

CONFIDENTIALITY

HONG KONG



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1.0 INTRODUCTION

One of the fundamental principles of dental ethics is that all information which passes between a dentist and patient in the course of a professional relationship is secret. This may seem quite a straightforward principle to adopt, however, it can sometimes bring members of the dental team into conflict with others such as police, solicitors, the IRD and other dental practitioners, for example, who may request access to such confidential information.

It is a dentist's duty to observe the rules of professional secrecy by refraining from disclosing voluntarily, to any third party, any information which has been learned directly or indirectly during the course of his/her professional relationship with the patient. This obligation extends to all members of staff and it is, therefore, wise to include a clause in contracts of employment to reinforce this point.

1.1 THE DENTAL COUNCIL OF HONG KONG (DCHK)

The DCHK sets out its guidance on confidentiality in its Code of Conduct:

Record keeping

Dental practitioners should keep accurate and contemporaneous records of dental treatment and should keep them for a minimum of three years since the patient's last treatment. It is the responsibility of the dental practitioner to safely maintain these records against loss and to safeguard their confidentiality.

Abuse of professional confidence

Disciplinary proceedings may be taken where it is alleged that a dental practitioner has improperly or carelessly disclosed information which he has obtained in confidence from or about a patient.

A breach of a patient's confidentiality, contrary to the DCHK's Code, could result in a dentist being found guilty of professional misconduct, leaving them vulnerable to action being taken on their registration.

1.2 THE PERSONAL DATA PRIVACY ORDINANCE (PDPO)

Dentists are also classed as data users under the PDPO, as they hold data from which patients can be identified. Dentists are therefore required to abide by the Data Protection Principles, which include:

Principle 3 – Use of Personal Data

(1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.

Principle 4 – Security of Personal Data

(1) All practicable steps shall be taken to ensure that personal data [...] held by a data user are protected against unauthorized or accidental access.

A breach of these (or any other) data protection principles could render a dentist vulnerable to prosecution by the Privacy Commissioner for Personal Data, who has the power to issue substantial fines.

Section 64 of the PDPO also creates a criminal offence of breaching confidentiality where it is done with intent to gain money/property, intent to cause loss of money or property, or where the breach causes psychological harm. There are, however, a number of defences available which include disclosures required by law, and disclosures for the prevention or detection of crime.

2.0 CAN CONFIDENTIALITY EVER BE BREACHED?

There are exceptions to the rule of confidentiality and there are situations where such a breach can be justified. A decision to breach a patient's confidentiality should never be taken lightly and practitioners are advised to seek the advice of our dentolegal advisers if in doubt about the circumstances.

2.1 CONSENT

The rule of thumb in confidentiality is that the secrets belong to the patient, not the dentist. It is therefore permissible for a practitioner to disclose information to a third party if the patient's consent has been obtained.

There are a number of common situations where patients give consent to disclosure. One such example is an approach from an insurance company with whom the patient has made a claim. The insurance company may approach the dentist for information to assist the company in dealing with the patient's claim. Included with such a request will often be a signed authority from the patient, consenting to the release of such information, however, if a dentist is in any doubt about the patient's consent then the simplest way of establishing the validity of the request is to contact the patient for confirmation, seeking written consent for release of the records requested.

Many practitioners receive a request for release of dental records from solicitors acting on behalf of patients who may be contemplating making a claim of negligence against the practitioner or indeed another practitioner. Dentists receiving such a request should immediately contact Dental Protection and should certainly not release such information without a signed authority from the patient. It is important to appreciate that patients do, of course, have a right of access to their own dental records under the PDPO. Further information on disclosure of dental records is available in our information pack on clinical records.

In the past and in the interests of the effective transfer of information between practices, original radiographs and copies of records were passed back and forth often at the request of a receptionist. Any request for records made by a professional colleague in another practice must be supported by a written authority from the patient. It is easy to ask a patient who wishes their records to be passed to a new practice, to write to their former practice inviting that practice to forward copies of the records either to the patient themselves or directly to the new practice.

