

# European Court of Human Rights as a Guarantee of Observation the Medical Secrecy

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## Abstract

The European Convention on Human Rights proclaims the right of everyone to privacy of information about their state of health, which is a particularly important issue during the COVID-19 pandemic. The aim of the study is to determine the essence of the ECtHR's activity as a guarantee of information culture, highlight the main elements of its activities in this aspect, and analyze the right to medical secrecy in the practice of the European Court of Human Rights. The formal-logical method was used to analyze the norms of the European Convention on Human Rights, determine the content of basic concepts, and systematize the material in order to obtain generalizing conclusions within the framework of the stated problem. The predictive method was used to determine the prospects for the development of legislation aimed at creating a system of effective legal provision for the confidentiality of patient information. The European Court of Human Rights has more than once drew attention to the enormous importance of protecting personal, in particular medical data, so that a person can enjoy his or her right to private and family life with satisfaction. That is why public authorities must ensure the confidentiality of information about the health of individuals. It should not be disclosed or processed without the prior informed consent of the person concerned. There are a lot of cases of unlawful disclosure of information about the patient's health and liability for unlawful disclosure.

**Keywords:** Confidentiality, European convention on human rights, illegal disclosure of information, medical secrecy, respect for private life

## INTRODUCTION

Modern society is often defined as informational, that means, that the main role in it belongs to information. The transition to an information society implies a change in the entire economic system of society and country, since the growth of the information industry for the national and world economy is becoming ever more significant.<sup>[1]</sup> Nowadays, information is the most important factor in the development of society. Scientific, technical, and social progress, the development of innovative technologies has led to an increase in the array of information, called the "information explosion." The era of the "information society" has come, in which most of the workers are not engaged in the production of material goods, but are directly related to the search for new knowledge, with the receipt, accumulation, and dissemination of information.<sup>[2,3]</sup>

Some authors even consider the technology of information space and the formation of the structure of information policy on its basis as a foundation for integration into the corporate

environment of the principles of human potential.<sup>[4,5]</sup> However, the culturological aspect of informatization of society is still insufficiently studied. An important role in this aspect is played by the protection of private life, the protection of confidential information, which is recognized as a fundamental human right in accordance with international human rights standards. The most famous definition of privacy was formulated by the American scientist, Westin,<sup>[6]</sup> in his famous book "Privacy and Freedoms," who defined privacy as the requirement of individuals, groups, or institutions to independently determine when, how, and to what extent, information about them can

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be transferred to others persons. Medicine is probably the first profession, whose workers, constantly dealing with personal and family secrets, were obliged not to divulge them. Thus, the famous oath of Hippocrates contains the following provision: "Whatever during treatment-as well as without treatment-I see or hear about human life from what should never be disclosed, I will keep silent about considering such things a secret."<sup>[7]</sup>

It should also be noted that legislation on personal data has been actively developing and changing in recent years. At the same time, it regulates various spheres of society, including the medical field, establishing various regimes of information and personal data. Although traditionally, the term "health data" has referred to information produced and stored by healthcare provider organizations, vast amounts of health-relevant data are collected from individuals and entities elsewhere, both passively and actively.<sup>[8]</sup>

One of the personal data modes is the medical secrecy mode. It should be noted that the protection of personal data, including medical information, is a fundamental feature of the right to respect for private life.<sup>[9]</sup> At the same time, the growth of information technologies has led to increased use of personal health information for purposes other than those for which they were originally collected. Disease management strategies, for instance, often depend on the ability to identify individuals with specific conditions for more intensive treatment or care management. The use of personal health information for commercial advantage also has become increasingly common.<sup>[10,11]</sup> Indeed, in practice, there are many cases of divulging medical secrets. For example, when communicating with relatives of patients, medical workers are rarely interested in documents confirming kinship and willingly talk about the diagnosis and prognosis of the disease with persons who simply introduced themselves as relatives of the patient.<sup>[12]</sup> This is largely due to the fact that people who have suffered from the disclosure of medical secrets do not defend their rights, and the perpetrators do not bear any responsibility.

