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**THE PROTECTION AND DISCLOSURE OF
MEDICAL CONFIDNEITALITY IN COURT
PROCEEDINGS IN THAILAND**

BOONYARAT CHOKEBANDANCHAI

Ph.D. THESIS

2010

Abstract

In Thailand, s. 231 Criminal Procedure Code provides the court the broad discretion to direct the physician to disclose medical confidentiality in judicial proceedings. No criteria or guidelines have been formulated by the law to limit the judge's discretion. This can lead to a problem in the standardisation of judgements, as different judges hold different views concerning the protection of medical confidentiality. Therefore, this thesis argues that some criteria should be set up to support the judge in exercising the discretion about the disclosure of medical confidentiality in judicial proceedings. The argument has been supported by the results of empirical study which aims to explore the stakeholders' about the mentioned issue. The thesis findings are; (1) more education about the law concerning medical confidentiality should be provided to the public, (2) the court should interpret the law to give effect the Constitutional right to privacy, (3) S.231 Criminal Code should be revised to include the clause: "The court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the case, and also balance the interest between maintaining confidentiality and the interest of justice". More relevant factors lie in English laws such as necessity, proportionate and safeguards against abuse should also be considered. (4) more study is needed about the possibility of appointing an expert to a panel of judges.

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Chapter 1 Introduction

Medical confidentiality is the term used to describe the concept that all communications taking place in the course of the professional relationship between physicians and their patients must be confidential. The releasing of patients' secrets without their consent not only threaten individuals' rights to privacy, but may also deter people from seeking medical advice and treatment which could affect the safety of society as a whole. Therefore, there is widespread agreement that physicians should not, in principle, announce to the world that which patients have confided in them. This principle has been recognised since the time of the Ancient Greeks, as it is contained as part of the Hippocratic Oath which provided that:

Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not be nosed abroad, I will keep silence thereon, counting such things to be as sacred secrets.'

The concept of medical confidentiality has been recognized at the international level, as it is iterated in the Declaration of Geneva 1994, which provides an obligation, as a matter of professional ethics, on physicians to maintain medical secrets of their patient. At European level, the importance of medical confidentiality was confirmed by the European Convention on Human Rights (hereafter the Convention), which has been interpreted by the European Court of Human Rights (ECtHR) that Art.8 awards the right to keep one's health condition secret. In England, the duty of confidence is explicitly recognised by the common law and the Data Protection Act 1998. It is also recognised as "private and family life" provided by the Human Rights Act 1998, as it gives the effect of the rights under Art.8 of the Convention.

Although many legal systems accept an obligation of confidence, it is not absolute and subject to certain exceptions. Physicians are sometimes permitted or even required to disclose medical information. The most easily recognised exception of the rule is when the patient consents to disclosure of his or her medical information. It is also recognised that the interest in maintaining confidence can

sometimes be overridden by the public interest in disclosure of medical information.

In judicial proceedings, the administration of justice is the overriding consideration. This interest is mainly specified as an interest that the truth be established in court proceedings, a purpose which can only be achieved if, in principle, all existing evidence is available to the court when making a decision. Therefore, although the duty to maintain confidentiality lies in the public interest, the interest in the administration of justice will always prevail, and the physician has to disclose medical information when requested by the court.

In Thailand, medical confidentiality is protected as part of the constitutional right to privacy, and also protected via ordinary law, such as criminal law. However, the principle of privacy is rarely mentioned by the court judgement. With regard to the issue concerning the disclosure of medical confidentiality in court proceedings, criminal procedure law provides medical privilege for the physician to refuse to give testimony. However, the law also provides the court the broad discretion to direct the physician to disclose medical confidentiality. This can lead to a problem in the standardisation of judgements, as different judges hold different views concerning the protection of medical confidentiality. No criteria or guidelines have been formulated by the law to support the judge in exercising the discretion whether or not medical information should be disclosed in judicial proceedings. Therefore, is it appropriate to leave the court to exercise the discretion without any limitation, or there should be some criteria for the judges in exercising the discretion whether or not medical confidentiality should be disclosed? And what should be appropriate means for Thailand to protect medical confidentiality that would conform to international standards. As English law has reputation as an observer of the rule of law and the court has long experience in dealing with the issue of medical confidentiality, the study of English law is introduced in this thesis as an example for Thailand.

Under English law, the Human Rights Act 1998 requires that all legislation to be interpreted to give effect of the Convention rights which includes the protection of

right to privacy under Art.8. With regard to the protection of medical confidentiality in judicial proceedings, no privilege is proved for physicians. However, in certain circumstances the judge may refuse to compel the physician to disclose medical confidentiality. In deciding whether or not medical confidentiality should be disclosed, the court will perform a balancing exercise, weighing the interests in maintaining medical confidentiality with the interests in the administration of justice before any discretion will be made. The court may direct the physician to disclose medical information where the court found that the interest in preserving the confidential medical information is outweighed by other interests. Therefore, the way the court interprets the law to give an effective of Convention right and the balancing exercise of confidential disclosure could be an example for Thai court to exercise the discretion whether or not medical confidentiality should be disclosed in judicial proceedings.

The purpose of this thesis is to study the protection and disclosure of medical confidentiality in judicial proceedings in Thailand and find out what would be the best way to protect the disclosure of medical confidentiality in the court room. As Thailand has little experience in medical confidentiality, the study of English law, which is experienced in dealing with issues concerning medical confidentiality as well as the protection of right to privacy, will be very useful. The study of English law could help to inform discussion on appropriate measures for Thailand to adopt to support the judge in the exercise of the discretion with respect to the protection and disclosure of medical confidentiality in judicial proceedings, and what would find acceptance in relation to proposals for law reform.

This thesis has six chapters. Apart from this introduction, chapters 2 and 3 address English and Thai laws concerning medical confidentiality, respectively. The common law duty of confidence, Human Right Act 1998 and Data Protection Act 1998 will be reviewed by focusing on medical confidentiality. The way the courts have interpreted the law and balanced the interest between privacy, confidentiality and other public interests to decide whether or not medical information should be disclosed in judicial proceedings will also be analysed. Thai laws concerning medical confidentiality will be reviewed and compared with English law in

chapter 3 in order to find out whether the principles under English law could be adopted for Thailand, particularly the court's discretion of medical confidentiality disclosure.

Chapter 4 presents empirical research conducted in Thailand, namely the 2007 Survey. The objective of the survey is to explore the opinions of the members of the public, physicians and judges who are important stake-holders with respect to the protection of medical confidentiality in judicial proceedings in Thailand. The first part of the survey provides the questions that aim to explore the public's opinions towards the laws concerning medical confidentiality in Thailand. The second part of survey provides questions concerning judges' discretion with respect to the disclosure of medical confidentiality in order to explore whether the public, physicians and judges agree or disagree that some criteria should be set up to support the judges in exercising the discretion of confidential disclosure. The results of the 2007 Survey are presented in tables and figures, with comments from the respondents and the interviewees. The results of the survey will give better insight into what needs to be done and what would find acceptance in relation to proposals for law reform.

The data analysis of survey results will be discussed in chapter 5 combine with various issues of English and Thai laws mentioned in chapter 2 and 3, to find out what would be appropriate and acceptable measures for Thailand to provide the protection of medical confidentiality in judicial proceedings. Chapter six is the conclusion and recommendation. It is hoped that the recommendations offered by this thesis will be considered as a possible model for Thailand to deal with the issue of protection and disclosure of medical confidentiality in judicial proceedings in Thailand.

Chapter 2 The protection and disclosure of medical confidentiality in court proceedings in England

1. The protection of medical confidentiality

1.1 The common law duty

In English law, breach of confidence is actionable in contract law or in the tort of negligence. If the doctor/patient relationship is based on a contract, for instance, where a patient is receiving private health care, the doctor is under a contractual obligation to maintain the patient's secrets¹ and it must then be decided whether in the information disclosure amounted to a breach of contract giving rise to a claim for compensation.² To found an action in tort for the negligent of information disclosure done by a doctor, the obligation of confidence must be seen as part of the duty of care and the breach caused actionable damage. However, usually, the mentioned requirement is inapplicable to the release of patient information as it may not cause damage which can be regarded as actionable damage in negligence to the patient.

A claim for breach of confidence can also be found as a *sui generis* action which lies in the law of equity. In *Attorney-General v Guardian Newspapers (No2)*,³ the court ruled that the duty of confidence does not only depend on any contract but it depends on the broad principle of equity that those who received confidential information shall not take unfair advantage of it.⁴

¹ *Parry-Jones v Law Society and Others* [1969] 1 Ch 1, 9, per Diplock, L.J.

² *Reynolds v Health First Medical Group* [2000] Lloyd's Rep. Med. 240.

³ [1998] 3 All ER 545.

⁴ *Ibid.*, 624-625, per Bingham LJ. And see "Confidentiality and Medical Records", in J. Laing, A. Grubb, (eds), *Principles of Medical Law*, 2004, 555.

There are three elements required for the common law to find the existence of an obligation of confidence.⁵ In *Coco v A N Clark (Engineers) Ltd.*⁶, the court ruled that the breach of duty of confidence is to succeed if three elements are existed. Firstly, the information itself, must have the necessary quality of confidence. Secondly, the information must have been imparted in the circumstance that importing an obligation of confidence, and thirdly, there must be an unauthorized use of the information to the detriment of the party communicating it.⁷

The information must have the necessary quality of confidence requires that the information must not become public knowledge or public property.⁸ However, this raises to the question of how to consider whether or not the information is become public knowledge. If only two people know a secret, it does not mean that it is not confidential.⁹ Therefore, if in fact the information is secret, it is capable of being kept secret by the imposition of a duty of confidence on any person to whom it is communicated. The information only ceases to be capable of protection as confidential when it is known to a substantial number of people.¹⁰ This can be concluded that disclosure of confidential information to a limited number of people, such as close relatives and friends, does not cause it to lose its confidential character. Thus, if the patient discloses his or her medical secret to small group of relatives or close friends, the information is still likely to be confidential.

