

CONFIDENTIALITY

MALAYSIA



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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, child protection officers, solicitors, the Customs and Inland Revenue authorities, 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 MALAYSIAN DENTAL COUNCIL

The Malaysian Dental Council's written guidance does not specifically refer to the duty of confidentiality and exceptions to it. However, the duty of confidentiality is recognised by statute as shown by illustration (i) to section 52 and illustration (f) to section 53 of the Specific Relief Act 1950.

Regulation 29(2)(b) of the Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006 casts a duty on dental practitioners to guard against "loss, tampering or use by unauthorised persons" of clinical information.

There is corresponding provision for private hospitals, which is regulation 43(2)(b) of the Private Healthcare and Services (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006.

There is no corresponding statutory provision for public sector healthcare establishments.

A breach of a patient's confidentiality guidance could result in finding of infamous conduct in a professional respect leaving them vulnerable punishment being imposed on them, including removal from the register of dental practitioners, suspension from the register, or a reprimand.

By regulation 29(3) of the Private Clinics Regulations and regulation 43(5) of the Private Hospital's Regulations, a breach of the duty of confidentiality, in so far as allowing the use of the patients' medical records by unauthorised persons, amounts to an offence punishable by a fine not exceeding ten thousand ringgit and/or imprisonment for a term not exceeding three months.

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, insofar as private dental practitioners are concerned under the Private Healthcare Facilities and Services Act 1998 and Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006 the Access to Health Records Act 1990 and the Data Protection Act 2010. Under the Data Protection Act, "personal data" means any information in respect of commercial transactions..." The term "commercial transactions" is not defined in the Act. 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 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, there are provisions in the Criminal Procedure Code which obliges a dentist to give information to the police if they are acting in the course of investigations under the Code.

Under section 10(1) of Prevention and Control of Notifiable Diseases Act 1998, a dentist (and “every person”) would be under a statutory duty to report to the health authorities a case of a notifiable disease for example.

A further example of a statutory requirement is the obligation of a dentist to provide dental records on request to the Director General of Healthcare or an officer authorised by him under the Private Healthcare Facilities and Services Act 1998 and the Regulations made thereunder.

Under the incident reporting provisions of the Private Clinics Regulations (regulation 12(4)) and the Private Hospitals Regulations (regulation 19(4)), the Director General of Health may request “further information” in regard to a reported incident from the private clinic or hospital in question. The term “further information” is not explained!

Similar provisions are in place in regard to grievance procedures under the Private Clinics Regulations (regulation 27(4)) and the Private Hospitals Regulations (regulation 40(6)). Under the said provisions, the Director General of Health “shall investigate or cause to be investigated” any complaint under the relevant grievance procedures which is referred to the Director General.

Even though these might be considered exceptional circumstances it is worth remembering the advice contained in the MDC’s Code of Professional Conduct that would normally apply.

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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 criticizing 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 THE INLAND REVENUE AND THE CUSTOMS

When carrying out an in-depth investigation of a practitioner's business and financial affairs, it is common for the Inland Revenue and the Customs to request patients' record cards, bills, receipt books etc in order to confirm the accuracy of the information submitted in that practitioner's tax return.

The Inland Revenue have very wide powers under the Income Tax CT 1967 (including by sections 78, 80 and 81) thereof) to require any person to produce for examination all books, accounts, returns and other documents which the Director General of Inland Revenue deems necessary. The Inland Revenue also have wide powers of access to and search of buildings and to inspect, copy or make extracts from "books", "documents", "things", etc. The Inland Revenue also have the power to order to call for "such information or particulars and may be demanded".

The Goods and Services Tax Act 2014 has a generally-worded section 165 which requires "every person" to give "information about any matter into which it is the duty of an officer of goods and services tax to inquire and to give "information about any matter into which it is the duty of an officer of goods and services tax to inquire and to produce any "document", "thing", etc. to such officer.

Section 80 of the Act provides that a senior officer of goods and services tax shall have all the powers of a police officer under the Criminal Procedure Code in relation to enforcement, inspection and investigation.

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.
- 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 an order issued by the Inland Revenue and the Customs 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. There are wide provisions in the Criminal Procedure Code by which the police, when investigating a crime, alleged or otherwise, or a "sudden" or "suspicious" death may compel a dentist to answer questions subject to the right against exposure to a criminal charge, penalty or forfeiture. 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

This is a contentious exception to the rule, but it is possible that a dentist could learn information of a serious nature about a patient. The dentist, whilst having a duty of confidentiality to the patient, also has a duty to society and this may, in certain circumstances, outweigh one's duty to the patient.

At the other end of the scale, the police might properly compel a dentist to confirm a patient's attendance at a given date or time, perhaps to corroborate an alibi given by the patient in connection with the investigation of a crime. In such cases the police officer is not required to obtain the patient's written consent to the disclosure of this information, disclosure of this information.

Alternatively, the police may seek an order from the courts, compelling the practitioner to release information. In these circumstances the court would weigh up the individual patient's right to privacy against the interests of the public and reach a view which will be accepted by the MDC should the patient later complain about a breach of confidentiality.

Of special interest is section 116 of the Child Act 2001 by sub-sections (1) and (2) of which informers are protected. The sub-sections state as follows:-

- (1) Any person who gives information that a child is in need of protection shall not incur any liability for defamation or otherwise in respect of the giving of such information; and
- (2) The giving of any information that a child is in need of protection shall not, in any proceedings before any Court or in any other respect, be held to constitute –
 - (a) a breach of professional etiquette or ethics; or
 - (b) a departure from accepted standards of professional conduct.

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 law and the practitioner's ethical conscience.

2.10 COURT ORDER

While confidential information is not privileged from disclosure in Malaysia, a request from a lawyer is, in itself, not sufficient to allow the disclosure of information.

The Prevention of Terrorism (Temporary Provisions) Act 1974 – 1989 Section 518 and more commonly the Police and Criminal Evidence Act 1984 (PACE) 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 Criminal Procedure 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 practitioner has a duty to observe the rules of the profession, whether written or unwritten, in that regard.
- 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

DENTAL PROTECTION

33 Cavendish Square
London W1G 0PS
United Kingdom

Victoria House
2 Victoria Place
Leeds LS11 5AE, UK

39 George Street
Edinburgh EH2 2HN, UK

enquiries@dentalprotection.org
dentalprotection.org

Malaysia Dental Association
54-2 Medan Setia 2
Plaza Damansara
Bukit Damansara
50490 Kuala Lumpur
Malaysia

Tel: 03 2095 1532 or 03 2095 1495
Fax: 03 2094 4670

enquiries@dentalprotection.org
dentalprotection.org