

Open Research Online

The Open University's repository of research publications and other research outputs

Confidentiality: the legal issues

Journal Item

How to cite:

Cornock, Marc (2011). Confidentiality: the legal issues. *Nursing Children and Young People*, 23(7) pp. 18–19.

For guidance on citations see [FAQs](#).

© 2011 The Author



<https://creativecommons.org/licenses/by-nc-nd/4.0/>

Version: Accepted Manuscript

Link(s) to article on publisher's website:

<http://dx.doi.org/doi:10.7748/ncyp2011.09.23.7.18.c8682>

<http://www.ncbi.nlm.nih.gov/pubmed/21987976>

Copyright and Moral Rights for the articles on this site are retained by the individual authors and/or other copyright owners. For more information on Open Research Online's [data policy](#) on reuse of materials please consult the policies page.

oro.open.ac.uk

Confidentiality – a legal commentary

By

Marc A Cornock

PhD, LL.M, PGDipHE, LLB (Hons), BA (Hons), BSc

Lecturer in law

School of Law, The Open University

Correspondence to:

**Marc Cornock
Lecturer in Law
School of Law
The Open University
A2 Wing, Michael Young Building
Walton Hall
Milton Keynes
MK7 6AA
Tel: 01908 655807
e-mail: m.a.cornock@open.ac.uk**

Confidentiality is a fundamental principle of nursing practice that underpins the nurse's relationship with their patients. It is a principle that combines both legal rules and ethical standards.

Legal and ethical basis for confidentiality

Confidentiality as a legal concept may be said to be an obligation on one person to uphold the confidentiality of another person's personal information. This legal obligation of confidentiality arises in several distinct areas, these being: under common law; in the terms of a contract, these terms can be express terms or implied by the nature of the contract; and finally as a general legal duty where it could be considered negligent if harm results as a consequence of a breach of confidence.

As a legal principle, confidentiality in the health care setting is based on the general duty of confidence; as such it is generally accepted legally that a health care practitioner owes their patients a duty of confidence. Confidentiality for the health care professional arises ethically due to its inclusion as a concept in professional health care codes of conduct and standards, for instance 'The Code: standards of conduct, performance and ethics for nurses and midwives' issued by the Nursing and Midwifery Council (2008). The ethical principles of confidentiality within codes of conduct build upon and expand the legal basis of confidentiality and place additional obligations on the health care professional with regard to their duty regarding confidential information.

The legal and ethical rationalisation for confidentiality is that the health care professional will protect the information that is divulged to them by patients, or to which they have access about patients as a result of their position, and not pass this

information on without the permission of the patient or without reasonable justification. The reasoning behind this is that with this assurance patients are able to provide all the information regarding their situation that aids diagnosis and treatment. This is because they are able to rely on their information being held confidential and thus would not be passed on to others without reasonable justification. For example, as a result of the legal and ethical principle of confidentiality in health care, a 'Gillick competent' (see below for an explanation of this term) fifteen year old patient would be able to seek advice regarding their sexual relationships.

The principles of confidentiality

As to specifically what information is seen as being confidential, there are various legal cases that have established the principles for deciding this. These principles are:

- 1) The information must have the necessary quality of confidence
- 2) The information must have been imparted in circumstances importing an obligation of confidence
- 3) The information must not already be in the public domain
- 4) That it must be in the public interest to protect the information.

Point two includes all information that a nurse would acquire about their patients in the course of their professional duties. Point three merely means that the information is not something that is already known. It is probably point one that would cause the nurse most difficulty. However, if one considers it as meaning that it would not be possible for others to know this particular piece of information without the patient telling them then it becomes less problematic. For instance, if the patient were to say that they lived in X street this would not have the necessary

quality of confidence as it would be possible for others to know this without the patient telling them. Though the details of the patient's latest medical investigations would have the necessary degree of quality as it would not be possible for someone outside of the health team to know this.

Point four means that the duty of the nurse with regard to confidentiality is not absolute. Where it is in the public interest for the information to be disclosed it can be disclosed, even without the patient's consent; where failure to disclose information may expose the patient or others to death or risk of serious harm, for instance child abuse, could be disclosed without the consent of the patient or their parents.