The same issue has been raised in *Attorney General v Guardian Newspapers Ltd and others.*¹¹ The facts in this case involved Peter Wright, a former member of the British security services, who was subject to the Official Secrets Act 1911. He

⁵ JK Mason, RA McCall Smith, GT Laurie, *Law and Medical Ethics*, 2002, 239-240.

⁶ [1969] RPC 41.

⁷ [1969] RPC 47, per Megarry J.

⁸ *Saltman Engineering Co. Ltd v Campbell Engineering Co Ltd* [1963] 3 ALL ER 413, 415.

⁹ *Stephen v Avery* (1988) 2 ALL ER 477, 481, per Nicolas Browne-Wilkinson V-C (Ch D).

¹⁰ *Ibid.*, 481, per Nicolas Browne-Wilkinson V-C (Ch D).

¹¹ *Attorney General v Guardian Newspapers Ltd and others* (2) [1988] 3 ALL ER 545.

wrote his memoirs about his time in the security service, and the book was published, first in Australia. The British Government immediately acted to ban the book in the UK. However, the book continued to be available legally in Scotland as well as overseas, and then some English newspapers published the articles from the book. The issue for the court to consider was whether information that has been made widely available had the necessary quality of confidence such that the confidant still had an obligation to maintain confidentiality. The court held that the principle of confidentiality only applies to information to the extent that it is confidential. Once the information has entered to the public domain, which is generally accessible, the principle of confidentiality can have no application to it. Then the confidential information, as confidential information has ceased to exist as well as the obligation of confidence.¹² The court also went on to state that the information which has already been communicated to the world cannot be subjected to a right of confidentiality. However, this will not be the case if the information has only been disclosed to a limited part of public.¹³

From this, it can be seen that the scope of ‘the necessary quality of confidence’ means that the information must not be something which is public property or known to substantial numbers of people. Information can be regarded as confidential only as long as it is not in the public domain. Applied in the context of medical confidentiality, this seems to suggest that, if a patient’s medical secrets come to the knowledge of the public, they cease to be confidential. It is noted that the facts in *Attorney General v Guardian Newspapers Ltd and others (2)* clearly demonstrate that the information had become public domain as they were published world-wide. There was no doubt that the number of people involved were ‘substantial’. However, there is still a question of degree: when is information sufficiently broadly disseminated that it can be said to have lost its confidential character?¹⁴ This issue may need to be considered on a case-by-case basis.

¹² Ibid., at 660-661, per Lord Goff.

¹³ Ibid., at 595.

¹⁴ Laing and Grubb 2004, 558-559.

The second requirement is that the information must have been imparted in circumstances imparting an obligation of confidence. This means, in the context of medical confidentiality, it needs to consider whether or not the relationship between doctor and his or her patient is one which leads to an obligation of confidence. English court accepted that in common with other professional men for instance a priest, the doctor is under a duty not to disclose his patient information which the doctor has gained in his professional capacity, with out consent of the patient.¹⁵ In *Attorney General v Guardian Newspapers Ltd and others*,¹⁶ the court stated that the law has long recognised that an obligation of confidence can arise out of particular relationships such as the relationships of doctor and patient, priest and penitent. Moreover, the obligation may be imposed by an express or implied term of contract or can even exist independently of any contract on the basis of an independent equitable principle of confidence.¹⁷

Therefore, it is clear that in English law, the courts have accepted that the relationship between doctor and patient is one which gives rise to a duty of confidentiality, independent from any contractual duty. Moreover, the duty of confidence covers not only the information that the doctor obtains directly from the patient but also includes the information about the patient that the doctor has learnt indirectly in the course of his or her profession.¹⁸ And in *Attorney General v Guardian Newspapers Ltd and others*,¹⁹ the court stated that the duty of confidence can arise when confidential information comes to the knowledge of a person in circumstances where he or she has noticed or has agreed that the information is confidential.²⁰

¹⁵ *Hunter v Mann* [1974] QB 767 at 772.

¹⁶ [1988] 3 ALL ER 545.

¹⁷ *Ibid*, 639, per Lord Keith.

¹⁸ *W v Egdell*, [1990] ALL ER 835 at 849 per Bingham LJ.

¹⁹ [1988] 3 ALL ER 545.

²⁰ [1998] 3 ALL ER 545 at 595, per Lord Goff.

Therefore, it can be seen that the court gave wide recognition to the duty of confidence. Applying in the context of medical confidentiality, it means that the doctor has the duty to maintain confidential information that directly or indirectly comes to the knowledge in the course of his or her profession including other information observed by the doctor in connection with medical treatment.²¹

Therefore, the common law duty of confidence

The third requirement formulated in the *Coco* decision was that the confidential information must have been used without authorisation and to the detriment of the confider. This means that confidential information will be protected from unauthorised use. As a result, if a patient has given his or her consent to the doctor to disclose confidential medical information, the disclosure of the information by the doctor will not be regarded as breach of confidence. However, it is legitimate to ask: to what extent can an unauthorised disclosure of information be regarded as detrimental to the confider? In *Attorney General v Guardian Newspapers Ltd and others* (2),²² the court considered this issue. Keith L.J stated that:

It is worthy of some examination whether or not detriment to the confider of confidential information is an essential ingredient of his cause of action in seeking to restrain by injunction a breach of confidence. Presumably that may be so as regards an action for damages in respect of a past breach of confidence. If the confider has suffered no detriment he can hardly be in a position to recover compensatory damages.... There may be no financial detriment of the confider since the breach of confidence involves no more than an invasion of personal privacy. Information about a person's private and personal affairs may be of a nature which shows him in a favourable light and would by no means expose him to criticism. ... I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know it, even though the disclosure would not be harmful to him in any positive way.²³

²¹ For more detail see Laing and Grubb 2004, 555-556. And see S. Pattinson, *Medical Law and Ethics*, 2006, 176.

²² [1988] 3 All ER 545.

²³ *Ibid.*, at 639-640.

It can be concluded that the concept of detriment has been interpreted in broad term. The detriment can be found in the fact of disclosure of confidential information in itself, even though the disclosure may not be really harmful to the confider and no need to prove of financial harm.²⁴ Therefore, regardless of whether or not the secret information would embarrass the confider, only the disclosure of secret information is sufficient to establish the detriment to the confider.

It is often said that the reasons behind the legal recognition of an obligation to maintain confidentiality is that it is in the public interest that confidences should be protected.²⁵ In *Attorney General v Guardian Newspapers Ltd and other (No 2)* the court ruled that the right to personal privacy is one which the law should seek to protect. And it is in the public interest that confidences should be respected. Therefore, the encouragement to help respect of confidentiality is in itself establishing a sufficient ground for recognising the obligation of confidence.²⁶ The court went on to give further comment that ‘there is an inherent public interest in individual citizens and the state having a enforceable right to the maintenance of confidence. Life would be intolerable in personal and commercial terms, if information could not be given or received in confidence and the right to have that confidence respected supported by the force of law.’²⁷

Therefore, it can be seen that the courts’ main purpose in recognising confidentiality in common law is not primarily for the protection of any *individual* patient’s right to privacy, but for the good of society as a whole. The court also noted that the public interest also provided a legal basis for justifying disclosure of confidential information, as the public interest in maintaining confidentiality may be outweighed by some other countervailing public interest which favours

²⁴ *Cornelius v Taranto* E.M.L.R 12, para 72. And see Pattinson, 2006,177.

²⁵ *Attorney General v Guardian Newspapers Ltd and others (2)* [1998] 3 ALL ER 545.

²⁶ *Ibid.*, at 639-640, per Keith LJ.

²⁷ *Ibid.*, at 596, per Donaldson MR

disclosure.²⁸ (will be examined in 2.2)

1.2 The impact of the Human Rights Act 1998

The European Convention on Human Rights (hereafter the Convention) has been incorporated into English domestic law by the effect of Human Rights Act 1998 (HRA). Art.8(1) of the Convention provides a right to respect for “private and family life”²⁹ This protects the disclosure of personal information as an aspect of an individual’s ‘right to respect of his private and family life’. The European court of Human Rights (ECtHR) has interpreted the concept of private life under Art. 8 in broad terms. It covers the physical and psychological integrity of a person.³⁰ It can sometimes embrace aspects of an individual’s physical and social identity. Respect for “private life” must also comprise to a certain degree the right to establish relationships with other human beings.³¹ Elements such as, for example, gender identification, name and sexual orientation and sexual life also fall within the personal sphere.³² In *Pretty v. UK*,³³ the court considered that, although no previous case has established as such any right to self-determination as being contained in Article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees. The court went on to stress that the right to private life included ‘the ability to conduct one’s life in a manner of one’s

²⁸ Ibid., 659.

²⁹ Article 8 of the Convention states that:

- (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.

³⁰ *X and Y v. the Netherland*, (1986) 8 E.H.R.R. 235, para 22.

³¹ *Burghartz v. Switzerland*, (1994) 18 E.H.R.R. 101, para 47; *Mikulic v. Croatia*, (2002) ECHR 27, para 53.

