Public Interest and rights of individuals to privacy

David M. Wood[i] and David A. Frenkel[ii,iii,iv]

The spreading of information and in particular leaking of private information may change lives. The concept of public interest enjoys an uneasy relationship with notions of privacy. “Public interest” is held out as justification for interference with privacy or with private interests.

Medical and health confidentiality is deeply rooted in our society and is one of the first recorded professional legal and ethical duties a member of the medical professions should obey and follow as part of the Hippocratic Oath. Maintaining the confidentiality of medical information is one of the few universally accepted ethical rules.

Privacy and confidentiality

There are legal definitions of infringements of privacy. The Israeli Law may serve a clear example. Section 1 of the Protection of Privacy Law of 1981 states that, “no person shall infringe the privacy of another person without the other's consent". Section 2 of that law defines what infringement of privacy is. It includes "using or passing on to another, information on a person's private affairs, other than for the purpose for which it was given" and "publishing of any matter relating to his intimacy, including […] his health condition […]". The right of Privacy in Israel has been elevated to the level of a statutory constitutional basic right. Section 7 (a) of the Basic Law: Human Dignity and Liberty of 1992 states: "(a) All persons have the right to privacy and intimacy’, and section 8 states: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than is required." The Patients' Rights Law was enacted in 1996. It imposes a duty of confidentiality on all medical personnel.

The European Convention on Human Rights does not refer to health privacy. Article 8 of the Convention whose title is “Right to respect for private and family life” states:
“1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

The Calcutt Committee (2004) in the United Kingdom said that, ‘nowhere have we found a wholly satisfactory statutory definition of privacy.’ But the Committee was satisfied that it would be possible to define it legally and adopted this definition in its first report on privacy: The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.

[i] Department of Pharmacy, King’s College London, UK
[ii] Faculty of Business and Management, Ben-Gurion University of the Negev, Beer-Sheva, Israel
[iii] School of Law, Carmel Academic Centre, Haifa, Israel
[iv] Corresponding author: Prof. David A. Frenkel. E-mail: david.frenkel@gmail.com

There is no right to privacy in UK law even after the Human Rights Act 1998, and Parliament has shown a lack of enthusiasm for creating such a right. However, the judiciary has developed the doctrine of breach of confidence in a way that provides a limited right to privacy, particularly since the Human Rights Act 1998. Although Article 8 of the European Convention on Human Rights creates a right to respect for private life, this is not a right to privacy. Also Article 8 must be balanced with Article 10 which guarantees freedom of expression, which is significant when the press is alleged to have breached an individual's right to privacy, as stated by instructors at the Open University (2011).

The concept of privacy in Israeli law is individualistic in general and in principle. However, the law does recognise some of the interests of the public to legitimately override the individual interest in privacy, for the sake of public interest, e.g. reportable infectious diseases to the health authorities or infringement of privacy in cases of alleged criminal acts (though in such a case a specific permissions by authorities, like courts or the attorney general, is needed).

In the general case, legislators, as well as medical professionals, accept the principle that the duty of confidentiality is not absolute. They agree that there may be exceptions and even confidential information may be disclosed in three cases:

- a) when the patient, if legally capable consented to or asked for the disclosure, or the information is disclosed to health professionals involved in providing treatment to the patient;
- b) it is required by law;
- c) it is justified in the public interest.

Public interest

However, what constitutes “pubic interest”? Not everything that interests the public or individuals in the public is necessarily in the public interest. There is a difference between the public interest and the interest of the public (Laurie et al, 2010).

Public interest may encompass contradicting attitudes. It is a public interest to protect individuals' rights to privacy and confidentiality. Public interest is different from interests of the public or communities or groups, large or small, which are part of the public. Interests of such groups are more likely to infringe individual rights to privacy, confidentiality, and dignity. However, this public interest is not an absolute one, as Powers (1994) has phrased it by stating "A commitment to privacy rights does not entail a commitment to absolute rights" (Powers, 1994; Laurie, 2002). Ashcroft (2001) has exemplified the possible contradictions by writing: "there is a public interest in the effective […] administration of […] criminal justice; but there is also a public interest in restraining undue […] surveillance of our personal lives". What is, therefore, public interest and what exactly constitutes public interest? Is it necessary to find out how many want to know or how many may benefit from or would be affected by the information, before it can be declared to be “public interest”? What is the degree to which the ends of the individual members of society should be the ends of their society? Should public interest be identical to, or should it be connected to the idea of human rights? According to Häyry and Takala (2007) "Public interest is a diffuse matter and respect for it can mean many things. Some of which cannot always co-exist peacefully".

