

Privacy and the Law

Part One

Introduction

The 1997 decision of the Medical Practitioners' Disciplinary Committee regarding the extent of the medical practitioner's duty to her or his patient to protect the patient's confidence has caused concern amongst general practitioners. The New Zealand Medical Association takes this opportunity to briefly explore the law concerning the disclosure of patient health information and the medical professional's duty of confidentiality. This is the first part of a two-part article. The legal provisions pertaining to privacy of health information are extensive, and we have referred only to the major provisions for the sake of brevity.

1. The Health Act 1956

The Health Act contains several important provisions concerning the disclosure of health information.

Section 22C **permits** disclosure of health information if the disclosure is permitted under The Health Information Privacy Code (The Code) or the disclosure is to the persons listed (includes a social worker, an employee of the Department of Social Welfare, the Police, the Ministry of Health, the Regional Health Authority and others) for the specific purposes list. It is important to note however, that disclosure under this section is **discretionary** only and not mandatory.

Section 22F **requires** every medical professional to disclose health information at the request of the individual concerned or their representative or at the request of another health and disability provider that is or will be providing health services. This requirement to disclose is **mandatory** unless:

- The medical professional has a lawful excuse for not disclosing (the fact that payment is due to the medical professional does not constitute a lawful excuse); or
- the request is by someone other than the individual and the medical professional has reasonable grounds for believing the individual does not wish the information to be disclosed. This excuse does not extend to requests for information by the parent or guardian of a child under 16 years or the representative of a deceased individual; or
- the refusal is authorised under the Health Information Privacy Code 1994.

2. Health Information Privacy Code 1994

The Health Information Privacy Code 1994 came into force on 30 July 1994.

The Code applies to health information about identifiable individuals held by medical professionals (including billing information). The most referred to sections are those concerning access (rule 6) and disclosure (rule 11).

RULE 6 entitles an individual to have access to health information. There is no express right for parents to have access to their children's medical files as the right is granted to the individual concerned personally. However, medical professionals should bear in mind section 22F Health Act (above) and Rule 11 (2)(b) of The Code.

The medical professional **may refuse to disclose** information for the reasons listed which include:

- The disclosure would be contrary to the individual's interests; or
- the medical professional has reasonable grounds for believing the individual would not wish information to be disclosed; or
- the disclosure would involve the unwarranted disclosure of the affairs of another individual; or
- in the case of an individual under the age of 16 years, the disclosure of that information would be contrary to their interests.

RULE 11 states that a medical professional **must not disclose** health information unless

- the disclosure is to the individual concerned or is authorised by them, or the disclosure is to a representative of a deceased or incapacitated individual or is authorised by them; or

The disclosure of health information may be **refused** for the reasons set out above under Rule 6.

Authorisation is not necessary if it is not desirable or practicable, and

- The disclosure is by a medical professional or nurse to a nominated person, or the principal caregiver, or a near relative, and is disclosed in accordance with recognised professional practice, and the individual or their representative has not expressly vetoed this disclosure;
- the disclosure is necessary to prevent or lessen a serious and imminent threat to public health or safety or the life or health of an individual (this will be explored in the second part of this article);
- the disclosure is by a medical professional or nurse to a Medical Officer of Health for the purposes of section 20 of the Misuse of Drugs Act 1975 or section 49A of the Medicines Act 1981 concerning drug seekers;
- the disclosure is authorised by the Commissioner.

Rule 11 does not **oblige** a medical professional to disclose information.

Just because an exception to Rule 11 may be apparent, the medical professional may still decide **not** to disclose. It must be remembered that the medical professional still has the duty of confidentiality and the duty to comply with the Code of Health and Disability Services Consumers' Rights which impose stricter limits on disclosure than The Code.

3. The Code of Health and Disability Services Consumers' Rights

This Code of Patient Rights came into force on 1 July 1996. Right 1 provides that patients have the right to have their privacy respected. Breaches of this Code can result in fines up to \$200,000 and other harsh penalties.

4. The duty of confidentiality

Every medical professional is to 'Protect the patient's secrets even after his or her death' (NZMA Code of Ethics). This duty of confidentiality may only be broken when the medical professional has either the permission of the patient, or when the law requires otherwise.

Penalties for not complying with this principle include removal from the medical register. Other penalties under the Medical Practitioners Act 1995 include suspension, conditional registration, fines up to \$20,000, and costs.

For an action for breach of confidence in common law to be successful the complainant, or the disciplinary body, must prove that:

- The information communicated had the necessary quality of confidence about it;
- there was an obligation of confidence attached to that information and no circumstances existed which negated this and
- there must be an unauthorised use of the information to the detriment of the party who initially communicated it.

5. Statutory duties to disclose health information

Numerous legislative provisions exist in New Zealand that stipulate when and how personal health information must be disclosed by a medical professional. Some provisions require the notification of health information, or the supply of health information on request, others merely permit the disclosure of health information but do not require its disclosure.

Summary

The requirements on medical professionals to respect patient privacy and confidentiality under the various legislation and ethical and common law doctrines present a very real and practical dilemma for medical professionals. Even if the Health or Privacy Act permits disclosure, the medical professional may in doing so breach his or her ethical or common law duty of confidentiality and the Code of Health and Disability Services Consumers' Rights. The extent of such breaches and the practical difficulties experienced by medical professionals in complying with the law will be examined further in the second part to this article.