The development of the concept of medical secrecy is associated with the development of medical ethics dedicated to the relationship of medical professionals with patients.<sup>[13]</sup> Confidentiality and respect for privacy are traditional moral precepts of health professions and are indicative of the duty of secrecy of professionals, regarding data about a third party, obtained through the exercise of his or her work.<sup>[14,15]</sup> Moreover, patients have a right to medical confidentiality. This restricts access to personal and identifiable medical information held by his health-care provider, which should be kept private and confidential and not normally divulged to the other agencies without consent.<sup>[16]</sup> In this aspect, in order to protect against disclosure of information about the health of individuals, it is necessary to study the provisions of the European Convention on Human Rights, which are extremely important, since it itself and the practice of the European Court of Human Rights are applied by national courts as a source of law. The aim of the study is to determine the essence of the ECtHR's activity as a

guarantee of information culture, highlight the main elements of its activities in this aspect, and analyze the right to medical secrecy in the practice of the European Court of Human Rights, as well as outline further research.

## LITERATURE REVIEW

The study of the problems of protecting human rights, in particular his right to confidentiality of personal data, as well as decisions of the European Court of Human Rights aimed at protecting private life and the right to freedom of expression, are devoted to the works Morits,<sup>[17]</sup> Pozdnikin,<sup>[18]</sup> Antonchenko,<sup>[19]</sup> Prudnikova,<sup>[20]</sup> and others. At the same time, a number of scientists were looking for an optimal balance between the right to freedom of expression and its restriction by the state for public purposes. For example, Morits<sup>[17]</sup> understands the public interest as a range of issues related to various spheres of public relations, related to the right of everyone to access information that may be considered socially necessary, based on existing case law, and the dissemination of socially necessary information ensures the observance and realization of constitutional human rights and freedoms to information, and the right of the public to know certain information outweighs the potential harm from its dissemination, if the purpose of disseminating such information is legitimate, necessary, and appropriate in a democratic society.

The limits of acceptable interference are defined by the boundaries between the public and the private, which define the space that organizations, governments, or other people cannot invade: (1) in the sphere of behavior-the forms of activity and the way of action that the individual has the right to protect (hide) intimacy from outsiders' attention; (2) in the sphere of making individual decisions, a person must be protected from intrusion into this sphere, that is, from pressure on him when making an individual choice-freedom; (3) the ability of a person to control information about himself to decide when, how, and to what extent information about a person becomes known or communicated to others.<sup>[16,21]</sup>

Pozdnikin<sup>[18]</sup> mentined that the right to privacy presupposes the ability to live in accordance with one's desires, which, however, should not come into clear conflict with public interests, the norms of law, and morality adopted in a given society. The right to privacy establishes the prohibition of any form of arbitrary interference with private life by the state and guarantees the protection of the state from such interference by third parties. In this context, it should be noted that it is very difficult to achieve a balance of human rights interests, and the legal regulation of confidentiality does not meet modern conditions. Concerning the medical information, J. George mentioned that medical confidentiality and security are becoming important all over the world. Protecting patient's health privacy should be a major concern and protecting people's privacy and confidentiality of the information are the most important facts that should be considered for better health improvement.<sup>[22]</sup>

In the modern world, it is also very important to ensure information culture, and the European Court of Human Rights plays an important role in this aspect. For example, Antonchenko<sup>[19]</sup> notes that the formation of information culture in a whole generation of people is a social order of the information society, the transition to which began in the second half of the twentieth century. This century has identified information as the main resource, and the main technology-information technology to search, present, and process, store, and use information. Prudnikova<sup>[20]</sup> notes that modern society makes a number of requirements for the individual in relation to the level of its information culture, including the ability to adequately formalize knowledge; adequacy of interpretation of formalized data and use of new information technologies in their life; ability to effectively use modern computer technology; and information technology that contribute to the formation of the paradigm of the information person.