According to Cathcart (2011), “Two distinct meanings of the word ‘interest’ are at issue: in one we give our attention to something because it has potential to do us good or harm; in the other we are merely curious. The distinction is explicit in the difference between the negatives: ‘disinterested’ and ‘uninterested’. For journalists there are subjects which are in the public interest but which the public doesn’t find interesting. […] And equally there are stories which interest the public but have no potential to make the reader better or worse off in any meaning way […]”.

However, instead of trying to define public interest as an absolute interest we should define it as a relative concept of a private or individual interest. Acts in the public interest may be good for some individuals and bad for others. By that we will be able to hold constant private interests in order to determine those interests that are unique to our society. See Krasner (1978) who analysed cases in order to identify national interests when no corporate interests was found in the US foreign policy. Nevertheless, we are unable to draft a definition of Public Interest which will cover and answer all possible questions and issues and be accepted by everyone. The fact that there might be different approaches which may lead to various definitions of the same term may point to the fact that it is quite possible that "public interest" cannot be defined, or even does not need to be defined. Still it is possible to argue that, broadly speaking, public interest should include acts or conducts which further society's best interests as well as protection of the general public from harm. It is also possible to state that it should include promotion of collective interests [Laurie, 2002]. Nevertheless, we should be very careful when we speak of collective interests. Such interests may lead us to interests of the public or groups in society, especially in non-liberal communities, who are willing to stigmatise groups, either because of their origin, race and ethnicity, or because of their culture, behavioural preferences and views. Hence we should try to limit the meaning of Public Interest in order to safeguard the individual rights to privacy and confidentiality. It is important to guarantee that people will not be discriminated on the basis of their genetic profile and one's right to full medical insurance will not be lessened.

The General Medical Council in the UK stated among the duties of a doctor registered with them “to respect patients’ right to confidentiality”, and to “Never abuse your patients’ trust in you or the public’s trust in the profession.”

Confidentiality v. The Public right to know

Though all these are theoretically accepted by all, the practice is different. Medial confidentiality is not absolute. One important example is public health need, when authorities should prevent an epidemic. It is generally accepted that threats to other people may lawfully override patients’ right to confidentiality. However, President Roland Reagan caused a change in this matter. Early in his presidency he decided to go public regarding his wearing small audio-amplifying hearing aid device. A few months after he had been re-elected for second and last term of presidency, he made public that he was going to undergo surgery to remove cancerous polyps from his colon, and the American public were invited to look over the surgeon’s shoulder during the President’s colonoscopy. He relinquished presidential power to the Vice President for eight hours. The surgery lasted less than three hours and was successful.

The long tradition of confidentiality regarding health issues of the American heads of state had come to an end. A month later, he made public that he underwent an operation to remove skin cancer cells from his nose and two months later he made public that additional skin cancer cells on his nose were detected and removed. Three months later he underwent out-patient surgery for an enlarged prostate, but no cancerous growths were found. Six months later, aged 76 he made

public that he underwent another skin cancer operation on his nose. All these health problem and surgeries did not prevent him from continuing his presidency in full. A question might be raised – would he be elected or re-elected had he had those health problems before the elections and made them public? By making public health problems, Reagan made them a part of the "public right to know".

There are many examples of poor health being a factor in a politician's downfall and failure to be elected. Other examples show the opposite and politicians with poor health continuing their political career (Tossell and Goldman, 2004).