³² See e.g. *Burghartz v. Switzerland*, (1994) 18 E.H.R.R. 101, para 24, *Dudgeon v. the United Kingdom*, (1981) 4 E.H.R.R. 149, para 41, and *Laskey, Jaggard and Brown v. United Kingdom*, (1997) 24 E.H.R.R. 39, para 36.

³³ Application no. 2346/2002.

own choosing',³⁴ which includes the opportunity to pursue activities perceived to be physically or morally harmful or dangerous to the individual concerned. Therefore, regarding the wide scope interpretation, the right to private life can be deemed to include the protection of confidential information such as medical record.³⁵

However, Art.8 of the Convention is not absolute. Art. 8 (2) provides for interference with the rights under Article 8 (1), provided that the interference is in accordance with state law and is necessary for specific purposes in the public interest, such as 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 health or morals, or for the protection of the rights and freedoms of others. Therefore, the protection of private life can be interfered in order to protect these overriding interests.

Protection of medical confidentiality was the issue in *Z v. Finland*.³⁶ In this case Z applied for relief to the ECtHR, alleging that her right to privacy under the Art.8 of the Convention was violated when her HIV status was disclosed by the media during her husband's criminal trial. One of the critical issues in her husband's criminal trial was his HIV status. The ECtHR held that the publication of her HIV status and the fact that the court in Finland held that medical records only needed to be confidential for ten years violated her right to privacy and family life. However, the ECtHR rejected Z's claim that seizure of her medical records and the court order requiring her doctor to give evidence regarding her HIV status at her husband's trial violated her right to privacy, holding that the disclosure of her medical records could be justified under Art.8(2), as the importance of public interest in investigation and prosecution of a crime against her husband overrode her right to privacy in this instance. The reasoning of the judgement is based on the fact that interference with the patient's Article 8 right was 'a proportionate for the legitimate aims and necessary in a democratic society'. Because the evidence

³⁴ (2002) 35 E.H.R.R. 1, para 62.

³⁵ Pattinson, 2006,178.

³⁶ (1998) 25 E.H.R.R. 371.

taken from the applicant's doctor regarding the issue of when X had become aware of or had reason to suspect his HIV infection could indicate the material time decisive for the question whether X was guilty of sexual offences.

The order of applicant's doctor to give evidence was also subjected to adequate safeguards against abuse. It was because the case was heard in camera and the court ordered that the court file and transcripts of the doctor were kept confidential. Therefore, all those involved in the proceedings were under the duty to keep the information confidential. The breach of duty of confidence could constitute criminal offence under the law. (More discussion of the case will be brought in chapter 5)

Another case on the application of Art.8 took place in *M.S. v Sweden*.³⁷ In this case, M.S. was a nursery-school teacher who had injured her back at work and claimed compensation from the Swedish Social Insurance Office. During the investigation conducted by the Social Insurance Office to consider whether the woman entitled to receive compensation under Industrial Injury Insurance Act, it had requested and received her medical records from the clinic which contained details of an abortion that she later had as a result of her back problem. Social Insurance Office then rejected the applicant's claim compensation under the Insurance Act, finding that her sick-leave had not been caused by industrial injury. M.S. then claimed that her right to privacy guaranteed by Art.8 had been violated by the release of her medical records without consent. The ECtHR reiterated that the protection of personal data, particularly medical data, is of fundamental important to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention.³⁸ However, in deciding whether to accept the applicant's compensation claim, the Office had a legitimate need to check information received from her against data in the possession of the clinic. In the absence of objective information from an independent source, it would have been difficult for the Office to determine whether the claim was well-

³⁷ (1997) E.C.H.R. 49.

³⁸ *Ibid.*, para 41.

founded. Therefore, there were relevant and sufficient reasons for the communication of the applicant's medical records by the clinic to the office and so the measure was not disproportionate to the legitimate aim pursued. Accordingly, it concluded that there had been no violation of the applicant's right to respect for private life as guaranteed by Art.8 of the Convention.³⁹ (More discussion of the case will be brought into chapter 5).

It can be concluded from both *Z* and *M.S.* that the protection of medical information is regarded as being of fundamental importance to a person's enjoyment of his or her private and family life as guaranteed by Art.8. As a result, the disclosure of the information without consent generally constitutes a breach of the right to privacy. However, disclosure can be justified by Art.8 (2) if it is proportionate to protect an overriding interest.

Under English legal system, the HRA requires that English courts must take account of, and act compatibly with, any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights as well as various opinions and decisions of the Commission for Human Rights and the European Union Council of Ministers,⁴⁰ which will be examined below.

In *A Health Authority v x and Others*⁴¹ the court decided the case by referring to Art. 8 and the above mentioned cases. The court held that, in principle, patient records were confidential between the patients and doctors. That confidentiality was underscored by the guarantee of respect for the patient's private and family life in Art.8 of the Convention. However, applying the principles in *Z v Finland* and *MS v Sweden*, the court was satisfied that disclosure of the documents was

³⁹ Ibid., para.44.

⁴⁰ Human Rights Act 1998 s.2 (1). It is noted that s.6 provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." S.3 provides that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which compatible with the Convention rights." From this, it means that the court have to act compatibly with the Convention provided that primary legislation does not make it impossible to do so.

⁴¹ [2001] EWCA 2014.

necessary within the meaning of Art.8(2) of the convention.

In the case of *Campbell v MGN*⁴² the court interpreted the law of confidentiality to give the effect of ECHR which included the protection of right to privacy.⁴³ Breach of confidence was addressed as ‘misuse of private information’ when the misuser knows or ought to know that the information is private. Consequently, when the duty is equitable, confidential information is now regarded as private information covered by Art.8. And the meaning of a confidential relationship as previously understood has been broadened by removing the requirement of disclosure in confidence. This means that there is no need to establish a confidential relationship as a condition for an action for breach of confidence.⁴⁴

1.3 The Data Protection Act 1998

The UK has implemented Directive 95/46/EC via the Data Protection Act 1998 (DPA). It provides further protection for medical information. The purpose of the Directive is to enable the free flow of personal data between Member States by ensuring that fundamental rights and freedoms of individuals, and in particular their right to privacy, are protected.⁴⁵ The Act applies to both computerized and paper records. The Data Protection Act provides the statutory scheme regulating the processing of personal data belonging to data subject by data controllers.⁴⁶ The Act also requires that appropriate security measures will be taken against unauthorized access, or alteration, disclosure or destruction, of personal data and against accidental loss or destruction of personal data.⁴⁷ The Act is complex and

⁴² [2004] UKHL 22.

⁴³ Lord Nicholls stated that ‘The time has come to recognise that values enshrine in articles 8 and 10 are now part of the cause of action for breach of confidence’. [2004] UKHL 22, para 17.

⁴⁴ For more detail see Pattinson, 2006,178.

⁴⁵ Article 1 of the Directive. And see D. Beyleveld, “An Overview of Directive 95/46/EC in Relation to Medical Research”, in D.Beyleveld, D.Townend, S. Rouille-Mirza, J. Wright (eds), *The Data Protection Directive and Medical Research Across Europe*, 6-7.

⁴⁶ DPA, s.1(1).

⁴⁷ For more detail see Pattinson, 2006, 185-189. And see Laing and Grubb, 2004, 606-620.

this thesis will explore only some specific key features.

1.3.1 The key terms definition

The key terms definition of the Act are defined in section 1(1):

“*Personal data*” is given a very wide definition in the Act, it means data which relate to a living individual who can be identified

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

It also includes any expression of an individual’s opinion and statements of intention in relation to that individual.⁴⁸ Patient health records, defined in section 68 (2) as “Any record consisting of information relating to the physical or mental health or condition of an individual and has been made by or on behalf of a health professional in connection with the care of that individual” falls within the definition of personal data.⁴⁹ “Health care professional” is also defined widely in Section 69 (1), to include doctors, dentists, nurses, midwives and the like.⁵⁰

“*Sensitive personal data*” is defined in section 2 , and means personal data consisting of information as to the subject’s physical or mental health or condition.⁵¹ This means that health records contain both personal data and sensitive personal data which have to be processed under the requirements of the Act.

“*Data subject*” means an individual who is the subject of personal data. It is noted that s.1(1) defines personal data as data which relate to a living individual,

⁴⁸ S.1 (1). And see Laing and Grubb, 2004, 608-609.

⁴⁹ S.1 (1) and S.68

⁵⁰ See s.1, s.68(2) and s.69 (1). And see Pattinson, 2006, 185.

⁵¹ S.2 (e).

so the Act's requirements do not apply to the posthumous processing of patient data. As a result, all registered patients who are alive will be data subjects.⁵²

"Data controller" means a person who (either alone or jointly or in common with other persons) determines the purposes and the manner in which any personal data are, or to be processed. This means NHS bodies and private health care providers such as private hospitals and clinics are fall within this definition.⁵³

"Data processor" means any person (other than an employee of the data controller) who processes the data on behalf of the data controller.

"Processing" is given a very wide scope. The Act covers obtaining, recording, or holding the information or data or carrying out any operation or set of operations on the information, including any alteration, retrieval, use, disclosure, erasure, or destruction.⁵⁴ This definition makes "processing" a broad term, including any activity in relation to personal information will fall within this section. Thus, any activity concerning patient's health records, will constitute processing for the purposes of the Act.⁵⁵

1.3.2 The Data Protection Principles

The Act establishes eight Data Protection Principles which create obligations for a data controller.⁵⁶ Under the Act, the first data principle requires that personal data shall be processed "fairly" and "lawfully". This means the processing of personal data must conform with other laws concerning confidentiality such as common

⁵² S.1 (1). And see Pattinson, 2006, 185.

⁵³ Ibid.