## MATERIALS AND METHODS

It should be noted that in recent years, domestic and foreign scientists have actively studied the issues of the activities of the European Court of Human Rights, analyzed the provisions of the the European Convention on Human Rights, in particular article 8, which enshrines the right to privacy. However, it should also be noted that in this area, many aspects remain unexplored. In particular, for example, at the doctrinal level, the activities of the European Court of Human Rights, as a guarantee of information culture, have not yet been sufficiently studied; there are also no complex works that would analyze the right to privacy in the context of nondisclosure of medical secrets. That is why, this scientific article is devoted to such an important problem of science as the analysis of the activities of the European Court of Human Rights as a guarantee of information culture. Given the purpose of the study, the paper uses a set of regulatory principles, techniques, and methods by which knowledge of the specifics of the European Court of Human Rights as a guarantee of information culture. It should be noted that the following methods were used in the work: discourse and content analysis, system analysis method, induction and deduction method, historical method, formal-legal method, comparative-legal method, and others.

At the same time, the research was performed using qualitative methods, such as discourse and content analysis, which allowed to outline the specifics of the European Court of Human Rights' activities as a guarantor of information culture. The methodological basis of the research is a complex of general scientific and special legal methods of cognition. When studying the functioning of the European Court of Human Rights as a guarantee of information culture, the author used the dialectical method. The formal-logical method was used to analyze the norms of the European Convention on Human Rights, determine the content of basic concepts, and systematize the material in order to obtain generalizing conclusions within the framework of the stated problem.

The comparative legal method helped identify trends and compare the approaches of various European Court of Human Rights cases in the context of the protection of confidential information. In order to obtain and generalize knowledge about the essence and stages of development of the European Court of Human Rights practice in the context of protecting confidential information of patients, the historical and legal method was used. The system analysis made it possible to assess the existing approaches to the legal regulation of the protection of confidential information of patients. The predictive method was used to determine the prospects for the development of legislation aimed at creating a system of effective legal provision for the confidentiality of patient information.

The methodology of scientific research is based on factorial, cause-and-effect analysis aimed at identifying the circumstances that constitute the danger of disclosing confidential information to patients. The method of factor analysis was applied for a systematic study of the activities of the European Court of Human Rights as a guarantee of information culture, as well as for the development of proposals aimed at improving the legal support of this area. The theoretical basis of the research is the works of scientists, lawyers, and specialists in various branches of law. The legal framework of the study is made up of generally recognized principles and norms of international law and international treaties, the European Convention on Human Rights, as well as the practice of the European Court of Human Rights regarding the protection of medical secrets.

## RESULTS AND DISCUSSION

In most countries, the provision on the inadmissibility of deliberate or negligent disclosure of information about the patient's health, diagnosis, and treatment is enshrined in legislation. Since ancient times, receiving the title of doctor, a novice healer swore to keep medical secrets.

Today, there are cases of unlawful disclosure of information about the patient's health and liability for unlawful disclosure. Article 8 of the European Convention on Human Rights provides that everyone has the right to respect for private and family life, home, and correspondence. Furthermore, in the context of this article, the European Convention on Human Rights proclaims the right of everyone to secrecy of information about his state of health.

It should be noted that the composition of information constituting a "medical secret" includes information about the patient's state of health; the very fact of seeking medical help; the fact of examination or other research, as well as their results; the presence or absence of the disease, as well as the diagnosis; methods of treatment, prescribed medications, procedures performed, and other manipulations; intimate and family aspects of the patient's life; and other information obtained during a medical examination, including from the patient himself. It should be noted that the jurisprudence of the European Court of Human Rights has had an impact on the development of health-care rights across Europe.<sup>[23]</sup>

In this context, it should be noted that the most important in the direct application of the norms and principles of the European Convention on Human Rights is the case law established by the European Court of Human Rights, which specifies human rights and determines their legal nature. That is why it is interesting to study the practice of the European Court of Human Rights, which protects the secret about the state of human health as one of the important rights. For example, in the case of *M. S. V. Sweden*,<sup>[24]</sup> the applicant's medical records were forwarded from the clinic where she was being examined to the social services without her permission and knowledge. The court ruled that the protection of personal information, and even more so medical information, is essential for the satisfaction of a person's right to respect for his private and family life. Respect for confidential health information is an important principle. It is important not only to protect the privacy of patients but also to maintain their trust in the medical profession and health services in general.

