

Guidance Notes – Confidentiality Obligations

This leaflet is aimed at persons with a duty of confidentiality, and provides information on all relevant provisions applicable at Charité. Part 1 of the leaflet describes general obligations in relation to maintaining corporate confidentiality, while Part 2 sets out obligations regarding the use of patient-related data.

Part 1

Corporate confidentiality

Scope of confidentiality obligations

These confidentiality obligations include a duty to refrain from disclosing confidential information to third parties without authorization, as well as a duty to prevent unauthorized persons from gaining access to documents, whether written, graphical or otherwise. In particular, confidentiality must be maintained when dealing with matters which are subject to confidentiality by law, through a collective agreement, as part of a service agreement, administrative regulations, or where a duty of confidentiality has been imposed by the employer.

This duty of confidentiality applies when dealing with persons not officially involved in the matter at Charité, and therefore includes other members of staff not involved in the confidential matter. In particular, this includes any persons not associated with Charité, family members, and representatives from the press, radio, and television. Persons authorized to provide information to representatives from the press, radio, and television receive this authorization through specific arrangements.

Special procedural law provisions apply in relation to the right to refuse testimony when giving evidence in court. A separate provision on the right to access to documents (24 Feb. 2010) sets out procedures for granting permission to testify in court (entity responsible for medical staff: Medical Directorate; for nursing staff: Nursing Directorate; others: Human Resources).

Duty of confidentiality after termination of contract

Obligations to maintain confidentiality persist beyond the term of the contract. The contracted individual's obligation to protect confidential information remains even after the termination of their contract.

Consequences of breaching confidentiality

A breach of confidentiality may constitute a criminal offense, and may result in prosecution. It may also result in disciplinary action being taken. A breach of confidentiality may also give rise to claims for compensation.

Part 2

Duty of confidentiality to patients

As part of your professional duties at Charité, you will be given access to medical records; these will need to be processed in accordance with your instructions and the duties with which you have been entrusted. You are bound by a professional duty of confidentiality under section 203 of the Criminal Code (§ 203 Strafgesetzbuch). Therefore, all persons employed at Charité will be bound by the following excerpt, which is taken from an information leaflet published by the Berlin Chamber of Physicians:

1. Legal framework

The physician's duty of confidentiality is regulated both under section 203 of the Criminal Code (§ 203 Strafgesetzbuch) and by the professional regulations of the State Chambers of Physicians (§ 9 BO). The legal duty of confidentiality also extends to auxiliary staff working alongside a physician, as well as persons working in the medical field as part of their professional training, such as physician assistants. Physicians are under a professional legal obligation to ensure these persons receive training regarding their duty of confidentiality, and to keep a written record of such training. Both private hospitals and private practices providing outpatient medical services are subject to the Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG), while public sector providers (such as university hospitals and municipal hospitals) are subject to state data protection legislation (in Berlin, this is the Berlin Data Protection Act, BlnDSG). The physician's duty of confidentiality is explicitly regulated by the standardized provisions in the Criminal Code (Strafgesetzbuch, StGB), data protection legislation, and professional regulations (BO). In addition, the patient's right to confidentiality arises as a result of the physician's secondary obligation under the contractual agreement with the treating hospital, and as a result of the principle of informational self-determination, which is enshrined in the Basic Law for the Federal Republic of Germany (Grundgesetz).

Therefore, a physician who breaches confidentiality is likely to be subject to criminal prosecution, as well as disciplinary action brought by the relevant Chamber of Physicians. He/she may also be liable to claims for compensation by patients affected by this breach.

2. Scope of the physician's duty of confidentiality

Confidentiality obligations cover a wide range of matters. In addition to information and data on the patient's health status (e.g. diagnosis, treatments used, medical notes, x-rays, test results), these also include any thoughts, opinions, feelings, or activities, as well as private, financial and professional circumstances disclosed by the patient, either about themselves or a third party, and where it is clear that strict confidentiality is in the interest of the patient or the third party about whom the disclosure is made (e.g. the patient tells the physician about their neighbor's illness). The patient's name, and the fact that the patient was in receipt of medical treatment, are also subject to confidentiality.

A physician's duty of confidentiality is not limited to deliberately disclosed facts; it also extends to circumstances the physician may have observed or learned by chance whilst exercising their normal duties (e.g. observations made during home visits). In general, the duty of confidentiality applies to all physicians, including those not deliberately chosen by the patient (e.g. medical officers, occupational physicians, military physicians, police physicians, correctional medicine physicians).

a) Temporal scope of confidentiality

In principle, the duty of confidentiality continues to apply even after the death of the patient. If, after the death of the patient, members of his/her family (or other persons) wish to access the patient's medical record or request information from the patient's physician, this should be dealt with in

accordance with the likely wishes of the deceased. In this event, the key criterion should be whether the maintaining of confidentiality, with regard to confidential matters previously disclosed to the physician, would be in the best interest of the deceased.

