

Human immunodeficiency virus: confidentiality and disclosure of information to third parties

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Introduction

Social concerns relating to human immunodeficiency virus (HIV)/acquired immune deficiency syndrome (AIDS) can be understood in two ways. Firstly, social concerns can refer to the health determinants of the pandemic. The second disquiet relates to the way in which the HIV/AIDS pandemic has impacted upon society socially. One of the most vexing ethical dilemmas faced by doctors in this regard, concerns confidentiality. This pertains to whether or not their patient's HIV-positive status should be kept confidential, or disclosed to a third party. In this article, we will examine the meaning of "confidentiality" as it relates to the doctor-patient relationship. We will then discuss the two oppositional positions: keeping a patient's confidentiality, or breaching it.

Confidentiality

Regarding the doctor-patient relationship, Gillon states that two conditions are necessary to fulfil the ethical duty of confidentiality.¹

"One person (the doctor) must undertake, that is, explicitly or implicitly, promise, not to disclose another's secrets, and that other person (the patient) must disclose to the first person information that he considers to be secret. Thus, there can be no transgression of confidentiality if the information is not regarded as secret by the person giving it. Equally, it is only because doctors have undertaken not to disclose patients' secrets, that they have acquired a duty of confidentiality".

The concept of confidentiality has played a vital role in the public's perception that there is something sacred in the doctor-patient relationship. There are numerous codes of ethics which affirm the significance of confidentiality, such as the Declaration of Geneva, The World Medical Association's

International Code of Medical Ethics, and importantly, The Hippocratic Oath. Considered as the oldest part of the Hippocratic Corpus, The Hippocratic Oath dates between the between the 6th and 3rd centuries BCE.² It is believed to be a fragment of the ritual of the Pythagorean brotherhood.³

The initiate was required to swear:

"And whatsoever I shall see, or hear, in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets".

Although the Oath is rarely sworn in its original form, as Knight points out: "Even if a medical graduate does not formally affirm this Oath at qualification, he accepts its spirit and intentions as his ideal standard of professional behaviour".⁴ Beyond the Hippocratic Oath, medical practice traditions also emphasise the professional obligation for medical secrecy, such as the Charaka-Samhita from India⁵ (around 100 CE), and the Jewish Oath of Asaph⁶(2nd to 7th centuries). Constantine the African (c. 1010-1087 CE) wrote that a physician "ought to keep to himself confidential information concerning the ailment, for at times the patient makes known to the physician things he would blush to tell his parent."⁷ In more contemporary times, the Islamic Code of Medical Ethics states that a "doctor shall put the seal of confidentiality on all information acquired by him, through sight, hearing or deduction. Islamic spirit also requires that the items of the law should stress the right of the patient in protecting secrets that he confides to his doctor. A breach thereof would be detrimental to the practice of medicine, besides precluding several categories of patients from seeking medical help."⁸The moral foundation of a doctor-patient relationship is grounded in confidentiality and trust.

Confidentiality: a *prima facie* duty

In the light of this, we can argue that there is a long and valued history of the recognised duty of a doctor not to make any improper disclosure concerning her patient's illness, treatment, condition, or any other information of which he or she has knowledge, because of the special relationship between a doctor and his or her patient. The major reason for this is that the information that a patient gives to doctor in confidence belongs to him or her, and the doctor is duty-bound to act as its guardian. If it is acknowledged that there is a moral obligation to respect the dignity and worth of a patient viz. respect for his or her autonomy, then it follows that any information given in trust to doctors, should remain in trust.

In addition, because a doctor is considered to be an expert in medicine, there are certain matters that are known to him or her alone, and which do not concern others. This pertains to the value, worth, and professional autonomy of the doctor. If doctors were required to disclose information derived from their relationship with their patients, then their professional autonomy would be threatened, as the information would move from the doctor-patient relationship into a more public domain. It is also interesting to consider that in a conflict-of-interest situation, called "dual loyalty", and defined as a situation "when a doctor has simultaneous obligations to his or her patient, and a third party", it is usually stated that the moral imperative is to maintain complete loyalty to the patient, above all others.