The Wellcome Trust began a thorough study of patient data in 2016 after a review by the National Data Protection Service found that only a third of citizens were aware of how the NHS used patient data.<sup>[25]</sup> This was the result of the failed Care Data program, a government initiative to centralize and digitally process all patient records, which was postponed due to concerns, patient groups, and civil liberties groups.<sup>[26]</sup> It is in this context that "Understanding Patient Data" was launched, which aimed to support a nationwide change in public perceptions and understanding of patient data by facilitating communication with the public, patients, and health-care professionals.<sup>[27]</sup> This is based on the perspective that patients will not mind sharing their health information if there is openness and transparency.<sup>[28]</sup> It is also worth adding the following statement: "if people have the opportunity to ask questions and get straightforward answers, they are more likely to support."<sup>[29]</sup> As we can see, a public opinion survey shows that the UK public is generally willing to share health data, but only if it is done in a safe, transparent way, taking into account the views of stakeholders.<sup>[30]</sup> We propose to move directly to the European experience of regulating this area.

The European Court of Human Rights took the position of protecting human rights to secrecy about the state of one's health and summarized that national legislation should provide appropriate guarantees in order to exclude any communication or disclosure of personal data in relation to health, if this does not comply with the guarantees provided for in article 8 of the European Convention on Human Rights. Another case concerning the confidentiality of health information is the case *Z V. Finland*,<sup>[31]</sup> in which the European Court pointed out a violation of article 8 of the European Convention on Human Rights<sup>[32]</sup> in respect of the disclosure by the Finnish Court of Appeal of the plaintiff's state of health without her consent in criminal proceedings. Both the plaintiff and her husband were HIV positive. The court ruled that the disclosure of health information could have a negative impact on a person's private and family life, as well as on social status and employment,

exposing the person to dishonor and risk. Also, in violation of article 8, the European Court of Human Rights also recognized the decisions of national courts to keep the case file confidential for 10 years.

Senyuta<sup>[33]</sup> notes the inclusion, according to the Court's decisions, of the statements on the patient's health status in the component of a person's private life. The European Court on Human Rights recognized that the dissemination of information about the state of health of patients is of higher value than the interests of justice.

In the case of *Panteleyenkov V. Ukraine*,<sup>[34]</sup> ECHR expressed its position on the hearing of the case behind closed doors. The applicant sued the Chernigov College of Law and its rector, alleging that the rector had made offensive statements against him, among them one about his mental health. The hospital provided the court with a certificate stating that the applicant was registered as mentally ill, which the judge read out in the courtroom. The ECtHR acknowledged that the presence of the public in the hall when the judge read out the information obtained from the psychiatric hospital was one of the elements that negatively affected the applicant's private life. Thus, the measures taken by the court constituted a violation of the applicant's right guaranteed to him by article 8 of the Convention.

In case of *Herczegfalvy V. Austria*,<sup>[35]</sup> correspondence was sent to the applicant during his stay in the psychiatric hospital, but it was first received by the hospital curator, who decided what correspondence was to be sent to the applicant. Although part 2 of article 8 allows violation of part 1 of article 8 to protect health, the court ruled that the hospital violated article 8, citing the fact that no action had been taken to support the law on the prevention of arbitrary screening of correspondence or protection against arbitrary interference, as stated in article 8. In the case *L. L. v. France*,<sup>[36]</sup> the applicant complained in particular about the submission to and use by the courts of documents from his medical records, in the context of divorce proceedings, without his consent and without a medical expert having been appointed in that connection. The Court held that there had been a violation of article 8.

The essence of the case *Biriuk v. Lithuania*<sup>[37]</sup> is the largest Lithuanian daily newspaper, *Lietuvos Rytas*, published a front-page article about the threat of AIDS spreading in a remote region of Lithuania. In particular, it contained references to the medical staff of the local hospital, confirming that Mr. Armonas and Ms. Biryuk were infected with the HIV virus. Ms. Biryuk, described as "notorious for promiscuity," was also reported to have two illegitimate children with Mr. Armonas. In this regard, Mr. Armonas and Ms. Biryuk brought lawsuits against the newspaper, citing a violation of their right to respect for private life. In July 2001 and April 2002, the courts upheld the claims, finding that the article was defamatory and that the newspaper had published information about the private lives of Mr. Armonas and Ms. Biryuk without their consent or legitimate public interest.