Reagan created a new situation for politicians which has become standardised across the developed world. His idea to confront individual privacy with public right-to-know, was well thought out and he only revealed the information during his second term of presidency when he knew he would be unable to be re-elected. Until then, medical and health issued of the president were kept secret and confidential. The extent of Ronald Reagan's health problems during his first term, excluding the hearing problem, was not made public until after he completed his second term (Ferrell, 1992; Annas, 1995).

It is not easy for a politician to go public with his entire personal private, including health, matters. People may be concerned if candidates cannot finish their terms, which may cause problems and burden on the citizens. However, is every citizen capable of understanding and evaluating the medical information delivered in the press, which may or may not be objective?

President Reagan made the politicians' health matters a part of people "right to know". One of its results is that divulging medical information by the politician is considered to be honesty. However, being honest can potentially be a 'lose-lose' situation for a politician (Cowen and Gross, 2007).

In case the politician discloses his medical matters, he may lose the elections as people may disapprove his capabilities, when interpreted by his competitors or cause voters to lose faith in his ability to function. If he lies about his health or capabilities, and the media discovers the deception, voters would no longer respect the politician due to his dishonesty. If the politician hides his health matters and refuses to give his consent to releasing information, he would be treated as a person who has things to hide, and is dishonest. A report from CNN.com stated, "in today's political environment, saying no is tantamount to admitting there is something to hide and so many candidates have taken to releasing sometimes voluminous medical records in an effort to answer question and thwart further digging" (Kahn, 2000).

Should the health of politicians be public domain, and politicians be excluded from the definition of patients when confidentiality is concerned? Should that "exclusion" be broadened to include other public figures, for example, from the business, sports or show business?

The guidelines published by the Council on Ethics and Judicial affairs of the American Medical Association instruct physicians to "cooperate with the press to insure that medical news is available more promptly and more accurately than would be possible without their assistance" provided that their patient authorises them to disclose medical information. In case the patient does not give his consent, the American Medical Association advises physicians not to release any information. The view of the American College of Healthcare is that "society's need for information rarely outweigh the right of patients to confidentiality". The US National Institute of Health (NIH) recommends that "if a patient attracts media attention", NIH will consult with the

patient "on what information, other than the fact of hospitalization or condition, may be released in response to a media request".

Tossell and Goldman (2004) call professional medical associations to join with the media and consumer advocates to create a standard that guides disclosures of presidential candidates' medical records. As a starting point they suggest the following principles:

- Candidates must consent to the release of their medical information before it is made public.
- In most instances, a summary of a candidate's medical records should be sufficient. This will protect the confidentiality of a provider's subjective notes.
- A candidate should be able to withhold certain health information from public disclosure if the information is irrelevant to the candidate's ability to perform the duties of president and would jeopardize one's willingness to seek and receive certain care (Tossell and Goldman, 2004).

The conflict between the right to privacy and the public's right to know is heightened when a political figure seeks office. The public may be asked to choose between a candidate who may serve a whole term and a candidate who would not be able to finish out his term and will put a burden on the government and the citizens. This was not the view of President Clinton during his elections campaign, when he promised to open his medical records should he be elected (Washington Post, 1992). However, he promised to make medical information available to the press immediately, a day after The New York Times published what a physician reporter L. Altman (1992) wrote that "Mr. Clinton has been less forthcoming about his health than any Presidential nominee in the last 20 years".

Politicians already elected to their office, are not always happy with medical information released even they have authorised disclosure of their medical state. President Eisenhower was very embarrassed when his physicians announced that he had had "a good bowel movement" after his first heart attack (Ferrell, 1992; Annas, 1995). President Reagan (1990) was very disappointed for many years after one of the doctors of the NIH reported, after the removal cancerous polyps from his colon during the colonoscopy which everyone was invited to watch over the surgeon's shoulder on the TV, that "The President *has* cancer" instead of saying "the President *had* cancer".

Rule of Proportionality

In dealing with such delicate and borderline cases related to violation of right to privacy, we propose to apply the rule of proportionality in each individual case. Cf. Laurie et al, 2010; Schwarze, 2006; Wade and Forsyth, 2002; Koch, 2003; Jans, 2000; Jacobs, 1999; and R. v. International Board (1986).