⁵⁴ S.1(1). And under s.1(2), unless the context otherwise requires, 'using' or 'disclosing', in relation to personal data, includes using or disclosing the information contained in the data.

⁵⁵ Ibid.

⁵⁶ Sch.1 part 1.

law duty of confidence and HRA.⁵⁷ Therefore, the disclosure of personal information which breach the duty confidence will be regarded as information that has not been processed lawfully.

The first principle further provides that the processing of personal data must comply with (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.⁵⁸ This means the processing of health record must comply with both requirements in Sch2. and Sch.3, as health record contains both personal data and sensitive personal data. The requirements under Sch.2 are that the data subject has given consent for the processing of personal data. It is noted that this condition, unlike the first condition in Sch3., (examined below) does not require an “explicit consent” of the individual. The Directive gives the definition of “the data subject” as “any freely given specific and informed indication of the data subject’s wishes”,⁵⁹ Therefore, in this circumstance any consent would be considered by the law including implied consent.⁶⁰

Schedule 3 provides further conditions for the processing of sensitive personal data. Since health information falls within the definition of “sensitive personal data”, at least on further conditions in Sch3 must be satisfied. These condition are; Schedule 3 provides further conditions for the processing of sensitive personal data. Since health information falls within the definition of ‘sensitive personal data’ under s.2(e), at least one further condition in Sch 3 must be satisfied. The conditions in Sch 3 are;

1. The data subject has given his or her explicit consent to the processing of the personal data.⁶¹
2. The processing is necessary to protect vital interests when consent cannot

⁵⁷ Pattinson, 2006, 185-186.

⁵⁸ Sch.1, para 1.

⁵⁹ S.2 (h).

⁶⁰ Laing, and Grubb, 2004, 614-615.

⁶¹ Sch.3, para.1.

be given, cannot reasonably be expected to be obtained, or has been unreasonably withheld.⁶²

3. The processing is necessary for the purpose of or in connection with legal proceedings, legal advice or legal rights, including those necessary for the administration of justice.⁶³
4. The processing is necessary for medical purposes and is undertaken by (a) a health professional, or (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.⁶⁴ The Act defines “medical purposes” to cover the preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.⁶⁵
5. The processing is in accordance with any further order made by the Secretary of State.⁶⁶

The first principle also requires that in order for processing to be “fair”, the data controller must “so far as practicable” inform the data subject with the information about (a) the identity of the data controller, (b) the identity of any representative of the data controller, (c) the intended purposes of processing, and (d) any further information necessary, in the specific circumstances, for processing to be fair to the data subject.⁶⁷ The information must be provided at the time that data is obtained from the data subject. If the information is not obtained directly from the data subject, such as from a third party, the information must be provided “so far as practicable” at “the relevant time” which provides by

⁶² Sch.3, para.3.

⁶³ Sch.3, para.7 and para.8.

⁶⁴ Sch.3, para 8(1).

⁶⁵ Sch.4, para 8(2).

⁶⁶ Sch.3, para.10. And see Statutory Instrument 2000/417.

⁶⁷ Sch.1, Part II, paras. 2 and 3.

the Act as before it is first processed or disclosed.⁶⁸

Other Data Protection Principles concerning the obligation the personal data shall be obtained only for the specified and lawful purposes; shall be kept up to date and for no longer than is necessary for the purposes.⁶⁹ The Sixth Data Protection Principle requires that personal data shall be processed in accordance with the rights of data subjects under the Act. These rights are provided, for example in s.10, s.13 and s.14. Under s.10, a data subject has the right to give notice in writing to require a data controller to cease, or not to begin, processing personal data that is likely to cause substantial damage or distress to him and that such damage or distress would be unwarranted. S.13 provides that an individual who suffers damage or distress by the violation of any requirements of the Act by a data controller has the right to ask for compensation. And s.14 provides the right for the data subject to apply to a court to correct any inaccurate information about him. If the court is satisfied, it may order the data controller to rectify, block, erase or destroy any inaccurate data, including any other personal data which contains an expression of opinion that appears to be based upon inaccurate data.

1.3.3 Relationship between the Data Protection Act, the law of confidentiality and Human Rights Act

Both common law of confidentiality and DPA have some common features, as the laws provide an obligation to maintain the confidentiality of personal information. Since the First Data Principle provides that personal data shall be processed lawfully, it is clearly meant that all relevant laws of confidentiality which includes common law duty of confidentiality are brought into the Act. This means the processing of personal data shall also be met the requirements set up under the common law of confidentiality.

⁶⁸ Sch. 1, Part II, paras. 2(1) (a) and 2(1) (b) and (2) respectively.

⁶⁹ Sch.1, Part I, paras.2 – 5.

However, not all misuse of personal information will fall within the scope of both laws. In some case, some information will fall within the scope of common law but will not fall within the DPA. It is because DPA dealing with data that is processed by means of equipment or recorded as part of a relevant filing system, or as part of an accessible record as defined by s.68.⁷⁰ Therefore, if personal data is not processed or recorded by any means which provides under DPA s.1(1), it will not fall within the definition of “data” provided by the law. For example, if the doctor heard about his or her patient private information in the course of his or her profession which is not recorded in medical notes, the obligation of duty of confidence in this situation will fall within the scope of common law as the information is not recorded by any means required by DPA s.1(1).⁷¹

Some expert said that “the effect of HRA could bring the common law of confidentiality and the DPA closer together”.⁷² As we seen, the common law duty of confidence has been recently interpreted by the court to give the effect of Art.8 of the Convention which protects the right to privacy. At the same time, DPA implement the Directive 95/46/EC which aims to protect individual’s fundamental rights and freedoms, particularly the right to privacy, in connection with the processing of manual and computerized personal data,⁷³ which is also provided in the Convention and are referred as Convention rights. This means both common law duty of confidence and DPA have common feature of the protection of right to privacy which is the crucial principle provided under the Convention and is referred as Convention right. The impact of HRA is that it requires that the courts must act compatibly with the convention rights,⁷⁴ and all legislation must be

⁷⁰ S.1(1). And see Pattinson, 2006, 188.

⁷¹ For more details see Pattinson, 2006, 188.

⁷² Ibid., 189.

⁷³ The Directive 95/46/EC, art.1 provides the object of the directive;

1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.

⁷⁴ HRA, s.6(1).

interpreted, insofar as possible to give the effect in a way which is compatible with the Convention rights which includes Art.8.⁷⁵ Therefore, it can be seen that HRA will bring both common law duty of confidence and DPA close together as the laws must be interpreted to give the effect of Convention rights which includes the right to privacy under Art.8.

1.4 Anonymised Information

Recently, English court ruled that the information that is not capable of identifying a person called anonymised information does not constitute the obligation of confidence. This judgement was settled in *R v Department of Health, ex p Source Informatics Ltd.*,⁷⁶ the court considered the question of whether an obligation of confidence exists regarding information that is not capable of identifying a patient, or any person to whom an obligation of confidence is owed, and whether it would be a breach of confidence to disclose anonymised patient information. Source Informatics, a database company, wished to collect anonymised data from GPs and pharmacists about GPs' prescribing habits, and then sell these data to pharmaceutical companies for direct marketing of GPs.

However, the Department of Health issued a letter to Health Authorities advising GPs and NHS Pharmacists that they would face a legal risk of breaching the duty of confidence if they provide patient's information to the company, even though the information was anonymised and aggregated before sale. It is because patients provided information for their treatment and wider NHS purposes but not for direct marketing. Source Informatics then challenged in judicial review proceedings that the NHS guidance was unlawful and the use of "information from which the identity of patients may not be determined, does not constitute a

⁷⁵ HRA, s. 3 (1) states;

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. And see Pattinson, 2006, 189.

⁷⁶ [2001] Q.B. 424.

breach of confidentiality”.⁷⁷

At first instance, Latham J. ruled that the policy was lawful. It could be a breach of the duty of confidence to disclose confidential information without patient’s consent, whether or not it was anonymised. Also, the unauthorised disclosure of confidentiality was found in itself a sufficient detriment to constitute an action for breach the duty of confidence whether or not detriment was required. There was a public interest that confidences were respected. It was important that patients were not inhibited from seeking medical assistance. Therefore, the judge did not find that disclosure to Source Informatics could be justified in the public interest.⁷⁸ However, the judge declined to consider Department of Health claim that patients give implied consent for wider NHS purposes which included management purpose and research.⁷⁹

On appeal, the decision was reversed.⁸⁰ In deciding whether a pharmacist would interfere with patients’ personal privacy in disclosing anonymised information to Source Informatics, Simon Brown LJ, with whom the other judges agreed, concluded that pharmacists’ participation in the scheme did not breach their patients’ confidentiality, since patients’ identities would be protected. The judge gave the reason that the duty of confidence in relation to personal information characteristically arises in equity. Where equity provides the basis for recognising confidentiality, the scope of the duty of confidence rests on nothing more nor less than whether further disclosure or use of the information by the confidant can occur without “unfair treatment” of the confider. The court held:

... the confidant is placed under a duty of good faith to the confider and the touchstone by which to judge the scope of his duty and whether or not it has been fulfilled or breached is his own conscience, no more and no less. One

⁷⁷ For more details see D. Beleveld and E. Histed, *Case Commentary Anonymisation Is Not Exoneration*, 69-80.

⁷⁸ [1999] 4 All E.R. 185.

⁷⁹ For more details see Beleveld and Histed, 1999, 72.