There are exceptions to the general principle of confidentiality. In addition to the requirement for disclosure in the public interest, disclosure can also be required by law. There are a number of statutory provisions which create exceptions to the rule of confidentiality, for example the Public Health (Control of Disease) Act 1984 which requires notifiable diseases to be reported to the appropriate authority.

In addition, any information can be disclosed with the express consent of the patient. A 'Gillick competent' child (see below) is able to give the necessary consent for disclosure of their personal and health related information. or if the child is not 'Gillick competent' the person with parental responsibility can provide consent.

It is a legal assumption that information will be shared between members of the multi-disciplinary health care team, where this is for the benefit of the patient, that is for their care and treatment. In certain circumstances it is permissible to disclose

information to a third party e.g. close relative or appropriate authority e.g. social worker. This would be when it is in the best interests of the patient to do so, for example with a child patient, if the child is suspected of being abused.

Confidentiality and the child

Confidentiality can be complex with adult patients but those under eighteen it can be more complex as there is more than one individual to consider. Instead of having just the patient to consider, with child patients there is also the parent or person with parental responsibility to consider as well. There is a balancing act that needs to be undertaken. The child has to be allowed and supported to make their own autonomous decisions, after being deemed competent to understand the implications of doing so (for more on the child being competent see Cornock 2010). However, the child also has to be protected when they are unable to make their own decisions or where they cannot comprehend the implications of their decisions. In these instances their parent or guardian need to be informed of their health care needs.

For nurses, this can result in difficult situations where the child makes a request that their parents are not informed about a specific aspect of their care or treatment, or indeed about the care or treatment at all, for instance with regard to contraceptive advice and treatment, but where the nurse does not believe that the child has the sufficient competence to be declared 'Gillick competent'.

'Gillick competence means that the child has sufficient emotional and intellectual maturity and understanding such that they are able to comprehend the nature and purpose of the treatment being proposed including any possible complications and side effects, as well as the consequences of not having the proposed treatment'

(Cornock 2010 at page 16). Gillick competence has been accepted as the basis for determining the child's ability to consent to their own treatment since it was first put forward in a legal case in 1986 (Gillick v. West Norfolk & Wisbech Area Health Authority).

As such confidentiality is not an automatic right of the child and can only be considered where the child is deemed to be 'Gillick competent'. Where the child is not 'Gillick competent', parents or guardians who have parental responsibility (see Cornock 2011 [parental responsibility article details](#) for a discussion of parental responsibility) have a legal right to be consulted and informed about the welfare and treatment of their children. The problem for the nurse is in balancing the child's autonomy with the legal rights of those with parental responsibility.

Where the child is determined to be 'Gillick competent', there is no automatic reason for the parents or guardians to be informed of the child's health needs and treatment. Indeed, in this situation, the nurse should be acting as advocate for the patient and protecting their personal information, unless there is a compelling reason for not doing so, such as a legal obligation to disclose it or the best interests of the child require it. Additionally, the nurse should encourage the child patient to inform their parents of their health needs or allow the nurse to inform them. However, the treatment should not be dependent upon informing the parents. Once the treatment has been provided a 'Gillick competent' child is as entitled to the same respect for the confidentiality of their treatment and care as an adult.

Conclusion

Although there are circumstances where the child patient would not want their parents informed of aspects of their personal lifestyle, for example sexual activity or drug and alcohol related issues, there are times when a patient's confidence has to be breached. These reasons include where it is in the best interests of the patient to do so and where there is a legal obligation to do so. Confidential information can also be disclosed with the consent of the patient.

References

Cornock M (2010) Hannah Jones, consent and the child in action: a legal commentary *Paediatric Nursing* **22** (2) 14 -20

Cornock M (2011) Parental responsibility article *Paediatric Nursing*

Gillick v. West Norfolk & Wisbech Area Health Authority [1986] AC 112

Nursing and Midwifery Council (2008) The Code: standards of conduct, performance and ethics for nurses and midwives Nursing and Midwifery Council, London.

Word count - 1,487