

Health Information Privacy and Right to Information

A case study of India and Sri Lanka

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Abstract— Privacy is a concept which is felt on a personal basis and accordingly it is difficult to define. Health information privacy is concerned with control, access and sharing of personal health information. Inherently personal health information possesses special degree of protection which originates through the traditional fiduciary relationship between the Doctor and patient. This paper is based on the findings of a research conducted on analysing the extent to which the right to privacy of personal health Information can be upheld while balancing it with the right to access for information. The study is designed as a case study of India and Sri Lanka and data collection done through a survey of literature. After an analysis of the legal framework of the two jurisdictions it was found out that an individual cannot exercise complete control over all personal information they have to allow access to such information to certain parties depending on certain circumstances. Doctors, nurses and other health care service staff personnel need to access such information for treatment purposes. Further, such information needs to be accessed for public purposes such as health research, statistical purposes, prevention of contagious diseases and epidemics. Accordingly an absolute right to privacy of over such information cannot be entertained as it violates another person's right to access to such information especially in order to uphold the benefit of the public.

Keywords: privacy, health information, right to access information

I. INTRODUCTION

Privacy is a concept which is felt on a personal basis and accordingly it is difficult to define (Gostin, 2002). Most commonly cited definition for right to privacy is "right to be left alone" as it was expressed by Warren and Brandies (1890). The Universal Declaration of Human Rights of 1948 also recognises right to privacy under Article 12 and it has been emphasized in International Covenant on Civil and Political Rights of 1966 under 17.

As Domingo (1999) expressed, the concept of privacy has different limbs including information privacy which involves control and access of personal information. Gostin (1993) defines health information to include all records that contain information that describes a person's prior, current or future health status, including aetiology, diagnosis, prognosis or treatment methods of reimbursement for health services. Accordingly Health information privacy is concerned with control, access and sharing of personal health information.

Ensuring protection for personal health information is important for number of reasons. Inherently personal health information possesses special degree of protection which originates through the traditional fiduciary relationship between the Doctor and patient. The historical Hippocratic oath says that,

"I will not divulge anything of a private nature regarding people's personal lives that I see or hear, whether in the course of my professional activities or not, because I recognize the shameful of revealing such information". (Gostin, 1993)

Personal health information may contain certain types of strictly confidential information about an individual such as sexually transmitted diseases such as HIV, mental disorders, genetic disorders and similar types of highly sensitive information. If such information is revealed to the public, it can cause marginalisation in the society and can bring social stigma on such persons. Accordingly affording protection for privacy of personal health information within a legal system of a country is very important.

Two major approaches of protecting health information privacy can be identified around the world (Hiller, 2011) (Baumer *et al* 2004). One such approach is the introduction of specific laws in relation to privacy of health information. United States is the best example for such an approach where they have brought in Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH). Health Information Privacy Code of New Zealand 1994 and Personally Controlled Electronic Health Records Act 2012 are some other examples. However, most of the countries have followed the second approach of providing protection for health information privacy

through their general data protection legislation. Data protection Act of UK 1998, Privacy Act of Australia 1988, Personal Information Protection and Electronic Documents Act of Canada 2000 and Personal Data Protection Act No. 709 of 2010 of Malaysia are some of the examples

II HEALTH INFORMATION PRIVACY V RIGHT TO ACCESS INFORMATION

Scholars such as Fried (1968) and Rachel (1975) who believed in the control theory of privacy were of the view that privacy including health information privacy exists only when an individual possesses complete control over his personal information. However, scholars including Pelsak (2005), Culnan and Armstron (1999), Allen (1988) Gavison (1984) who followed the restricted access theory of privacy, reject the above approach where they argue that an individual cannot exercise complete control over all personal information they have to allow access to such information to certain parties depending on certain circumstances.

In the context of personal health information doctors, nurses and other health care service staff personnel need to access such information for treatment purposes. Certain third parties such as employers and insurance companies may need to access such information for other purposes such as settlement of hospital bills. Additionally such information needs to be accessed for public purposes such as health research, statistical purposes, prevention of contagious diseases and epidemics. Accordingly an absolute right to health information privacy cannot be exercised and it has to be balanced with the right to information. Accordingly the question arises as to the manner in which health information privacy and the right to information can be balanced. This paper is based on the findings of a research conducted on analysing the extent to which Right to privacy of personal health Information can be upheld while balancing it with the right to access for information. The study is designed as a case study of India and Sri Lanka and data collection done through a survey of literature.