Three tests are required in order to meet the rule of proportionality:

- The first is the *test of effectiveness*: the measure taken should constitute an effective means for the realisation of the aims or targets pursued by that measure.
- The second is the *test of fair balance*: there should be a fair balance between the aims pursued and the interests harmed.
- Finally, the third is *the test of necessity and subsidiarity*: the measure taken is necessary to achieve those aims and no alternative which is less intrusive is available.

Should public figures such as politicians, judges, leaders of industry, be entitled to protection of their privacy, in matters of health? Their health situation may affect their ability to adequately perform their duties which may affect individual citizens. Doctor-Patient relationship is a confidential one, and a breach of confidentiality is unethical and unlawful unless it is necessary to protect public health, public security and serious social public interests. If public interest over-rides the right to privacy, medical staff may be forced to break their ethical and legal duties of confidentiality.

Conclusion

In relation to political candidates, Kahn (2000) put out the question: "Worried about fitness or just plain voyeurism?" His answer is: "[…]. It seems that all we really need to know is whether a candidate is physically and psychologically for to hold office, an assessment most people would be comfortable leaving to trained and unbiased professionals. Once a candidate is pronounced "fit to serve" any digging for further information starts to look more like reality-based programing than investigative journalism. […] voyeurism is not a good enough reason to violate medical privacy".

We endorse Kahn's idea. It follows also the view expressed by George Annas that "the only medical information to which the public should be entitled is information that indicates, to a reasonable medical probability that a presidential candidate will not survive a four-year term, or will not be able to function mentally in a reasonable manner" (cited at Tossell and Goldman, 2004, and see Annas, 1995).

This approach applies the third test of the rule of proportionality - *the test of necessity and subsidiarity.* The assessment whether that person is or is not fit for the service, is the least intrusive option and achieves the aims of effectiveness and fair balance.

The assessment of health condition of politicians or those in high positions in business, sports and show business who have serious medical condition that affect their ability to carry out their job may affect the public, the entire country or specified public, may be revealed to the public who may be affected, but only in cases when they become incapable to function. Again, it is not the details of the health problems that should be revealed but only the concluding assessment regarding the inability and the incapability of these persons, either permanently or only temporary. The information the public should be entitled to know is whether that person is unable to function, and if this is the case – what should be done in order to replace him and how. However, if that person decides to step down or quit, before the assessment has been produced, no such an assessment should be made public. The reasons of stepping down or quitting should be left to him, if he decides to give any.

In cases of political function, the decision should be laid in the hands of a statutory pre-nominated medical team. The members of such a team should be appointed and act according to legal regulations. This committee will be entitled to receive all necessary medical information from the treating physicians, and submit their conclusions to the appropriate body who would decide how to proceed (such as transfer powers to deputies, calling for new elections), depending on the medical conclusion, which may be different in case of temporary inability compared to a permanent one.

The same principle should be applied also in all other fields of life, when the information necessary is the medical assessment, without divulging medical details. As an example we can take the right of employees to confidentiality of health privacy. The assessment of the physician, and when necessary of the occupational doctor, for sick leaves, about fitness to work and what kind of work, should be enough without going into the medical details.

By that we follow and fulfil the tests of the rule of proportionality. Here, too, we use the least intrusive option and achieves the aims of effectiveness and fair balance. The doctor-patient confidential relations are least infringed, for necessary reasons.

Nothing will prevent the person from revealing their medical state to the public – as this is their right, even it is only to create empathy and better public relations. However, it should be at their discretion.

We also think that the same should apply also regarding health information of the dead. Unless public health matters or criminal proceedings demand otherwise, any disclosure of health details of a deceased would be considered as voyeurism, and as put out by Kahn - voyeurism is not a good enough reason to violate medical privacy, and we may add – even when the patient has died. The deceased's hairs should have the right to decide what information could or should be revealed, if at all.

References

Altman L. K. (1992), Clinton, Citing Privacy Issues, Tells Little About His Health. New York Times, 10 October 1992:1.

