

# **An Assessment of Patient's Privacy and Confidentiality under Nigerian Law in The Covid-19 Era**

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## **Abstract**

Coronavirus disease 2019 (COVID-19) pandemic is undoubtedly a global threat that has affected over 500 million people (as at May 2022) and the measures taken to combat the spread of the virus' impact on patient's privacy and confidentiality. The COVID-19 pandemic has raised challenges in dealing with patient's personal information sharing by the authorities. While the Nigerian Constitution and other statutes recognize a person's right to privacy and confidentiality, during extraordinary times such as the COVID-19 pandemic, maintaining privacy and confidentiality becomes difficult and may be breached to a degree to halt the spread of the virus. This paper examines the general concept of medical privacy and confidentiality under Nigeria's law as well as the exceptions thereto. The examination of these exceptions will justify the circumstances under which medical confidentiality may be breached in COVID-19 era.

## **Introduction**

The Nigerian laws recognise a patient's right to privacy and confidentiality (See section 37 of the 1999 Constitution of Nigerian as amended and section 1 of the National Health Act 2014). Medical confidentiality implies that medical personnel maintain confidentiality of their patient's medical information and keep their records safe and private from a third party. It is a duty that medical practitioners are obligated to perform to their patients, to give patients the chance to feel free and disclose every medical information to the doctor, not withholding anything and with the full knowledge that the doctor will keep it confidential and private. However, the nature of the COVID 19 pandemic has given rise to circumstances which seems to test this age long ethic and law in the medical profession.

The COVID-19 pandemic caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) has resulted in an international public health emergency and created unprecedented ethical challenges towards the response in handling the situation. COVID-19 began in December 2019 with reports of patients with pneumonia being diagnosed in Wuhan, China, which quickly turned into an outbreak (BBC News 2020). While Chinese officials declared a lockdown of Wuhan on 23 January 2020, this failed to deter the spread of the virus around the world. The World Health Organization (WHO) declared the COVID-19 outbreak to be a Public Health Emergency of International Concern (PHEIC) on 30 January 2020, and subsequently a pandemic on 11 March 2020 (WHO 2020).

Cases have increased exponentially since the initial detection of this disease involving more than 185 countries and territories worldwide. More than 500 million cases have been confirmed with over 6 million deaths by mid-June 2022 (WHO COVID

19 dashboard) while in Nigeria, there are over 250 thousand confirmed cases and over 3,000 deaths by mid-June 2022 (NCDC COVID 19 Nigeria). Lockdowns and various other public health measures that encourage social distancing have been implemented in Nigeria and in many other countries in an attempt to curb the pandemic.

It is not easy facing the unknown, which has created fear in the midst of the public. There have been report of patients complaining of wrongful diagnosis, reports of patients infected with the virus escaping from isolation centers, exposed and likely infected individuals failing to self-isolate or to give accurate record to the authorities in line with the regulations and so on (Oragwu, Juwah and Ifejika: 2020). These circumstances forced government and medical personal to publicly publish names of COVID 19 infected persons who escaped from designated isolation centers, defend their records and testing procedure in the public glare which sometimes requires disclosure of personal medical records of the patients that made allegations against the authorities and in some other circumstances private information of likely infected person are disclosed to protect the public. This paper examine the general concept of medical privacy and confidentiality under Nigeria's law vis-à-vis the challenges posed by the COVID 19 pandemic.

### **Patients' Right to Privacy and Confidentiality in Nigeria**

Nigeria's patients' privacy and confidentiality rights protection system emanates from the Constitution of the Federal Republic of Nigeria 1999, as amended (the Constitution). Under section 37, the Constitution protects the rights of citizens to their privacy and the privacy of their homes, correspondence, telephone conversations and telegraphic communication. Patients' privacy and confidentiality rights are thus extensions of a citizen's constitutional rights to privacy. The National Health Act (NHA) is the principal legislation that regulates the provision of health services in Nigeria. The NHA provides a basis for the regulation, development and management of a national health services in Nigeria (section 1(1) of the NHA). The NHA obliges the person in charge of a health establishment to keep the health records of every patient confidential, disclosure to a third party must be with the patients consent (section 26(1, 2) of the NHA) The NHA requires the person in charge of health establishments to set up control measures for preventing unauthorized access to information (section 29 of the NHA).