⁸⁰ [2001] Q.B. 424.

asks, therefore, on the facts of this case: would a reasonable pharmacist's conscience be troubled by the proposed use to be made of patients' prescriptions? Would he think that by entering Source's scheme he was breaking his customers' confidence, making unconscientious use of the information they provide?⁸¹

Thus, the duty of confidence and whether or not it has been fulfilled or breached is determined by the confidant's own conscience, and there is no breach of confidence if the confidant can further use confidential information in good conscience. Unconscientious use was explained as using confidential information in a manner contrary to the legitimate interests of the confider, these being those interests of the confider that the law recognises as worthy of protection.⁸²

Therefore, as the equitable duty of confidence only requires pharmacists not to take unfair advantage of their patients, a pharmacist only acts in breach of confidence if this condition is met. Thus, the disclosure of anonymised information by pharmacists to Source Informatics was not treatment unfair to the patients, even though they have not given their consent for this use. Since the concealment of patient's identities was sufficient to secure patient's personal privacy, the company's proposed scheme did not involve a breach of confidence, as the patient's privacy would be safeguarded by anonymisation:

...I would stand back from the many detailed arguments addressed to us and hold simply that pharmacists' consciences ought not reasonably to be troubled by co-operation with Source's proposed scheme. The patients' privacy will have been safeguarded, not invaded. The pharmacists' duty of confidence will not have been breached.⁸³

According to the judgement, therefore, there is no duty of confidence where the information is fully anonymised, as anonymisation protects privacy.

There are several issues from the judgement that need to be considered. For example, the use of anonymised patient information for wider NHS purposes

⁸¹ [2001] Q.B. 424, 439, per Simon Browne LJ

⁸² [2001] Q.B. 424, 440.

⁸³ [2001] Q.B. 424, 440.

would relying on the conscience test, ‘whereby one asks whether the conscience of a reasonable person in the position of the confider would be troubled by the use of identifying data for the purpose in question’.⁸⁴ The ratio of the judgement referring to the conscience test contradicts the principle that public interest justifications can not modify the duty’s scope of confidence but can only override it. Therefore, the conscience test seems to make the justification of information disclosure easier than the public interest test.⁸⁵

A further issue is the court’s conception of privacy. It is noted that the Court of Appeal stated that ‘the concern of the law here is to protect the confider’s personal privacy. That and that alone is the right at issue in this case.’⁸⁶ However, in the Source Informatics scenario, the court held that once the information provided to the pharmacist is stripped of its ability to identify the patient, the patient’s personal privacy has been protected.⁸⁷ This view seems to narrow a concept of privacy, as it was held to be adequately protected by the concealment of their identities by appropriate anonymisation.⁸⁸ This means, with regard to medical information, there is no duty of confidence own to the patient once the information has been fully anonymised by those who lawfully obtained it.⁸⁹ This does not seem to be the correct interpretation. The right to privacy should be interpreted as much more than a right to concealment of one’s identity, because under Art.8(1) protection of privacy has been interpreted in broad terms.⁹⁰ Since the court in *Campbell*⁹¹ ruled that the common law of confidentiality should be

⁸⁴ Pattinson, 2006, 202.

⁸⁵ For more discussion see D. Beleveld and E. Histed, *Betrayal of Confidence in The Court of Appeal*, 2000, 281-287. And see Pattinson, 2006, 202.

⁸⁶ [2001] Q.B. 424, at 440. And see Beleveld and Histed, 2000, 294.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Pattinson, 2006, 201.

⁹⁰ *X and Y v. the Netherland*, (1986) 8 E.H.R.R. 235, para 22., and *Mikulic v. Croatia*, (2002) ECHR 27, para 53.

⁹¹ See *Campbell v MGN*, [2004] UKHL 22.

interpreted to give the effect of Convention rights which includes the right to privacy under Art.8, the ratio of the court judgment in *Source Informatics* which narrows the scope of the right to privacy can no longer be used, as this would be contrary to s.6(1) of HRA which requires the courts to act compatibly with the Convention rights.⁹²

Although the use of anonymised data without consent can be sometimes justified under Art.8(2), the use of such data must be subjected to the principle of necessity and proportionate, where the court in *Z v Finland*⁹³ will consider whether the reasons adduced to justify the measures were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued.⁹⁴ In this circumstance, the balancing exercise will be performed by the weighing between the competent interests. The balancing would be weighted in favour of patient interest where the court found that patient has a conscientious objection to the use of his or her personal information for certain purpose.⁹⁵ For example, consider a situation in which medical researchers proposed to use information about the treatment of women with irregular menstrual cycles to develop new chemical contraceptive methods.⁹⁶ Applying the decision in *Source Informatics*, it follows that women's information can be used lawfully where it has been fully anonymised, regardless of women's consent. However, it could happen that some women may certainly refuse to give the permission for their medical record to be used due to religious conviction. Therefore, the use of such personal data will be clearly against patients' will and they would regard this as exploitation of the vulnerable position they were in which could affect the trust between patients and health care member.⁹⁷

⁹² For more detail see Pattinson, 2006, 202.

⁹³ (1998) 25 E.H.R.R. 371.

⁹⁴ D. Beleveld and D. Townend, *When Is Personal Data Rendered Anonymous? Interpreting Recital 26 of Directive 95/46/EC.*, 2004, 79-80. And see Pattinson, 2006, 202.

⁹⁵ Ibid.

⁹⁶ For more detail see Beleveld and Histed, 1999, 73-74.

⁹⁷ Ibid.

2 Disclosure of medical confidentiality in judicial proceedings

2.1 Medical privilege

Privilege refers to a right to withhold from a court proceedings or a tribunal exercising judicial functions.⁹⁸ The existence of a privilege where a doctor has a right to refuse to disclose information to the court will always conflict with the interests of unimpeded administration of justice, which usually requires that all evidence relevant to the case must be made available to the hearing. The doctrine of privilege can be said to contain a general pronouncement of how to balance these competing interests. In *Grant v Downs*⁹⁹ the Australian court stated that :

The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial, litigation should be conducted on the footing that all relevant documentary evidence is available.

In general, the mere fact that information is imparted in confidence does not, of itself, sufficient to justify the court discretion to exclude the confidential information from the hearing, as the public interest in the administration of justice will be overriding.¹⁰⁰ Therefore, in order to ensure that the interests of justice will be best served, all existing evidence must be made available to the court when making a decision.¹⁰¹ From this it can be seen that privilege has the effect of undermining this principle, as some evidence that would otherwise be available will be excluded from the court.¹⁰² English law, however, does not provide for privilege in respect of the disclosure of medical confidentiality obtained by

⁹⁸ *Parry-Jones v the Law Society*, [1969] 1 Ch 1, 9.

⁹⁹ [1976] 135 C.L.R.674, 685 per Stephen, Mason and Murphy, JJ.

¹⁰⁰ Laing and Grubb, 2004, 586. And see *Home Office v Harman* [1983] 1 AC 280, 308 per Kinkel LJ.

¹⁰¹ See, for example, *Campbell v Tameside Council* [1982] 1 QB 1065 (CA), per Ackner LJ.

¹⁰² For more details about medical privilege see S. Michalowski , 2003,158-160.

doctors in the course of professional relationship with their patients.¹⁰³ In *Nuttall v Nuttall and Twynan*¹⁰⁴ the court stated that “what a person said to his doctor in a professional consultation was not privileged and that the doctor in the witness box must either give evidence or be committed for contempt of court”.¹⁰⁵

Therefore, once a doctor is called to give testimony and requested to supply confidential medical information, he or she has no right to refuse to testify. However, though the doctor has no *right* to refuse, the court, in particular circumstances, still has the discretion to decide whether or not to respect a confidence obtained through the professional relationship with the patient. In doing so, the court will balance the public interest in favour of disclosure against the public interest in maintaining the confidentiality of the information.¹⁰⁶

Moreover, as the doctor is under a legal duty to give testimony as well as carrying an obligation to maintain medical confidentiality, it could be embarrassing to answer questions contrary to his duty of confidence in the court room. In this situation, the doctor can seek the protection of the protection of confidentiality from the judge and ask if it is necessary for him to answer the question. The judge will exercise the discretion, which depends largely on the importance of the potential answer to the issues being tried, whether or not to direct the doctor to answer.¹⁰⁷

Therefore, it can be concluded that, although the doctor is under a legal duty to give testimony, the doctor can tell the court that he or she feels embarrassed to answer. The court then has the discretion not to direct the doctor to answer the question by considering the importance of the potential answer to the issue of the case.

¹⁰³ See *Attorney-General v Mulholland* [1963] 2 QB 477 (CA), 489 per Lord Denning; *Hunter v Mann* [1974] 2 ALL ER 414-420, 417 per Boreham J.

¹⁰⁴ [1964] 108 Sol J 605, per Edgedale J.

¹⁰⁵ *Ibid.*, cited in S. Michalowski, 2003, 159.

¹⁰⁶ *British Steel Corp. v Granada Television Ltd* [1980] 3 WLR 774, 821, per Wilberforce LJ.

¹⁰⁷ *Hunter v Mann* [1974] 2 ALL ER 414 (QBD), at 420, per Widgery LJ.

2.2 Public interest disclosure

As mentioned above, the presumption in favour of disclosure rests upon the public interest in the administration of justice. We will examine the concept of public interest and the duty of confidence before considering the exercise of the court's discretion in balancing the conflicting interests of maintaining confidentiality and administration of justice.

As covered in section 1.1 above, the main justification for respecting patient confidentiality is to be found in the public interest,¹⁰⁸ as society as a whole may be put at risk of wide spread of diseases if patients are deterred to seek medical treatment. However, the law of confidentiality also recognises that the public interest in maintaining confidentiality can sometimes be outweighed by the other public interest in disclosing specific information.¹⁰⁹ Such circumstance may include where disclosure is necessary to permissible only if made to someone with a proper interest in receiving the information.