In the case *L. H. v. Latvia*,<sup>[38]</sup> the applicant alleged that the collection of her personal medical data by a state agency without her consent had violated her right to respect for her private life. The Court recalled the importance of the protection of medical data to a person's enjoyment of the right to respect for private life. It held that there had been a violation of article 8 of the convention in the applicant's case, finding that the applicable law had failed to indicate with sufficient clarity the scope of discretion conferred on competent authorities and the manner of its exercise.

An indicative decision on the need to maintain a balance of interests when medical institutions provide information constituting medical secrets to the prosecutor's office is the judgment of the European Court of Human Rights in the case of *Avilkina and others v. Russia*.<sup>[39]</sup> The essence of the matter is that the deputy. The Prosecutor of St. Petersburg proposed to the Health Committee to oblige medical institutions to transmit to the city prosecutor's office information on all cases of refusal by members of the religious organization Jehovah's Witnesses to receive blood or blood components. From the point of view of the prosecutor's office, this decision was aimed at protecting the rights of citizens, since the ideology of the above-mentioned religious organization prohibited its followers from transfusing blood and its components. Avilkina and the other applicants objected to this decision and argued that the disclosure of medical documents to the prosecutor's office constituted a gross violation of their rights.

Thus, in this case, the ECtHR not only found a violation of article 8 of the convention on account of the fact that the interference with the applicants private life was not "prescribed by law," which could well have taken place, but drew the attention of the domestic courts and state authorities to the need to provide due protection against unauthorized transfer of personal data, as well as the establishment of a fair balance between the applicants' right to respect for their private life and the activities of public authorities. It should be noted that the issue of protecting personal information about patients' health becomes especially relevant in the context of the global COVID-19 pandemic. When seeking medical help, including if COVID-19 is suspected, a person counts on the safety of the information that they exchange with the attending physician, and on the state-guaranteed right to secrecy about the state of health and the nondissemination of such information without the consent of the person.

At the same time, there are very often cases of disclosure of personal information of a patient suffering from COVID-19, citing public interest in this case. Moreover, when we consider information as the public interest, it is necessary to assess the significance of various circumstances, the specifics of a particular situation, and resolve the conflict between two interests - the health information secrecy right and the public interest. It should also be noted that public interest is a fairly flexible concept and can change depending on specific circumstances. At the same time, the question of the legality of

using special applications to track the location of patients with COVID-19 is also open, since this is a direct state intervention in a person's private life. This means that countries that have created such applications must be mindful of the sensitivity of the transmitted data and must monitor the lawfulness of their processing and use.

The preservation of medical secrecy is of enormous importance for the individual and society as a whole, since it helps protect the honor, dignity, and health of citizens, ensures the possibility of a person's behavior at his own discretion, and also helps prevent the harmful consequences of self-medication. In addition, medical secrecy is of particular value to a person, since its illegal disclosure can lead to adverse consequences in almost all spheres of a person's life, including family, professional, etc. That is why the institute of medical secrecy, from the moment of its inception to the present day, is of high interest for specialists in various fields of knowledge. It should be noted that this issue was discussed in the scientific works of different authors. For example, Taylor and Wilson<sup>[40]</sup> analyzed reasonable expectations of privacy and disclosure of health data.

Faria and Cordeiro<sup>[41]</sup> made a research on the issue of the health data privacy and confidentiality rights; however, they mostly analyze the new European data protection regulation, which intends to bring reinforced tools on this domain. A number of Chinese scholars, such as Zhang *et al.*,<sup>[42]</sup> explores the antecedents and consequences of health information privacy concerns in online health communities by integrating the dual calculus and protection motivation theories.