When doctors respect the intimate information that their patients have confided to them, the defining characteristic of the doctor-patient relationship, that of trust, is enhanced.⁹ If confidentiality is no longer respected, then there is the possibility that patients will not go for HIV testing, counselling, and treatment, because they no longer trust their doctor. Moreover, if it is known that confidentiality is no longer present, the quality of information provided by patients may be diluted, as they may select to divulge only the part of their problem that they know, or assume to be "safe".¹⁰ In this way, confidentiality may be viewed as an instrumental value, in that the information provided (or withheld) will impact on the doctor's clinical diagnosis.¹¹ There are convincing ethical reasons to protect the confidentiality of HIV-positive persons. One of the most important reasons centres on the principle of respect for persons.

Breaching confidentiality

With the advent of the HIV/AIDS epidemic, in particular, tradition-bound practices such as confidentiality have been subjected to discussion and analysis.¹² The main ethical dilemma around confidentiality concerns the assessment of whether more harm is achieved by breaching confidentiality, or by respecting it regardless of the consequences.¹³

Placed in the context of rights, the right of the individual to confidentiality can be in conflict with the right of another to be protected from harm, e.g. at risk of acquiring the HIV infection.¹⁴ Confidentiality is essential to prevent discrimination. In this context, it is claimed that the duty of confidentiality is not absolute, but rather one that is subject to limitations. However, difficulties may arise, because the extent to which limitations to confidentiality can be exercised, are often not clearly articulated. Thus the onus to breach (or not) confidentiality lies in the ability and judgment of the doctor.

To assist in making a decision, two important considerations were identified by MacFarlane and Reid, which they consider to be justifiable reasons to breach patient confidence:¹⁵

- The first exception to the duty of confidentiality arises "when a statute makes provisions requiring medical practitioners to disclose information concerning a patient. There are statutes that provide statutory rights for certain individuals, or bodies, to have access to confidential information. A common example is where a statute may require a medical practitioner to notify the officer of the local authority whenever he is made aware of, or suspects, that a patient is suffering from one of the diseases in a list of notifiable diseases".
- The second exception to the duty of confidentiality arises "where there is an overriding public duty to disclose information. Doctors have a common law duty to disclose information to the public if failure to do so will expose the public to a serious risk of death or harm. For example, confidential information may be disclosed where there is a possible threat that the infected person may attempt to infect other members of the public. Through disclosure of the information, members of the public may be protected from the risk of death or harm, or the occurrence of any serious crime. On occasions like this, relevant medical authorities may disclose information concerning the health status of the patient to the required bodies, or individuals, who are entitled to the information." In the South African context, the latter would apply to situations such as perceived, or actual, cases of child abuse.

Therefore, breaching confidentiality can be argued to be the correct approach if the harmful information given in confidence is very dangerous, and the only way that the consequences can be altered, is through the doctor's disclosure. In cases involving infectious diseases such as HIV, a doctor might be compelled to disclose confidential information, in order to prevent others from being harmed.^{16,17}

In such situations, one of the problems that doctors face is that there are contradictions in many of the guidelines concerning breaching of confidentiality. For example, the Joint United Nations Programme on HIV/AIDS and the World Health Organization take the stand that, due to insufficient resources and personnel, disclosure of HIV status to sexual partners and other family members, may take place without patient consent. Moreover, they mention that another contributing factor to the epidemic might be that healthcare professionals do not understand their duties with regard to HIV/AIDS confidentiality and disclosure.¹⁸ However, the Nuffield Council on Bioethics points out that cautious consideration should be taken, because protecting others from harm should not be done at the expense of the patient, regardless of whether or not this is performed, in what the healthcare professional considers to be, the interest of the patient.¹⁹

Conclusion

Doctors appear to be under the *prima facie* duty to respect confidentiality, but also to abide by the rights of potential victims to protection. Breaching confidentiality is defended on the grounds that the harm divulged in confidence is so severe, that it can only possibly be averted by the patient's disclosure.²⁰ In cases involving moral conflict, there is no other choice for doctors, but to override one, or another individual's right. Ethical justifications may be made on both sides, concerning the infringement of certain rights, for the

sake of others. Yet, whether or not doctors decide to breach or retain confidentiality, for those who hold that the value of medical practice lies in the ideals of the doctor-patient relationship, there remains disquiet, for medical practice is inexorably changing.

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