

KEY POINTS YOU NEED TO KNOW ABOUT THE COMMON LAW OF CONFIDENTIALITY

WHO

- The common law of confidentiality applies to anyone who discloses information in a way that constitutes a breach of confidence (see below)

WHAT

- Common law' is not written in statute, but established by court decisions over time
- These indicate that a breach of confidence will be unlawful if:
 - The data is not in the public domain and is in some way sensitive or significant
 - The data was obtained in circumstances when an obligation to keep it in confidence might be expected (a paradigm example is the doctor -patient relationship)
 - Use of the data is unauthorised
 - But that a breach may be lawful if justified by being in the public interest
- If a data use is not a breach of confidence then it will normally also not constitute an infringement of the right to respect for private life under the Human Rights Act 1998
- Even if a data use is not a breach of confidence, you will still need to be sure you comply with the conditions of the Data Protection Act 1998 (DPA). Similarly compliance with the DPA does not necessarily guarantee that there can be no breach of confidence

WHY

- Patient data, if person identifying, by its very nature is likely to be sensitive and have been disclosed in circumstances where confidentiality was an expectation. So if a proposed research use is unauthorised and steps have not been taken to remove those features of the data that make it sensitive and significant to the individual then the research could constitute an unlawful breach of confidence
- However, the breach must be balanced against wider public interest and if the latter outweighs the former, the breach is not illegal

WHAT SHOULD YOU DO?

The 6 Caldicott Principles advise that you should:

1. Justify the purpose(s) for using confidential information
2. Only use confidential information when absolutely necessary
3. Use the minimum amount of confidential information that is required
4. Access to confidential information should be on a strict need-to-know basis
5. Everyone must understand his or her responsibilities
6. Understand and comply with the law