It follows that where a referral is made to a colleague, specialist or hospital department, involving the release of the confidential medical and dental history (including the contact details of the patient), then consent for that referral must be obtained from the patient or their legal guardian in the case of a child.

2.2 PUBLISHING

Occasionally members of the dental team will be involved in the publication of professional newsletters or the creation of a practice website or they may have other documents in their waiting room such as a book containing letters of gratitude from patients and photographs of them before and after their treatment. It is necessary to seek the consent of any patient before including such information in a public document or website, as this information could make it easy to identify the patient.

Whilst a patient might want to tell you just how wonderful their new dentures are they may not wish the rest of the patients in the town to know! Similarly, if you are writing a booklet or something similar which includes a picture of a patient then you should ensure that you have the consent of the patient to their picture being included. If you are submitting a paper or an article to a professional journal, you will be expected to produce copies of a written consent from the patient authorising you to use, for example clinical photographs and radiographs where the identity of the patient is discernable. The commercial dental press may not always check that a signed consent exists, however it is the author and not the publisher who has the professional duty to maintain patient confidentiality.

2.3 STATUTORY DUTY

Statutory obligations create an exception or modification to the obligation of confidentiality in specific circumstances. Fortunately there are few situations where a dentist is statutorily bound to disclose information about a patient – unlike our medical counterparts who are bound to disclose certain information in a wide variety of situations. However, for example, section 52(6) of the Dangerous Drugs Ordinance empowers a public officer to search a hospital and compel the production of documentation.

If such a request is received and it is necessary to release patient information:

- get the patient's consent to do so wherever possible – ideally in writing;
- make sure that you only release the minimum information necessary for the purpose; and
- be prepared to justify your decisions and any action you take.

In this way you can ensure that you keep the amount of information supplied to the minimum needed to comply with any statutory duty.

2.4 INFORMATION TO RELATIVES

Children

A dentist may disclose information about a child to a parent as long as the parent is the legal guardian. This is not a problem when the family is living as a unit, but problems can arise when a child's parents are not living together. It is not uncommon for an estranged parent to seek information from a dentist to assist them in criticising the other parent. One such situation which occurs commonly is where a young child develops a high caries rate. The estranged parent on occasion may try to use the existence of a high caries rate as proof that the other parent is unfit and can seek the dental records to help them in this respect. A dentist has no right, of course, to release such information unless proper authority is obtained and any practitioner that is placed in such a dilemma should seek the advice of Dental Protection.

The incapacitated patient

On occasion a patient, perhaps gravely ill, may be brought for dental treatment by a relative, nursing home matron etc. In such circumstances you may discuss the patient's treatment with the accompanying person if that discussion is in the patient's best interests. Staff, however, should be wary of providing information on the telephone where they may be overheard by a third party or when they cannot be confident of the identity of the person they are speaking to.

Problems can arise, for example, where a practitioner is pursuing a debt and has a member of their staff telephone the patient's home seeking payment. It is not unusual in such situations for the debtor to turn into an aggrieved party and suggest that their confidentiality has been breached by the practice informing

someone else in the household about their outstanding debt. Care should be taken in such situations possibly by reverting to the use of recorded delivery post marked "Strictly Private & Confidential" to ensure that the appropriate person receives the request for payment. Similarly, dentists and their staff should be careful about discussing treatment with other members of the patient's family without the consent of the patient.

Partners

Some clinicians invite husbands/wives/civil partners or other related couples who arrive together to come into the surgery together. This should only be done with the consent of the patient concerned, who may not wish their oral health to be discussed in front of their partner.

2.5 INLAND REVENUE DEPARTMENT (IRD)

When carrying out an in-depth investigation of a practitioner's business and financial affairs, it is common for the IRD to request patients' record cards, copies of the patient listings from NHS schedules, receipt books etc in order to confirm the accuracy of the information submitted in that practitioner's tax return.

