standards of Practice* – www.dhrs.gov.ky/portal/page/portal/hrshome/hpc/hpcfirms

For medicolegal advice please call our:

24-hour helpline on +44 113 243 6436

or email us at: medical.wi@mps.org.uk

www.medicalprotection.org

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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