The concept of public interest disclosure also accords fully with the structure of Art.8 of the Convention, which provides that the protection of right to private and family life can sometimes be interfered with as necessary for the interests of national security, public safety or economic well-being.¹¹⁰ As we have seen, the European Court of Human Rights has interpreted the concept of privacy in broad terms.¹¹¹ Therefore, the use of patient information without explicit consent engages Art.8(1), which is breached unless justified by Art.8(2).

In *Z v Finland*¹¹² the ECtHR confirmed that confidentiality and privacy are necessary to protect public trust in the medical profession and health care

¹⁰⁸ *Attorney General v Guardian Newspapers Ltd and others* (2) [1998] 3 ALL ER 545. And see 1.1.

¹⁰⁹ *Attorney General v Guardian Newspapers Ltd and others* (2) [1998] 3 ALL ER 545, 659 per Lord Goff.

¹¹⁰ Art.8 and 8(2).

¹¹¹ See 1.2.

¹¹² (1998) 25 E.H.R.R. 371. And see 1.2.

services, so that only “an overriding requirement in the public interest” can justify breaching medical confidentiality. Therefore, obviously, the concept of public interest disclosure justification fully accords in the Convention.

In England, the leading case concerning the disclosure of confidentiality in public interest is demonstrated the case of *W v Egdeell*.¹¹³ The fact of the case was about W, a detained patient who sought to discharge from the psychiatric hospital, asked Dr. Egdeell, a psychiatric to examine his condition with the aim to use the report for supporting his application for discharge. Dr.Egdeell, then prepared a report to the hospital which later forwarded to the Mental Health Tribunal. The report did not support W’s application as it contained the information about W relevant to his dangerousness which could pose a great danger to society. Therefore, W’s solicitor did not disclose it to the tribunal and withdrew W’s application. Dr. Egdeell then forwarded the information to the hospital as he believed should be known to the team treating W.

The Court of Appeal dismissed W’s for breach of confidentiality. The court considered that the question in the case was how the balance should be struck between the public interest in maintaining professional confidences and the public interest in protecting the public against possible violence. The Court balance these competing interests and came down in favour of disclosure.¹¹⁴ Stephen Brown P followed the General Medical Council’s guidance and Department of Health Code of Practice that allow the disclosure without consent only if necessary to prevent serious harm to others, or to detect, investigate, or punish serious crime.¹¹⁵ Bingham LJ stated that the disclosure was to prevent a real risk of consequent danger to the public.¹¹⁶ It is also interesting to note that Bingham LJ made reference (prior to the HRA) to Art.8 of the Convention. His Lordship stated that the situation in Egdeell fell squarely within the exception envisaged by Art.8(2), as

¹¹³ [1990] 1 All ER 835 (CA).

¹¹⁴ [1990] 1 All ER 835 (CA), at 846, per Stephen Brown P., and at 852-853, per Bingham LJ.

¹¹⁵ [1990] 1 All ER 835 (CA), at 846.

¹¹⁶ *Ibid.*, 852-853.

Dr. EgdeLL's conduct was necessary in the interests of public safety and the prevention of crime.¹¹⁷

It is noted that since, Art.8 aims to protect individual's fundamental right, namely the right to privacy, only another fundamental right or freedom can override it. Therefore, overriding public interest considerations must be interpreted as serving fundamental rights and freedoms. Some said that "the balancing exercise must be between the public and private interests in maintaining confidentiality and the public and private interests in disclosure".¹¹⁸

The verdict in EgdeLL seems to suggest the limits of the public interest defence. It is because "the disclosure should be made only to those whom it is necessary in order to protect the public interest, and the risk of harm must be real and involve the danger of physical harm".¹¹⁹ Therefore, some suggest that "the adoption of a reasonable belief test would allow for a mid-way position between requiring that objective proof of risk exists before any action is taken, and a blanket deferral to the doctor's opinion".¹²⁰ In *Woolgar v Chief Constable of the Sussex Police*¹²¹ the court indicated that necessity and proportionality require assessment on a case by case basis and unless this is impossible or would seriously compromise the public interest, the confider should be informed before the disclosure of confidentiality. Therefore, the confider will then have a chance to challenge in court before the disclosure of confidential information. This will enable the judge to exercise discretion as to whether or not the disclosure would be justified.¹²²

¹¹⁷ Ibid., 853.

¹¹⁸ R (S) v Plymouth city Council [2002] EWCA Civ 388, para. 32 (Hale LJ) cited in Pattinson, 2006, 193 at footnote 90.

¹¹⁹ Kennedy and Grubb, 2000, 1100-1101 cited in Pattinson, 2006, 193 at footnote 92.

¹²⁰ Pattinson, 2006, 193.

¹²¹ [1999] 3 All E.R. 604.

¹²² Pattinson, 2006, 193.

2.3 Duty of confidence and the interest in the administration of Justice

As mentioned in 2.1, although there is no legal privilege regarding breach of medical confidentiality, the court still has the discretion to decide whether or not to compel the doctor to disclose medical information. This raises the question of how to decide whether or not confidential medical information should be disclosed, because if the evidence in question could not be made available to the hearing, it could have an adverse effect on the administration of justice. The answer can be found in many cases in which the court has performed what is called “the balancing exercise” weighting between the interests in maintaining medical confidentiality and the interests of justice before any discretion will be applied. The court may direct the doctor to disclose medical information where the interest in preserving the confidential medical information is outweighed by other public interests, such as the interest of justice.¹²³

In balancing between disclosure and non-disclosure of confidential information, it is very important to consider with carefully, as use of the discretion will lead to some evidence being excluded from the hearing. As mentioned in 2.1, in the context of court proceedings, the interest of justice is very important. This interest is mainly specified as an interest that the truth be established in the court proceedings, which can only be achieved if, in principle, all relevant evidence is made available to the court to make the decision.¹²⁴ Therefore, the exclusion of some evidence, such as medical records, could have an adverse effect on the fair trial. This raises the question of how the court’s discretion to exclude such evidence should be exercised properly. Can the evidence be excluded from the hearing only the ground that such evidence has been imparted under the duty of confidence as to the course of doctor-patient relationship? Or the court can exercise the discretion to disclose patient information, though it is under the duty of confidence, if it was considered that such information is relevant to the issue of the case.

¹²³ *British Steel Corp. v Granada Television Ltd.* [1980] 3 WLR 774, 821.

¹²⁴ *Campbell v Tameside Council* [1982] 1 QB 1065 (CA), per Ackner LJ.

In *D v N.S.P.C.C.*¹²⁵ the court ruled that confidentiality does not give any ground for immunity.¹²⁶ Confidentiality is not a separate head of immunity.¹²⁷ Simon LJ also confirmed this view that the confidentiality of the communication is not itself a satisfactory basis for testing whether the relevant evidence should be withheld, and “it does not sufficiently reflect the true basis on which any evidence is excluded- namely, the public interest”.¹²⁸ The judge came to the conclusion that “in general, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege”.¹²⁹ Diplock LJ agreed with the House of Lords which indicated that confidentiality of itself does not provide a ground of non-disclosure, and denied to accept the proposition that “the basis of all privilege from disclosure of confidential documents in legal proceedings is to prevent the breaking of a confidence”.¹³⁰ Edmund-Davies LJ gave the similar comment with other judges. The judge state that “it would be unthinkable to vest the judiciary with a power to exclude in its discretion evidence relevant to the issues in civil proceedings merely because one side wants it kept out and the judge thinks that its disclosure is likely to prove embarrassing. In other words, the exclusion of relevant evidence always calls for clear justification”.¹³¹ The judge went on to raise the issue of balancing exercise weighting between the competent interests in order to decide whether the non disclosure is justified. His lordship stated that “it is a serious step to exclude evidence relevant to an issue, for it is in the public interest that the search for truth should, in general, be unfettered. Accordingly, any hindrance to its seekers needs to be justified by a convincing demonstration that an even higher

¹²⁵ [1978] AC 171.

¹²⁶ *Ibid.*, 230, per Lord Hailsham.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, 237.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*, 220.

¹³¹ *Ibid.*, 243.

public interest requires that only part of the truth should be told".¹³² Finally, the judge came to the conclusion that :

The disclosure of all evidence relevant to the trial of an issue being at all times a matter of considerable public interest, the question to be determined is whether it is clearly demonstrated that in the particular case the public interest would nevertheless be better served by excluding evidence despite its relevance. If, on balance, the matter is left in doubt, disclosure should be ordered.¹³³

Therefore, according to the court, it is clear that doctors are not exempt from giving testimony in respect of confidential information obtained in the course of the professional relationship with patients, merely on the basis that the information is confidential. This means the confidentiality of the doctor/patient relationship, which is protected outside the court, is not in itself sufficient to override the competing interest in finding the truth.

With regard to balancing exercise perform by the court. The courts usually carried out by weighing between the interests of maintaining confidentiality and other public interests. In some circumstance, the interest in preserving confidences may be outweighed by some other countervailing public interest which favours disclosure. For example in *Attorney General v Guardian Newspapers Ltd and others*¹³⁴ the court ruled:

The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest the confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring

¹³² Ibid., 242.

¹³³ Ibid., 246, per Edmund-Davies.