III THE INDIAN APPROACH

The constitution of India 1950 does not to contain an expressed right to privacy. However, the Indian Supreme Court has created and recognised a right to privacy utilising the right to life guaranteed under Article 21 of the Constitution. Accordingly in *Kharak Singh v. State of UP* (1963 AIR 1295) the Supreme Court held that

“It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.”

The right so recognised has been upheld in the context of health information in a number of cases involving privacy of personal health information such as *Orchid Hospital vs Savita Gulyani (Appeal No. A-2008/752)* *Mr. 'X' vs Hospital 'Z' (Appeal (civil) 4641 of 1998)* and *Mrs. Neera Mathur vs Life Insurance Corporation (1992 AIR 392)*.

Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 introduced under section 43A of the Information technology Act of 2000 recognises information relating to physical, physiological and mental health condition, sexual orientation and medical records and history as sensitive personal information. The rule provides for the manner in which such information can be collected, accessed and processed.

Accordingly it can be said that protection for right to health information privacy is well established in Indian legal framework. However, such right has been qualified in order to balance with right to information for public benefit. This evident from the section 8 of the Right to Information Act of 2005 where it says that a request to disclose information provided in a fiduciary relationship or personal information that has no relationship to any public activity or interest not to be accommodated. This exception for right to information has been upheld in a number of Indian judgments involving application under the Right to information Act.

Mr. Surupsingh Hrya Naik vs State Of Maharashtra IR (2007 Bom 121), the court reiterate that an disclosure of personal information which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual can be allowed under the Right to Information Act only if the Central Public Information Officer or the State Public Information Officer or the Appellate Authority under the Right to Information Act is satisfied, that the larger public interest warrants such disclosure.

In *Mrviqar Ahmad vs Gnctd (CIC/SA/A/2015/000289)* the applicant submitted an application under the Right to Information Act to gain access to a copy of the OPD slip and all the prescriptions of the applicants' ex-wife who was receiving treatment for a psychiatric disorder. It was held that the request should be allowed even though the medical records are personal in nature as it can be justified for the public interest and for a purpose such as to justify the applicant's claim for the custody of three minor children which was the in issue in this case. Also in the case of *Mrjyoti Jeena vs Government of Nct of Delhi (CIC/KY/A/2014/001348SA)* which was a similar

application for medical records of a psychiatric patient was allowed court to disclose such information about the medical records of her husband to the extent she needed to establish the disease her husband was suffering from in order to prevent cruelty against the applicant and the society due to his mental illness.

Accordingly it is obvious that health information privacy is not an absolute right in India and has been balanced with right to access for information for public benefit.

IV SRI LANKAN EXPERIANCE

Sri Lanka does not have an expressed right to privacy recognised under the Constitution of 1978. However, the common law of Sri Lanka provides some protection for privacy of personal information including personal health information under the common law action of *actio injuriarum* (Marsoof, 2008) (Amarasinghe, 1966). Protection for such information can be traced through the traditional fiduciary relationship between the Doctor and Patient. Further legal protection for personal health information can be secured through an expressed contract between the patient and the healthcare service provider under the contract law.

The Constitution of 1978 recognises the right of access to information under Article 14A and such right has been strengthened by the Right to Information Act of 2016. In order to balance the right to information with the right to privacy of personal information section 5 contains somewhat similar provisions to the Indian Act. It states that a request for access to information shall be refused, *inter alia* where—

- (i) the information relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies
- (ii) the information could lead to the disclosure of any medical records relating to any person, unless such person has consented in writing to such disclosure;
- (iii) the information is required to be kept confidential by reason of the existence of a fiduciary relationship;

Accordingly it is obvious that while upholding privacy of personal information including medical records, exceptions have been provided for the public interest.

V CONCLUSION

In the aforesaid circumstances it is apparent that ensuring protections for Privacy of personal health information is very important. However an absolute right to privacy of over such information cannot be entertained as it violates another persona right to access such information. Accordingly balancing the two rights in order to provide for public benefit is very important. Accordingly as it was held in the case of *Md Majid Hussain S/O Hussain R/O vs Md Aqueel S/O Md. Abbas R/O H* (Civil Revision Petition No.2129 Of 2014) ,

“No persons privacy can be invaded much against the consent and will of that person. However certain exceptions to this rigid principle are carved out to allow access to such information where larger public interest is involved.”

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