

# CONFIDENTIALITY

IRELAND



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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 confidential. 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 members of An Garda Síochána, solicitors, the Office of the Revenue Commissioners 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 obtained 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.

Dentists should inform their patients what information the practice holds about them, the uses to which it will be put and the identity of any third parties with whom the information may be shared, and why.

## 1.1 THE DENTAL COUNCIL

The Dental Council's Code of Practice on Professional Behaviour and Dental Ethics provides some guidance on a dentist's duty of confidentiality (paragraph 15):

"Professional confidentiality should be observed and this obligation extends to the dentist's staff. Disclosure of information relating to a patient's attendance or treatment may only be given with the patient's consent except in the following circumstances:

- i. when required by law;
- ii. when directed by a Court of law;
- iii. when necessary to protect the interests of the patient or the welfare of society."

A breach of a patient's confidentiality, contrary to this Code of Practice could result in a dentist's fitness to practise being found impaired, leaving them vulnerable to action being taken on their registration. It also leaves the dentist vulnerable to action by the patient, whether by way of complaint to the Data Protection Commissioner or through the Courts.

## 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 *Data Protection Act 1998 and 2003* (subject to certain limitations). 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 "Mrs Bloggs" might want to tell you just how wonderful her new dentures are she 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

If you find yourself presented with a statutory provision that directs or permits disclosure of patient information (and such provisions are rare) you should bear in mind the following principles:

- 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 insure that you keep the amount of information supplied to the minimum needed to comply with any statutory duty.

If you are in doubt as to whether the statutory duty to disclose applies to you in the circumstances, it is advisable to contact Dental Protection for guidance.

## 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. Obtaining the patient's consent is the optimum approach and attempts should be made to do so before any disclosure is made. However, there may be cases where the patient is incapable of giving a valid consent and in those cases, disclosure may be justified on the basis that it was necessary to protect the patient's best interests; in order to ensure that s/he is provided with the appropriate and necessary care.

Staff 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 OFFICE OF THE REVENUE COMMISSIONERS

The Dental Council's Ethical Guidance states that disclosure of information relating to a patient's attendance or treatment may only be given with the patient's consent, except when required by law. *The Data Protection Act*, also states that the restrictions on disclosure of personal data do not apply in a number of circumstances, including disclosure that is necessary for assessing or collecting any tax.

There are a number of provisions under Irish law which may require practitioners to grant access to the Revenue to documentation, including medical records. Not all the provisions are precisely clear as to the extent of the obligation.

Under sections 900 and 905 of the *Tax Consolidation Act, 1997* (as amended), a person shall allow a Revenue official entry into any premises and provide books of accounts and other requested documentation for inspection. The Act does, however, state that is

shall not be construed as requiring a person (a practitioner in this instance) to disclose information of a confidential medical nature.

Under Section 18 of the *Value Added Tax Act, 1972* an authorised officer of the Revenue may enter a business premises and seek the production of, search for and inspect any books, invoices or other documentation relating to services provided. Similarly, Chapter 4 of the *Tax Consolidation Act, 1997* gives the Revenue Commissioners broad powers to access books or papers relating to the payment of tax. In this specific provision there is no specified exemption as to the disclosure of medical records.

Dental Protection's advice therefore 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 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.

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

From time to time dental practices are contacted by telephone by local tax offices looking for confirmation as to whether or not a patient has undergone certain treatment despite the fact that the dentist in question has already signed the requisite form to enable the patient to reclaim the cost of treatment. The basis for such requests is unclear and the practitioner has no way of verifying the identity of the caller. The calls may even be to receptionists who are being asked to provide this information. In these circumstances, practitioners are advised to contact Dental Protection for advice and should ask for the request to be made in writing, confirming the authority on which the request is being made.

## 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 AND AUDIT

If you intend to use patient information for the purpose of your own internal clinical audit or for your own research, you can do so without the patient's consent, however it is advisable to advise patients that you intend to use their information for this purpose. If the research is external in nature ie. it entails the disclosure of patient information to third parties, then disclosure can only be done with the patient's express consent or if the information has been fully anonymised to the extent that it is not possible to identify the patient. Even if it is not possible to identify the patient from the information being disclosed, the patient should be advised about the disclosure.

Where patient information is to be used for research, you should satisfy yourself that the project is *bona fide* and approved by a recognised ethics committee before any disclosure is made.

## 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.

The Dental Council's guidance states that disclosure of patient information could be made without the patient's consent "when necessary to protect the interests of the patient or the welfare of society."

From time to time, members of An Garda Síochána may ask you to divulge patient information. You should be aware, and you should make your staff aware, that patient information should not be disclosed to the Gardaí unless the patient has consented to the disclosure or unless the information is the subject of a court order and disclosure is required to comply with it.

In certain circumstances disclosure of patient information may be justifiable, other than with patient consent or by court order, if the public interest in disclosure outweighs the preservation of the patient's confidentiality.

For example, if a practitioner was contacted by the Gardaí following a report of attempted child abduction in the doorway leading to his or her waiting room and asked by the Gardaí to give details of all the patients who had visited the practice that morning it may be possible to argue that the serious nature of the incident merited the breach in confidentiality.

At the other end of the scale, the Gardaí might request 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 Garda should be asked to obtain the patient's written consent to the disclosure of this information, making it clear that you have no wish to impede the police enquiries, but have an obligation to respect the patient's confidentiality. Alternatively, the Gardaí 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 dentist should the patient later complain about a breach of confidentiality.

Every case turns on its facts and 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. The analysis and the reasons behind disclosure or non disclosure in any case should be fully recorded by the dentist at the time.

## 2.10 COURT ORDER

While confidential information is not privileged from disclosure in Ireland, a request from a lawyer or court official is, in itself, not sufficient to allow the disclosure of information unless it is accompanied by the patient's written consent or disclosure of the records in question has actually been ordered by a judge or tribunal.

If the records are the subject of a court order directing their release, a dentist is obliged to comply with the order. However, if you have concerns about compliance with the order, for example due to the impact disclosure is likely to have on the patient, or any other reason you should contact Dental Protection.

The patient should also be advised about the disclosure and the reasons why it is being made.

## 2.11 COLLEAGUES

Dentists can, of course, share information with colleagues who are directly involved in the patient's treatment but you should be aware of the Data Protection Commissioner's attitude, as expressed in Data Protection Rules in Practice for the medical and healthcare sector:

*"If you are passing the patient data to another healthcare professional for guidance and advice on clinical issues, the patient data should be kept anonymous. If you wish to pass on the full data, including identifying details, you will need the consent of the patient in advance, except in cases of urgent need."*

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.

Finally, access to patient records by your own staff should be on a "need to know" basis. For example, non clinical staff should not need to access details of treatment or clinical data as distinct from names and addresses.

## 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.

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## 4.0 SUMMARY

- Confidentiality is a fundamental part of our professional ethics and every dental registrant has a duty to observe the guidance issued by the Dental Council.
- 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.





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