¹³⁴ [1988] 3 All ER 545.

disclosure.¹³⁵

Griffiths LJ stated:

The courts have, however, always refused to uphold the right to confidence when to do so would be to cover up wrongdoing. In *Gartside v. Outram* (1857) 26 L.J. Ch. 113, it was said that there could be no confidence in iniquity. This approach has been developed in the modern authorities to include cases in which it is in the public interest that the confidential information should be disclosed. See *Initial Services Ltd, v. Puttrill* [1968] 1 Q.B. 396, *Beloff v. Pressdram Ltd.* [1973] 1 A.E.R. 241 and *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526. This involves the judge in balancing the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of the confidential material.

With regard to the disclosure of medical information, the balancing exercise will also be performed weighting between patient confidentiality and other public interest. For example, in *A Health Authority v X and others*,¹³⁶ the case concerning the Health Authority requested the GP and his partners to disclose the document about the previous care proceedings in order to investigate if the doctors had complied with the health authority's terms and service. The court held that the strict confidentiality that attached to litigation material in children cases was not absolute and there were cases where it had to yield to a conflicting public interest. In this case there was a high public interest in the proper administration of professional disciplinary hearings, particularly in the field of medicine. Therefore, in balancing patient confidentiality against the public interest in effective disciplinary procedures for the investigation of medical malpractice, the balance came down in favour of disclosure of the case material.

The court ruled by referring to Art.8.of the Convention that patient records were confidential between doctor and the patients and was guaranteed as to respect of patient's private and family life. But the interference of such right, applying the principle under *Z v Finland* and *MS v Sweden*, the disclosure was justified within

¹³⁵ *Ibid.*, 659 per Lord Goff.

¹³⁶ [2001] EWCA 2014.

the meaning of Art.8(2). The court held:

.....the patient records are of course confidential as between Dr X and his partners and their patients.....They are equally confidential as between the patients and the Authority. This confidentiality of a patient's medical records, whether in the hands of a doctor or under the control of a public authority, is heavily underscored by the guarantee in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of respect for the patient's private and family life as it has been interpreted by the European Court of Human Rights.¹³⁷

Having regard to all the relevant factors I am satisfied that, in principle, there is a compelling public interest justifying — indeed requiring — the disclosure of the List A documents to the Authority. Putting the matter in Convention terms, as I must, and applying the principles in *Z v Finland* and *MS v Sweden*, I am satisfied in this case, as *Kennedy LJ* was in *Woolgar*, that the disclosure of the List A documents is, in principle, “necessary in a democratic society in the interests of ... public safety or ... for the protection of health or morals, or for the protection of the rights and freedoms of others” as those words are used in Article 8(2) of the Convention.¹³⁸

The court further ruled that the disclosure of medical record which interfered with patient’s rights under Art.8 could only be justified if there were effective and adequate safeguards against abuse. In deciding this issue, the court clearly stated principle under *Z v Finland* and *MS v Sweden* and the principle under section 6 of the Human Rights Act 1998 which required a public authority to act compatible with a Convention right. Therefore, it follows that it is the duty of every public body which transfers or authorizes the transfer of medical records from a doctor to a public body or from one public body to another to ensure that the confidentiality of the records is preserved and provided “effective and adequate safeguards against abuse”. The court held:

The importance of such a requirement is now underscored by what was said in *Z v Finland* and *MS v Sweden*. If there is to be disclosure of materials which entails an interference with a patient's right to respect for

¹³⁷ [2001] WL 513038, para 31

¹³⁸ *Ibid.*, para 50.

private life (and such is undoubtedly the case here) then that interference will be justified only if there are what in *Z v Finland* at p 408 (para 103) the Court referred to as “effective and adequate safeguards against abuse”. What those safeguards should be will, no doubt, depend upon the particular circumstances. The Court's approach in *Z v Finland* and *MS v Sweden* suggests, however, that typically what will be required is: • (i) the maintenance of the confidentiality of the documents themselves — the documents should not be read into the public record or otherwise put in the public domain; • (ii) the minimum public disclosure of any information derived from the documents; and • (iii) the protection of the patient's anonymity, if not in perpetuity then at any rate for a very long time indeed.¹³⁹

.....It follows, in my judgment, that although the Authority has made out its case for the disclosure to it of the List A documents, this disclosure should be on the express conditions (1) that the documents are to remain confidential and (2) that not merely the Authority but every other public body or other person to whom the documents may properly be transmitted is subject to the obligation to take effective and adequate safeguards against abuse of the kind referred to by Cazalet J in *Re A* and by the European Court of Human Rights in *Z v Finland* and *MS v Sweden*.¹⁴⁰

With regard to the disclosure of List B document, the court held that there was a compelling public interest requiring disclosure of the documents. The disclosure was, in principle, “necessary in a democratic society in the interest of....public safety or the protection of health or morals, or for the protection of the rights and freedoms of others” as provides in Art. 8(2).¹⁴¹ The public body or other person to whom the documents could properly be transmitted was also subjected to the obligation to take effective and adequate safeguards against abuse.¹⁴²

On appeal, the court upheld the decision of Mr Justice Munby. The court ruled that “the strict confidentiality attaching to litigation material in children's cases has long been upheld both according to common law and statute. Of course that

¹³⁹ Ibid., para 53.

¹⁴⁰ Ibid., 55-56.

¹⁴¹ [2001] WL 513038, para 73.

¹⁴² Ibid.

strict confidentiality is not absolute. There are many instances in which it must yield to a conflicting public interest.... There is obviously a high public interest, analogous to the public interest in the due administration of criminal justice, in the proper administration of professional disciplinary hearings, particularly in the field of medicine. In the application of the authorities which he had cited Munby J properly ordered the release of the case material, namely the list A documents".¹⁴³

From the judgement, it can be seen that the court gives the clear reason of balancing between the interest in maintaining confidentiality and the interest of disclosure. There was a high public interest in the proper administration of professional disciplinary hearings, particularly in the field of medicine. Therefore, public interest in upholding confidentiality was outweighed by the interest of disciplinary investigation which favoured disclosure.

Another case which has supported the approach given in *A Health Authority v X and others* was found in *Woolgar v Chief Constable of Sussex Police*.¹⁴⁴ The fact of the case was that a registered nurse sought an injunction to restrain the police from disclosing to her regulatory body, the United Kingdom Central Council for Nursing Midwifery and Health Visiting, the contents of an interview between her and the police which had taken place whilst the police were investigating the death of a patient in her care. The Court of Appeal dismissed the nurse's appeal from the refusal of the judge to grant her an injunction to restrain disclosure. The court ruled that there was a countervailing public interest entitled the police to release the material to the regulatory body as it was relevant to the issue of the investigation process conducted by regulatory body. Therefore, the court found that the disclosure was necessary in a democratic society in the interest of public safety or for the protection of health or moral, or for the protection of the rights

¹⁴³ [2001] EWCA Civ 2014, para 18-19 per Thorpe LJ.

¹⁴⁴ [2001] 1 WLR 25.

and freedoms of others.¹⁴⁵ The court went on further to confirm that although there was no request from the regulatory body, the polices, with their reasonable views, were free to pass the information to the regulatory body for the interest of public health or safety.¹⁴⁶

Kennedy LJ stated:

Putting the matter in Convention terms Lord Lester submitted, and I would accept, that disclosure is “necessary in a democratic society in the interests of ... public safety or ... for the protection of health or morals, or for the protection of the rights and freedoms of others.

Even if there is no request from the regulatory body, it seems to me that if the police come into possession of confidential information which, in their reasonable view, in the interests of public health or safety, should be considered by a professional or regulatory body, then the police are free to pass that information to the relevant regulatory body for its consideration.”¹⁴⁷

From the judgement in *A Health Authority v X and Others* and *Woolgar v Chief Constable of Sussex Police, U.K.C.C.* it can be seen that the courts interpreted the law to give the effect of the right to respect for private life as guaranteed by Art. 8 of the Convention. The courts recognised the fundamental importance of protecting personal data, guaranteed by Art.8. The justification of the interference of such right was ruled in accordance with *Z v Finland* and *M.S. v Sweden* which required the court to examine whether the reasons adduced to justify the interference were relevant and sufficient and whether the measure was proportionate to the legitimate aim pursued. And the disclosure of medical record was subjected to effective and adequate safeguards against abuse, including effective and adequate safeguards of the particular patient’s confidentiality and anonymity. It is noted that in *Woolgar v Chief Constable of Sussex Police, U.K.C.C.*, the court commented that in order to safeguard the interests of the individual, the person should be informed before disclosure to enable that person

¹⁴⁵ [2001] 1 WLR 25, para 36

¹⁴⁶ Ibid.

¹⁴⁷ [2001] 1 WLR 25, para 36

to seek assistance from the court.¹⁴⁸

Moreover, in exercising the discretion of information disclosure, the court will also consider the value of the relevant material of the case. This means the judge will consider the important of the documents to the issues of the case. In *R v Keane*,¹⁴⁹ the court stated:

... The judge has to perform the balancing exercise by having regard on the one hand to the weight of public interest in non-disclosure. On the other hand, he must consider the importance of the documents to the issues of interest to the defence, present and potential... Accordingly, the more full and specific the indication the defendant's lawyers give of the defence or issues they are likely to raise, the more accurately both prosecution and judge will be able to discuss the value to the defence of the material.¹⁵⁰

Therefore, in performing the balancing exercise, the court will also consider whether or not the information in question is relevant and material to the case. The balance will usually come down in favour of disclosure, if the confidential information is relevant and material for the case. In contrast, if the confidential information is not relevant or material to the issue of the case, the court will then normally decide in favour of public interest in non-disclosure.