The IRD may make an application under section 51(4)(a) of the Inland Revenue Ordinance.

Dental Protection's advice on the issue of potential breach of confidentiality is:

- Advice should be taken on each and every instance where such records are sought.
- Where records are sought the IRD should be asked to issue a formal notice under section 51(4)(a) of the Inland Revenue Ordinance. The notice should also include a reference to the Personal Data (Privacy) Ordinance.
- Notwithstanding the above, Dental Protection advises members that as a matter of good practice, all financial records should be kept separately from clinical details. If financial records are held within the same clinical notes, then they should be on a separate sheet that contains no clinical details whatsoever.
- Computerised records are generally structured in such a way as to achieve an effective separation between clinical, personal and financial records.

If records are to be disclosed then the minimum records necessary for the purpose of satisfying the Order issued by the IRD should be disclosed. Where possible this should be in the presence of the practitioner and clinical details should be concealed in an appropriate manner.

2.6 SCHOOLS AND EMPLOYERS

Where children are absent from school, or employees from their place of work, claiming as an explanation a visit to the dentist, there may from time to time be a request for the dentist or staff to confirm to a third party whether or not a certain patient has attended the practice at a given time and/or on a given day. The patient's consent should always be obtained – preferably in writing – before disclosing any such information.

2.7 IDENTIFICATION OF MISSING OR DECEASED PERSONS

Practitioners sometimes receive a request for records or other information either from the Coroner, the relatives or the police in connection with the identification of a deceased person. A breach of confidentiality in such situations can often be justified in order to minimise the distress caused to relatives at such an unfortunate time. In general, the Coroner asks for records in order to confirm the identity of a body where it is not possible for the relatives to confirm the identity. Therefore a request from the Coroner should be treated sympathetically and efficiently. The Coroner's representative will be able to produce information confirming his or her possible identity.

The position is less straightforward where a person has been reported as missing. Whilst the person is thought to be alive, no-one may give consent for their records to be released, even in anticipation that a body will be found imminently. However, there may be circumstances where the fact that a patient was known to be at the practice premises at a particular time would be of great assistance to the police in establishing the chronology of the patient's movements. If there is any doubt about how to approach a request from the Police or relatives in a missing person case, please contact Dental Protection in order to discuss the specific circumstances of the case before agreeing to breach the missing person's confidentiality.

2.8 RESEARCH

It is ethical to disclose information for the purposes of a bonafide research project which has been approved by a recognised ethics committee. Practitioners receiving a request for such information should assure themselves as to the validity of the research project and, if necessary, should withhold the release of confidential information until such time as they have established the validity of the research project.

2.9 PUBLIC INTEREST

Section 64(4)(a) of the PDPO provides a defence for those who *"reasonably believe that the disclosure was necessary for the purpose of preventing or detecting crime."*

Emphasis should be placed on the word necessary in this defence. Dentists should therefore not automatically disclose confidential information merely because a police officer has requested it. Dentists should attempt to seek the patient's consent unless it is necessary to provide the information without consent (for example because of time pressure).

Dentists facing such dilemmas should contact Dental Protection to discuss the matter fully with a dentolegal adviser. However, in the final analysis, the individual practitioner alone must resolve the dilemma and act according to a combination of what is believed to be in the patient's best interests and the dictates of the practitioner's ethical conscience.

2.10 COURT ORDER

While confidential information is not privileged from disclosure in Hong Kong, a request from a lawyer or court official is, in itself, not sufficient to allow the disclosure of information.

The provisions of the Police Force Ordinance allow a judge to make an order obliging the practitioner to release the information. Failure to comply with a court order would place the practitioner in contempt of court.

It is not unusual for the police to call, unexpectedly, at a practice seeking information to assist them in their investigations of a crime. Staff should be warned to be careful not to release information without first ensuring that they have proper authority to do so. Often the crime is of a minor nature and in such circumstances it may be difficult to argue that public interest outweighed the duty of confidentiality to the patient. In addition, the police should be aware of the relevant sections of the Police Force Ordinance and should be advised that they need to go through the appropriate channels in order to obtain confidential information.