Annas, G. J. (1995), The Health of the President and Presidential Candidates, The New England Journal of Medicine, 333(14) 945-949

Ashcroft, R. E. (2001), Ethical, Legal and Social Issues Facing the West London Database Project: A Review of the Literature , NHS Executive London Regular Office Research and development Office, London, p. 5.

Calcutt Committee (2004).
Privacy & Human Rights 2004 [online], www.privacyinternational.org/;
open.jorum.ac.uk/xmlui/bitstream/handle/.../W100_6_Reading8.pdf (accessed 23.05.24).

Cathcart, B. (2011). Is there any Difference between the Public Interest and the Interest of the Public? Talk given at the Leveson Inquiry Seminar on The Rights and Responsibilities of the Press, 6th October 2011.

Cowen, A. and Gross, L. (2007), Politicians and Privacy, in Convenient or Invasive: the Information Age (2007), Ethica Publishing, p. 43.

Ferrell R. H. (1992), Ill-Advised: Presidential Health and Public Trust, Columbia University of Missouri Press.

General Medical Council. *www.gmc-**uk**.org/static/documents/content/Confidentiality_0910.pdf* (accessed 23.05.2014).

Häyry, M. and Takala, T. (2007), American Principles, European Values and the Mezzanine Rules of Ethical Genetic Databanking, in M. Häyry, R. Chadwick, V. Árnason and G. Árnason (eds.) The Ethics and Governance of Human Genetic Databases, Cambridge University Press, Cambridge, UK, p. 21.

Jacobs, F. G.(1999), Recent Developments in the Principle of Proportionality in European Community Law in E. Ellis (ed.) The Principle of Proportionality in the Laws of Europe, Hart Legal Publishers, Oxford, p. 1-22.

Jans, J. H. (2000), Proportionality Revisited, Legal Issues of European Integration 27:3, p. 239-265

Kahn, J. P. (2000), Public Office and Private Lives: Do Politicians Deserve Medical Privacy?", at: http://edition/cnn.com/2000/HEALTH/08/08/etchis.matter (accessed 23.05.2014)

Koch, O. (2003), Der Grundsatz der Verhältnismaßigkeit in der Rechtsprechung des Gerichtshofs der Europäische Gemeinschaften, Duncker & Humblot, Berlin, p. 199 et seq

Krasner, S. D. (1978), Defending the National Interest: Raw Materials Investment and American Foreign Policy, Princeton University Press, Princeton NJ.

Laurie, G. Genetic Privacy, A Challenge to Medico-Legal Norms (2002), Cambridge University Press, Cambridge, UK, p. 279.

Laurie, G., Mallia, P., Frenkel, D. A., Krajewska, A., Moniz, H., Nordal S., Pitz, C. and Sandor, J. (2010). Managing Access to Biobanks: How Can We Reconcile Individual Privacy and Public Interests in Genetic Research? Medical Law International, 10, 315-337.

Open University (2011). http://www.open.edu/openlearn/society/the-law/privacy-rights-and-the-law/content-section-4.4 (accessed 23.05.2014)

Powers, M. (1994). Privacy and the Control of Genetic Information, in M.S. Frankel and A.S.Teich (eds.), The Genetic Frontier: Ethics, Law and Policy, American Association for the Advancement of Science, Washington, DC, p. 82

Reagan, R. (1990). An American Life. New York, Simon and Schuster

Schwarze, J. (2006), European Administrative Law, Revised 1st Ed. Sweet & Maxwell, London;

Tossell, E. I. and Goldman, J. (2004), President Health: Do we have a Right to Know? (1 April 2004) iHealth Beat, at http://www.ihealthbeat.org/perspectives/2004/presidential-health-do-we-have-a-right-to-know?view=print (accessed 23.05.2014)

Wade, W. and Forsyth, Ch., (2002), Administrative Law, 8th ed. Oxford University Press, p. 328

Washington Post (1992). Clinton Promises Medical Details (1992), Washington Post, 11 October 1992:A35

R. v International Board of Agriculture Produce ex p. E.D. & F. Man (sugar) Ltd. [1986] 2 All E.R. 115