Private and confidential

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In the medical arena the HIV pan-epidemic has brought issues surrounding the concepts of privacy and confidentiality into the spotlight. Issues of privacy and confidentiality are further exacerbated by large computer databases that store information that can then be manipulated, transmitted and accessed. It is the accessing of this data where the potential problems lie. *(SA Fam Pract 2003;45(4):50-51)*

INTRODUCTION

Privacy and confidentiality are similar in their moral justifications, and in that they both address issues relating to information[1]. Similarly neither are absolute obligations, in that they may be breached on occasions. They are referred to as *prima facie* obligations – in principle they should be respected however occasionally there may be justifications for not complying with them. It is important to understand that although similar and often confused, privacy and confidentiality remain distinct and separate concepts, and we should appreciate the differences.

PRIVACY

All of us are repositories of information; from before we are born until after we die. This information is about us as individuals, it is our information. Some of the information is in the public domain and easily accessible and in reality, it is not private. The privacy of information often lies in the detail - people may know that a patient is off sick, but they do not know the nature of the patient's condition.

A distinction may also be made between non-sensitive and sensitive private information. Non-sensitive information being the type of information that although private you are not particularly concerned if others become aware of it, as opposed to sensitive information where you would be distressed if others became aware of it. Obviously the distinction into this dichotomy is somewhat false and in reality there is a spectrum from definitely non-sensitive to extremely personal and sensitive. The arbitrator of the sensitivity of the information is the person whose privacy has been infringed, and is often dependent on the personality of that individual.

An individual's loss of privacy occurs if another or others gain access to private information about that individual. Complaints about violations of privacy are usually made when sensitive information has been obtained, however it should be remembered that violations of privacy are not restricted to others gaining access to sensitive private information about an individual. Obtaining non-sensitive private information about an individual is also a violation of their privacy.

Privacy may be derived from the principle of respect for autonomy – to live one's life according to one's own norms and standards; one requires a degree of privacy. To lead ones life autonomously one needs control over the collection, use and disposition of the information about you. Another approach emphasises the instrumental value of privacy by identifying various ends that are served by rules of privacy - ends such as personal development, creating and maintaining intimate social relations and expressing one's freedom.

Privacy is a necessary condition, creates the "necessary atmosphere" for maintaining intimate relationships. Without privacy, these relationships, including the doctor-patient relationship would probably not be possible. We grant others access to information about ourselves in order to have and maintain such relationships.

An individual necessarily surrenders some measure of privacy when they grant another access to their personal histories or bodies, as occurs in the medicine. Under what circumstances can we as clinicians inadvertently infringe upon a patient's privacy? One obvious example, since HIV has focused our attention on privacy and confidentiality, is performing a special investigation to determine a patient's HIV status without their consent. In principle this is private information about the individual that we are not entitled to, without their consent.

As alluded to above, privacy is a *prima facie* and not an

absolute obligation to a patient. On occasions we may have to infringe upon a patient's privacy, however an infringement would have to be justifiable. Infringement of a patient's privacy is not something that should be treated lightly and justification should be acceptable to reasonable public review. By reasonable public review I refer to either the HPCSA or judicial review.

CONFIDENTIALITY

Infringement of confidentiality only occurs when the individual to whom the information has been granted (in confidence or in a confidential relationship) either fails to protect the information or alternatively discloses it to someone else, without the consent of the individual whose information it is. Only an individual or institution to whom information is given in a confidential relationship can be charged with violating confidentiality. Unauthorised individuals that gain access to information about a person, violates that person's privacy and not confidentiality, even if they later publicise the information. From the above you will realise that if you hold information about a patient and do not adequately protect it and the information comes into the hands of a third party, while the third party may have breached the patient's privacy, you have violated the patient's confidentiality.

Justifications for confidentiality are similar to those for privacy. Like privacy, but unlike the absolute testimonial privilege of confidentiality in the lawyer-client relationship, confidentiality should be maintained. However there are times when confidentiality may be breached. Justifiable breech of confidentiality can be an extremely difficult moral decision. It usually involves balancing the obligation of confidentiality to the patient against the probability of, and magnitude of harm to another party, if that party is not warned of the potential risk of harm. The greater the risk of harm and the greater the magnitude of harm caused, the greater your justification for breaching your obligation of confidentiality to a patient. A prime example of this dilemma is - should a spouse or easily identifiable sexual consort be informed if their partner is found to be HIV positive?

Statutory circumstances are another example of where it is justifiable to breach confidentiality. Examples would include the reporting of births, stillbirths and deaths or notifiable communicable diseases amongst others. When giving evidence in court one could also be compelled by the court to give evidence.

PRIVACY AND CONFIDENTIALITY

Privacy can be breached without breaching confidentiality but the converse is not necessarily true. If we infringe upon a patient's privacy but do not disclose this information to a third party, there is no infringement of confidentiality. Similarly if somebody acquires private information about another individual with which they have no confidential relationship, they do not infringe upon that persons confidentiality even if disclose the information to others. On the other hand if there is a breach of confidentiality, then in the medical context, there is also usually a breach of the patient's privacy.

An interesting legal example that addresses both privacy and confiden-tiality has been reflected on by the Law Commission. The Compulsory Testing of Alleged Sexual Offenders Bill makes for interesting reading[2]. The question is, is there an enforceable legal right on behalf of a rape victim to test an alleged sexual offender for HIV? This would be an infringement of the alleged offender's privacy and the justification would be argued that if the alleged offender was HIV positive, the victim could initiate anti-retroviral therapy. Many would be most supportive of this argument. The justification does, however, mean that there will also be a necessary breach of confidentiality - as the result of the HIV test will then be communicated to the victim. Obviously, the same argument of justification applies.❐

Please refer to the CPD questionnaire on page 53.

This is the second article in the series on ethics. In 2003 we feature 4 ethics articles for the 2 ethics CPD points. Please refer to the March, July and September issues of the *SA Family Practice/Geneeskunde* for the others.

References

1. Beauchamp TL, Childress JF. Principles of Biomedical Ethics, fifth edition, Oxford University Press, Oxford, 2001.
2. The Compulsory HIV Testing of Alleged Sexual Offenders Bill (B10 2003). http://www.polity.org.za/pdf/CompHIVTestOfAllSexOffBill.pdf