2.11 COLLEAGUES

Dentists can, of course, share information with colleagues who are directly involved in the patient's treatment. There will be occasions, however, where a patient's medical practitioner might decline to release information to a dentist which, in his or her view, is confidential. While this can be frustrating, the doctor is acting in what he believes to be the proper ethical manner and the dentist may need to stress the reason for the enquiry, making it clear how and why the disclosure of the information is in the patient's best interest.

Whilst it might be appropriate for concerns regarding possible child abuse, for example, to be discussed between doctors, dentists and social workers responsible for a child's care and welfare, different considerations might be said to apply where the matter at risk is suspected anorexia in a teenager who presents with dental erosion. A dentist who has the patient's best interests in mind may be extremely annoyed and frustrated if a medical general practitioner will not disclose sensitive personal information held in confidence between him/her and the patient.

As a matter of courtesy, a dental practitioner might suggest to a patient, that s/he would like to discuss some aspect of the medical history, for example, with the patient's doctor or hospital consultant. A note of this discussion (and agreement) should be made in the patient's records. If, however, the patient makes it clear that s/he does not want the dentist to approach the medical general practitioner or hospital, then the patient's wishes should be respected and again this fact should be noted within the records.

3.0 OTHER CONSIDERATIONS

3.1 PRIVACY

The physical arrangements of a dental working environment should be such as to prevent the unintended sharing of sensitive personal information with third parties.

Many orthodontic practices are designed with more than one dental chair in close proximity and/or in clear sight or hearing of other patients and third parties.

Overheard conversations which refer to a patient, and computer screens that are visible to any party who has no right or reason to have access to the information they display, are examples that have caused problems in the past.

3.2 MAILING HOUSES

Practices may wish to send a practice newsletter or other information to patients of the practice. But problems have arisen where a patient's current address has thereby been disclosed to a former partner after their relationship has ended less than amicably.

3.3 REMINDER CARDS

Any information showing a patient's name and address, and the date and time of an appointment, should be sent in a sealed envelope to preserve the confidentiality of this information.

3.4 DISPOSAL OF RECORDS

Great care needs to be taken in the disposal of old paper records. Under no circumstances should they ever be disposed of as normal waste, and secure shredding and incineration is the only safe way to destroy old records that are no longer required.

3.5 USE OF IMAGES

The advent of intra-oral cameras and digital photography has greatly simplified the process of including photographs in the clinical records. It is important to understand, however, that any such images are an integral part of the patient's records even if they were taken for other purposes (such as lecturing, research, etc.). Consequently, the normal principles of confidentiality still apply.

It is popularly believed that some kind of 'masking' of the patient's face or features will be sufficient to establish confidentiality if, as a result, it would be difficult or impossible to establish the patient's identity. This may make it less likely that an objection will be raised, but it does not change the underlying ethical principle that no one has the right to use that image of the patient for any purpose without their consent.

4.0 SUMMARY

- Confidentiality is a fundamental part of our professional ethics and every dental registrant has a duty to observe DCHK's Code of Conduct and the provisions of the PDPO.
- The patient's secrets can only be divulged with the patient's consent except in exceptional circumstances as outlined above.
- The decision to breach confidentiality must never be taken lightly, nor should it ever be made by a member of staff. A dentist is responsible in this respect for all the acts and omissions of staff members and great care should be taken to ensure that all members of staff are aware of the importance of confidentiality.
- When a decision is taken to breach a patient's confidentiality then there must be sound reasons for doing so. In this way the practitioner can help to protect himself/herself against action which might be taken as a result of the breach.
- It is wise when facing such a decision to seek advice and in particular the advice of Dental Protection. Our dentolegal advisers are always pleased to be able to offer advice and to discuss the particular circumstances of each individual case.

How to contact us

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