Section 23 of the NHA states that every health care provider shall give a patient relevant information pertaining to his state of health and necessary treatment relating to their health status except in circumstances where there is substantial evidence that the disclosure would be contrary to the best interests of the patient; the range of diagnostic procedures and treatment options generally available to the patient; the benefits, risks, costs and consequences generally associated with each option; and the patient's right to refuse health services and explain the implications, risks or obligations of such refusal. The act further states that the health care provider concerned shall, where possible, inform the patient in a language that he/she understands and in a manner which takes into account his/her level of literacy. On this bases the medical practitioners are sworn to confidentiality of their patients. This can be seen from their oath as contained in the Medical and Dental Council of Nigeria (MDCN) Code of Medical Ethics, where practitioners pledge to practice the profession with conscience and dignity, with the

health of their patients being the first concern and it goes further to state that respect will be given to patients' secrets confided in the practitioner even after the patients' demise (see Article 44 of the Medical and Dental Council of Nigeria Code of Medical Ethics).

There are varying rights accruing to patients under the laws regulating the medical profession. These includes right to confidentiality and right of the patient to be informed of his medical condition. Generally, only private matters merit confidentiality protection. A patient's medical records enjoys the protection guaranteed under section 37 of the 1999 constitution. The duty of medical confidentiality is not only imposed on the medical personnel but also extended to any individual who comes in possession of medical record of an individual at any point in time. In the case of *Attorney-General v Guardian Newspapers* ([1990] 1 AC 109), the court held that a duty of confidence arises when such confidential information comes to the knowledge of a confidant who has knowledge that such information is to be treated as confidential.

### **Limitation to the Right of Privacy and Confidentiality under the Covid 19 Era**

Patients' privacy and confidentiality rights highlighted above is not an absolute right, but a qualified right. It is a qualified right because there are some conditions under which the right of privacy and confidentiality can be limited. These conditions are spelt out under section 26(2), which provides that:

Subject to the provision of section 27 of the Act, no person may disclose any information contemplated by Subsection (1) unless:

- (a) The user consents to that disclosure in writing
- (b) A court order or any law requires that disclosure
- (c) In the case of minor, with the request of the guardian or parent
- (d) In case of any person who is otherwise unable to grant consent upon the requests of guardian or representative
- (e) Non- disclosure of the information represents a serious threat to public health.

From the provision of section 27 of the NHA above, we can say that disclosing the identity of COVID-19 patients can be justified in some conditions. These conditions are:

### **Patient Consent**

The first of such circumstances is where the patient consents to the disclosure. Consent must be obtained from the patient if access to their record has been requested by the HPCSA, an insurance company, employer or people involved in legal proceedings. If no such authority is forthcoming from the patient, no disclosure can be made. Likewise, a COVID-19 patients can consent to the disclosure of his identity. Where the COVID-19 patient is a minor, the guardian or parent must consent.

### **Order of the Court**

The provision under section 26(b) of the NHA empowers the Court to make an order for the disclosure of a COVID-19 patient's identity where it deems necessary. Although the NHA does not specify conditions under which the identity of a patient could be disclosed

by the court, the Court may be guided by public interest in granting such orders. Therefore where a COVID-19 patient escapes quarantine into the public, the identity of such person can be disclosed in the interest of the public so as to save others.

### **Threat to public health**

Another exception to the privacy and confidentiality of a COVID 19 patient is 'serious threat to public health'. COVID 19 is a highly infectious virus, which has spread swiftly starting from China through the whole world, with over 500 million people being infected and over 6 million deaths as at June 2022. The WHO declared the outbreak of COVID-19 as a public health emergency of international concern and issued temporary recommendations under the International Health Regulations (WHO Situation Report-10). In March 11, 2020, the WHO declared COVID-19 as pandemic (Khan et al: 2020).

Disclosure is very important in the case of a COVID 19 patient so as to alert the public not to come into contact with any infected person. This seems to be a required procedure with states who are having their first index case. This disclosure may sometimes put the public on red alert to be more sensitive to the reality of COVID 19. It also helps in dismissing the superstitious view that COVID-19 is unreal and that it is a white man's disease.

### **Conclusion**

The right to patient's privacy and confidentiality cannot be over-emphasized. It enables the patient to build trust on the health personnel with their personal information. Right to medical confidentiality should be respected by every health care providers. However, public interest must be prioritized over private interests. In the light of the recent COVID 19 pandemic, the protection of public interest must be prioritized over the duty of confidentiality or non-disclosure owed to a patient. More attention should be given to public health rights than personal rights of individuals. This is because in cases of health emergencies like Covid-19 medical confidentiality may be a privilege and not a right, considering the overwhelming interest of public safety.

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