Nicholas<sup>[43]</sup> analyzed the confidentiality, disclosure, and access to medical records. He mentioned, *inter alia*, that the patient confidentiality is not absolute and there are situations where disclosure is allowed; consent is justification for disclosure; disclosure of anonymised information does not generally require patient consent, unless it is possible to identify the patient; when the public interest in disclosure is greater than the public interest in confidentiality, disclosure is allowed. In research, we conclude that the European Court of Human Rights has drawn attention to the great importance of protecting personal, in particular medical data, so that a person can enjoy his or her right to private and family life with satisfaction. In the event of disclosure of information constituting a medical secret, in most countries of the world, patients can take the following actions: filing a complaint with the head of the organization whose employee disclosed information constituting a medical secret; filing a claim for compensation for moral damage against the organization whose employee disclosed information constituting a medical secret; or filing an application with the police department or the prosecutor with a requirement to initiate a criminal case on the fact of disclosing information constituting a medical secret. At the same time, public authorities must ensure the confidentiality of information about the health of individuals. It should not be disclosed

or processed without the prior informed consent of the person concerned.

In order to secure the right to protection of personal health information, including medical records, public authorities must enable people to have access to files or data in an understandable manner and without long waiting times; seek rectification or withdrawal of a file or individual data if they have been processed contrary to existing precautions; to take action if a request for confirmation, communication, rectification, or withdrawal is not complied with. At the same time, public authorities must ensure that those who have access to health information of people in the public eye are obliged to keep it confidential. Thus, the European Convention on Human Rights guarantees everyone the right to secrecy about his state of health, while imposing on health workers the obligation to ensure the protection of personal data of patients and other data about a person obtained in the performance of their duties.

The impact of COVID-19 sets a precedent in the global healthcare system. We are convinced that in order to avoid these problems, the medical information necessary for the safe care of the patient must flow freely through the platforms of providers in a particular region. For example, patients may first be screened by a healthcare organization, tested at a “congressional” collection point run by another institution, tested in one of several clinical laboratories with new testing potential, and receive follow-up through the primary medical care or other methods of doing business in another institution, and be hospitalized to places with sufficient capacity, not necessarily associated with any previous providers in the information chain.

## CONCLUSION

The European Court of Human Rights has more than once drew attention to the enormous importance of protecting personal, in particular medical data, so that a person can enjoy his or her right to private and family life with satisfaction. It should be also mentioned that the European Convention on Human Rights guarantees everyone the right to secrecy about his state of health, while imposing on health workers the obligation to ensure the protection of personal data of patients and other data about a person obtained in the performance of their duties. However, there are a lot of cases of unlawful disclosure of information about the patient’s health and liability for unlawful disclosure. For example, there are a lot of cases of disclosure of personal information of a patient suffering from COVID-19. The question of the legality of using special applications to track the location of patients with COVID-19 is still open, since this is a direct state intervention in a person’s private life.

Article 8 of the European Convention on Human Rights provides that everyone has the right to respect for private and family life, home, and correspondence. In this regard, it should be resolved the conflict between two interests: the right to secrecy about the state of health and the public interest. From one side, public authorities must ensure the confidentiality

of information about the health of individuals. It should not be disclosed or processed without the prior informed consent of the person concerned. This means that countries that have created applications to track the location of patients with COVID-19 must be mindful of the sensitivity of the transmitted data and must monitor the lawfulness of their processing and use. From another side, it should also be noted that public interest is a fairly flexible concept and can change depending on specific circumstances. Moreover, according to article 15 of the European Convention on Human Rights, in the event of war or other extraordinary circumstances threatening the life of the nation, either party may take measures in derogation from its obligations. That is, to partially restrict freedom of religion, freedom of speech, or other freedoms. And many countries urgently sent notifications to the Secretary General of the Council of Europe that they have applied this article.

The impact of COVID-19 sets a precedent in the global healthcare system. We are convinced that in order to avoid these problems, the medical information necessary for the safe care of the patient must flow freely through the platforms of providers in a particular region. For example, patients may first be screened by a healthcare organization, tested at a “congressional” collection point run by another institution, tested in one of several clinical laboratories with new testing potential, and receive follow-up through the primary medical care or other methods of doing business in another institution, and be hospitalized to places with sufficient capacity, not necessarily associated with any previous providers in the information chain.

Thus, the restrictions imposed by countries, including the collection of personal data to combat the pandemic, represent the situation described in article 15 of the Convention. The purpose of this information collection is to use the data to track the spread of COVID-19 and the corresponding response of the EU member states. However, countries that do not sent notifications to the Secretary General of the Council of Europe that they have applied this article 15 of the European Convention on Human Rights may be responsible for illegal collection of information.

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