Privacy and the Law

Part Two

Introduction

The Privacy Act, the Health Act, and the Code of Health and Disability Services Consumers' Rights do not regulate all aspects of patient confidentiality. The general duty to maintain patient confidentiality is broader than the scope of the statutes. This is not always appreciated by medical professionals as many believe that they are obliged to disclose information when a request complies with Rule 11 of the Health Information Privacy Code or section 22C of the Health Act. This is a misconception, as Rule 11 and section 22C merely give the medical professional a **discretion** in certain circumstances to disclose patient information - they **do not impose a duty** which applies only in certain circumstances which are for the most part prescribed in section 22F of the Health Act.

In this article, we will briefly explore some of the practical implications that exist for medical professionals when considering disclosure of patient health information.

1. Police enquiries

Section 22C of the Health Act **permits** disclosure of health information to a police officer for the purposes of exercising or performing their official duties. However, a medical professional who **elects** to disclose such information must ensure that the disclosure does not breach their duty of confidentiality to their patient - an example of this is the recent MPDT firearms licence case. Briefly, the facts of that case and the MPDT's decision are set out below:

The MPDT firearms case: The police sent the medical professional a request enquiring as to whether in the medical professional's opinion the man was a suitable person to possess or be in control of a firearm. The medical professional immediately responded to the request by letter indicating that in his opinion his patient was not a suitable candidate. He then discussed the matter with a colleague who concurred with his actions. The patient discovered by chance that his medical professional had taken this action, and in response to the patient's request the medical professional then wrote to the police requesting that the withdrawal of the firearm licence be temporary until his patient had attended an anger management course.

The MPDT found the medical professional guilty of 'conduct unbecoming a practitioner' for disclosing to the police information about his patient without first discussing the concerns he had with his patient. The MPDT held that this was **not** a case where there was a sincere belief of imminent and serious danger either to an individual or to the community at large, so as to override the need to discuss disclosure with the patient. There was no other form of discipline taken against the medical practitioner - he was neither censured nor fined.

Thus the MPDT has upheld that the medical practitioner's duty of confidentiality is the first and foremost consideration, and has stressed that any medical practitioner who considers breaching this duty should discuss any concerns they may have with the patient before they

take such action. However, this finding has been criticised by the NZ Police, who considered that this was an urgent enquiry and that they viewed communication by the medical professional to the patient of his intention to release information to them as a dangerous course of action.

It is probable that the following declaration, now present on the new firearms licence form, was not part of the licence form at the time of this particular incident. The clause states:

'I consent to the police making enquiries into my fitness to possess or own a firearm and authorise any person approached by the police in this matter to release or disclose all relevant information.'

It is our view that this declaration should provide sufficient defence for a medical professional to disclose his or her patient's health information, as the patient's consent negates the duty of confidentiality. Furthermore, the police are currently consulting (August 1999) with treatment providers regarding protocols for information sharing.

2. Access to health information by other health agencies

Section 22F of the Health Act **requires** every medical professional to disclose health information at the request of another health and disability provider that is or will be providing health services, unless they have a lawful excuse for refusing to do so or the refusal is authorised by the Health Information Privacy Code. The purpose of providing access to other health providers is so that health information is not used as a means of obstructing free competition between health providers. This means a medical professional who holds health information about a patient is required to give that information to say a specialist who is going to provide health services to the patient, unless the medical practitioner has a lawful excuse for refusing to disclose the information, or the refusal is authorised by the Health Information Privacy Code, or the medical practitioner believes that the patient does not want the information disclosed to that specialist.

3. Requests by parents for health information about their children

Section 22F **requires** every medical professional to disclose health information to a representative of an individual. The term 'representative' is defined as the personal representative of a deceased person, the parent or guardian of a child under the age of 16, and the person appearing to be lawfully acting on the individual's behalf or interest (if they are unable to give consent).

Clearly the aim of section 22F is to enable a parent of a child under the age of 16 or the personal representative of a deceased person to access health information. However, the medical professional may **refuse** to disclose information for the reasons listed under rule 11 of the Health Information Privacy Code which include:

- The disclosure would be contrary to the individual's interest; or
- the medical professional has reasonable grounds for believing the individual would not wish the information to be disclosed ; or
- the disclosure would involve the unwarranted disclosure of the affairs of another individual ; or

- in the case of an individual under the age of 16 years, the disclosure of that information would be contrary to their interests.

These grounds for refusing access to health information will permit a medical professional to say no to parental access to child notes if they are suspected of abusing their children, or perhaps in situations where a teenager clearly seeks confidential advice from their medical professional. If in doubt - we suggest that the medical professional discuss with the child to determine their position regarding disclosure to their parents.

4. Disclosure to caregivers of mentally ill patients

Mentally ill patients, like all other patients, are entitled to confidentiality and the protection of privacy laws. If they do not wish their families to receive information, then that wish needs to be respected, subject to some limited exceptions. The exception being that it is not desirable or practical to obtain patient consent or if the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned. Commentators in this area suggest that the refusal to disclose information concerning mentally ill patients is often because patient consent has not been sought or that if it has been sought and refused, no attempt has been made to explain to the patient that disclosure would be in their interests.

Whilst the Health Act and the Health Information Privacy Code provide a number of grounds for giving family members access to the health information of a mentally ill person, these grounds may not be sufficient for those family members who wish to receive more information than the patient wishes them to have. In this situation, patient autonomy in respect for the patient's wishes prevails in law over the demands of family members.

Summary

Medical professionals can be excused from fully understanding the privacy laws. Disclosure of and access to health information is far from straightforward. The law is incredibly complex mainly due to the existence of too many statutes, and the coexistence of the duty of confidentiality which is often forgotten when the permissive provisions of the Health Information Privacy Code are viewed in isolation. The NZMA is more than pleased to provide assistance to medical professionals on any aspect of health information.

Need more help?

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