Keeping a specific matter secret, such as a diagnosis of alcoholism, might have been in the interest of the deceased person while he/she was alive. However, after their death, it may no longer be in his/her interest to keep the matter secret, such as when establishing his/her legal capacity. For instance, an assessment of a person's testamentary capacity is usually considered to be in the best interest of a decedent who has made a last will and testament. In this case, the physician can only invoke his duty of confidentiality if he has a reasonable or otherwise plausible reason for maintaining confidentiality; concrete evidence of the deceased's wishes to the contrary would therefore be necessary.

b) Individual confidentiality obligations

In principle, confidentiality obligations will apply even when dealing with other physicians. Similarly, confidentiality obligations apply when dealing with the patient's family members, including his/her spouse. Therefore, the physician remains under a duty of confidentiality unless he/she has been released from his/her duty of confidentiality, or a careful weighing of interests has revealed a disclosure to be appropriate.

The physician's duty of confidentiality also applies in relation to minors. While disclosure of information to the parents may be justified when dealing with minors, the decision to disclose information must be subject to careful consideration. This process of consideration should ascertain whether the minor is capable of fully understanding their own health status, i.e. the severity of their illness and any potential risks associated with treatment. If the minor is judged to have the necessary maturity and capacity to make informed decisions, their wishes to withhold information must be respected, even where this involves information being withheld from the parents. No duty of confidentiality applies when dealing with the legal representative of a patient unable to make their own medical decisions. The legal representative must be kept informed in order ensure that his/her decisions regarding treatment reflect the interests of the minor.

3. Permitted disclosures

a) Disclosure of patient data required by law

The expectation of trust is at the core of the principle of confidentiality; this means that a patient can expect his/her physician not to disclose any intimately personal information, which has been entrusted to him/her in confidence, to third parties. This trust is breached when the physician is either required or authorized under the law to disclose patient data to third parties. While patients are often unaware of the laws underpinning required or permitted disclosures, physicians are not required to inform the patient of their existence. Entities in receipt of patient data following authorized disclosure are only authorized to use such data for the purpose of the disclosure.

Other disclosures

Certain laws and regulations demand the disclosure of information. These include provisions pertaining to certain communicable diseases (Infektionsschutzgesetz), to the protection against unnecessary radiation (Röntgenverordnung), and to opioid substitution therapy (Betäubungsmittelverschreibungsverordnung) – all of which require the disclosure of information to a public body or register. Disclosures to the Berlin and Brandenburg Cancer Registry (Klinisches Krebsregister Brandenburg und Berlin) are dealt with via a central reporting office at Charité. Proper reporting procedures must be adhered to; these can be accessed via the intranet (https://intranet.charite.de/cccc/sops/klinisches_krebsregister/).

b) Express consent of the patient/Presumed consent of the patient

Cases in which the treating physician has been released from his/her confidentiality obligation through the patient's **express** consent prior to disclosure are generally unproblematic. If the patient has authorized the physician to disclose information regarding his/her health status to certain persons (family members, civil partner, etc.), institutions (e.g. private health care insurance providers, courts), or commercial payment offices, the physician is authorized to disclose such information.

Presumed consent to the disclosure of information is of relevance in two types of cases. The first includes cases where the patient's consent to the disclosure of confidential information has been **clearly indicated through his/her actions**. For instance:

- The patient is undergoing an assessment for submission to the social security office, private health insurance, etc.
- The patient receives treatment from a different physician following referral.
- The physician involves other physicians in the patient's treatment without the patient's knowledge (e.g. when asking a specialist for a second opinion). This is justified under the presumed consent rule if it is deemed in the objective interest of the patient.

The evaluation of cases is more difficult when they involve an unconscious patient. In legal terms, any actions performed as part of the treatment of an **unconscious** patient should be regarded as being performed without due authority. Therefore, the treating physician has a duty to safeguard the patient's presumed best interest. It follows that, in order to try to ascertain the patient's wishes, the physician must put themselves in the position of his/her patient. In these cases, the physician is effectively required to make decisions in accordance with his/her conscience. His/her decisions should be safe from challenge if it is clear that the physician carefully weighed the information available to him/her in a reasonable and transparent manner. The following serve as examples:

- As a rule, the admission to hospital of an unconscious patient should always result in the members of his/her family being informed – if and as far as these can be traced. If there are no identifying documents and the patient's identity cannot be established, the police should be notified.
- If there is evidence to suggest that the unconscious patient may have been involved in a criminal act (e.g. he/she is in possession of drugs), it may not be in the interest of the patient for the police to be notified, and the physician should take this into consideration.
- As a rule, the police should be notified in cases involving an unconscious person who is clearly a victim of crime, as it is to be assumed that the prosecution of the perpetrators is in the victim's interest.

c) Overriding public interest

These types of cases are the most difficult to evaluate, as they regularly require a physician to deliberately act against the best interest of his/her patient in order to protect an overriding public interest. Whether an overriding public interest justifies a breach of confidentiality can only be judged on a case-by-case basis. The decision has to be made based on the concrete circumstances of the individual case, and by applying section 34 of the Criminal Code (§ 34 StGB) regarding the principle of overriding **exceptional circumstances** (rechtfertigender Notstand).

Please refer to the original source for details of previously discussed cases.

Source: Berlin Chamber of Physicians (as at November 2008)

http://www.aerztekammer-berlin.de/10arzt/30_Berufsrecht/08_Berufsrechtliches/06_Behandlung_von_Patienten_Pflichten_Empfehlungen/35_Merkblatt_Schweigepflicht.pdf