It is noted that, though the information is relevant and material to the issue of the case, English courts still has the discretion to decide whether or not the information should be disclosed. And sometimes the court exercises the discretion to refuse disclosure of information where there is an important public interest in maintaining the confidentiality of the information in the issue.¹⁵¹ This can be seen, for example, in *D v N.S.P.C.C.*,¹⁵² the court held that documents disclosing the source of a complaint to the NSPCC should be immune from inspection in

¹⁴⁸ Ibid.

¹⁴⁹ [1994] 1 WLR 746.

¹⁵⁰ Ibid., at 751-752,. For more details see S. Michalowski, 187.

¹⁵¹ Laing and Grubb, 2004, 586.

¹⁵² [1978] AC 171.

discovery since otherwise the charity's capacity to perform its public functions may be put at risk. Edmund-Davies LJ stated that the judge still has the discretion to direct non-disclosure of confidential information even if such information is relevant and necessary to the case if there is additional reason, besides the general interest in maintaining confidentiality, pointing towards an overriding interest in non-disclosure,¹⁵³ for example, the public interest in protecting the information of the N.S.P.C.C. so as to enable that organisation to function and protect children effectively. Therefore, the existence of such additional public interest can outweigh the public interest in the administration of justice.¹⁵⁴

The fact concerning the mother of 14 months infant girl claiming damages for personal injuries and consequential loss against N.S.P.C.C. about its investigation process of a complaint received about maltreatment of the infant caused by the mother. She claimed that the society should disclose to her all documents in its custody, possession or power relating to the complaint and the complainant's identity. She stated that the identity of the complainant was unknown to her and that she required discovery of the documents to enable her to initiate proceedings against the complainant. The society denied to disclose the relevant document on the ground that it had the duty to sought information from the public as to ill-treatment, abuse and neglect of children on the assurance that such information would be treated with complete confidence and the identity of the complainant would not, without his or her express permission, be disclosed outside the society's organisation. And as the society needed to perform its duties under its charter and as the authorised persons under the Children and Young Persons Act 1969 required that the absolute confidentiality of information given in confidence should be absolutely respected.

Edmund- Davies LJ stated:

.....while irrelevant facts are inadmissible in legal proceedings in this country, not all inadmissible facts are irrelevant. To be received in evidence, facts must be both relevant and admissible, and under our law relevant facts

¹⁵³ Ibid., 242-246.

¹⁵⁴ See *Campbell v Tameside Council* [1980] AC 1028, 1087-1089.

may nevertheless be inadmissible. It is a serious step to exclude evidence relevant to an issue, for it is in the public interest that the search for truth should, in general, be unfettered. Accordingly, any hindrance to this seeker needs to be justified by a convincing demonstration that an even higher public interest requires that only part of the truth should be told.¹⁵⁵

In deciding whether the document in question should be disclosed, the court had balanced the detriment to the public interest on the administration side against the public interest on the judicial side which were the interest of the mother in her action for damage and the interest of the society to be able to continue its good work.

Having regard to all relevant factors, the decision came down to favour of non-disclosure. The ratio of the judge's decision against disclosure of the information was that N.S.P.C.C acting under a statutory duty as an "authorised person" under the Children and Young Persons Act 1969, section 1(1), "and there was a public interest in protecting its sources of information which overrode the public interest in the plaintiff's having the relevant documents in order to obtain legal redress".¹⁵⁶ Also, it was necessary to protect the informant from harassed by action of libel or slander. Therefore, it is clear that although information is relevant to the case, the court still has the discretion to direct non-disclosure if there are additional public interests that outweigh the public interest in the administration of justice, such as the public interest in allowing the state body such as N.S.P.C.C. to function its duty to protect children rights effectively. The court stated:

...I would put the reasons why it is in the public interest that the name and address should not be given. There are several. The first is that the society should be able to continue its good work. If it is to be compelled to disclose the names, its sources of information will dry up. The second is that confidences should be respected. The law should not compel the society break faith with those who have placed their trust in it. The third is that grave injustice may be done to the informant if he or she is to be the object of resentment by the mother, or harassed by an action for libel or slander, when she is not shown to have done any wrong at all, but has done

¹⁵⁵ [1978] AC 171, 242.

¹⁵⁶ [1978] AC 171, 177.

all for the best.

Weighing these considerations one against the other, I think the balance comes down decisively against the nave being disclosed.....When one looks at the duty which has been laid by Parliament on the defendants, and bears in mind the great public interest that children should not be neglected or ill-treated, in my mind there is no doubt at all that the public interest in protecting the defendants' sources of information overrides the public interest that [the mother] should obtain the information she is seeking in order to obtain redress.¹⁵⁷

3 Conclusion

In English law, a breach of medical confidentiality is not a criminal offence. The main discussion of the protection of medical confidentiality takes place in the context of the common law duty to respect confidences. The reason behind the protection of medical confidentiality lies in the public interest in maintaining confidentiality. Since the introduction of the HRA, the court needs to interpret the common law duty of confidentiality in the light of the ECHR, and it has been held that the common law cause of action should now be regarded as an extension of an individual's right to "private life" under Art.8. Moreover, the DPA also contains further safeguards for confidential medical information with regard to the specific situation of processing of such information. Art.1 of the Directive on which the Act based also states that the Directive seeks to protect the fundamental rights and freedoms of individuals, in particular the right to privacy. From this, it can be concluded that the HRA could bring the common law duty of confidence and the DPA close together, as both laws need to be interpreted to give effect to Convention rights.

With regard to the disclosure of medical confidentiality in court proceedings, English law does not provide privilege for a doctor to refuse to give testimony. This means that a doctor who is called upon to testify in judicial proceedings has no right to refuse. Although the duty to keep confidential medical information lies in the public interest, the interest of justice will always prevail in the end. In

¹⁵⁷ Ibid., 192 per Lord Denning M.R.

deciding whether or not medical confidentiality should be disclosed, the court will usually conduct a balancing exercise as to whether or not to exclude it. Under current case-law the courts will exercise discretion to exclude medical evidence where it is neither relevant nor material to the case. Where medical evidence is necessary for the trial, the court will exercise its discretion in favour of disclosure, based on the consideration that the interests of justice override the interest in maintaining confidentiality. However, even where confidential medical information is relevant and material to the case, there is still the possibility that the court may consider not to direct the doctor to disclose the information. This possibility occurs when there is a public interest in protecting such information that goes beyond the general interest in breaching confidentiality, such as the interest in protecting the ability of a body to do its duty properly.

From the case mentioned, it can be seen that in performing balancing exercise, English court always give clear reason of how to balance the competent interests and to what extent confidentiality should be disclosed including and how to safeguard the individual's interest. The protection of right to privacy is also interpreted as one of the reasons lies in the protection of medical confidentiality. These principles will be very useful for Thailand as the principle can be applied into Thai judiciary system. At present, in Thailand, the court has the broad discretion to direct the doctor to disclose medical information. Therefore, the principle lies in English law would be very useful guideline for Thai court to consider. The principle of balancing exercise will be one of the measures that could be applied in Thailand and it will be brought into the questionnaire of the survey in chapter 4 in order to explore the important stakeholders such as the public, physicians and judges' views towards the measure and the possibility of bringing the measure into the law reform process.

Chapter 3 The protection and disclosure of medical confidentiality in court proceedings in Thailand

1. The protection of medical confidentiality

1.1 Medical confidentiality as a constitutional right

Thailand has been under the rule of a democratic government with the King as head of the state for more than 75 years. Military regimes had come into power in the first few decades, leading to many up-risings calling for freedom of communication and the protection of fundamental rights.¹ Constitutions have been written, changed and replaced to better suit the changing times and circumstances that befell the country. In 1997, a new constitution was requested by the people to fulfil the reform of Thailand's administrative structure, including the protection of fundamental rights. Therefore, the 1997 Constitution was drafted, with mass participation of people from all sectors, concentrating on more liberty, freedom of communication and other fundamental rights. The 1997 Constitution was the first constitution for and by Thai people and it contained long and clear provisions for protection of human dignity and fundamental rights,² the first time that these had been protected as a constitutional right in Thailand's history. Among other things, the 1997 Constitution provided constitutionally guaranteed privacy rights.

S.34 of the Constitution 1997 states that:

‘A person's family rights, dignity, reputation or the right of privacy shall be protected.

The assertion or circulation of a statement or picture in any manner whatsoever to the public, which violates or affects a person's family rights, dignity, reputation or the right of privacy, shall not be made except for the case which is beneficial to the public.’

¹ S. Kaviya, “The Argument on Press Control Act 1941” *The Nation*, (28 October 1998).

² The 1997 Constitution was enacted on 11th October B.E. 2540 (1997) which was contained 336 sections.

In 2006, Thailand was in political crisis as there were accusations of corruption against the former Prime Minister, Thaksin Shinawatra. As a result, a military coup was staged to end the intense conflicts in Thai society. The resulting military junta created The Council of Administrative Reform, which suspended the 1997 Constitution and replaced it with the Constitution of the Kingdom of Thailand (temporary version) B.E.2549 (2006) (hereafter, B.E. 2549). Under B.E.2549, a Constitutional Drafting Assembly and a Constitution Drafting Committee were established to draft a new Constitution. Once again, the people were allowed to express their views and opinions about the new charter at every stage of the drafting process.

After the drafting was completed, the Constitution Drafting Assembly presented the draft charter to the people and held a referendum in August 19, 2007, the first ever referendum to take place in Thailand. The referendum result was that the majority of eligible voters who cast votes approved the enactment of the new constitution. Once the royal permission was granted, the new Constitution of the Kingdom of Thailand B.E.2550 (2007) (hereafter “the 2007 Constitution”) came into effect on October 1, 2007.

The major objectives of the 2007 Constitution are: to promote and protect individuals' rights and liberties; encourage people's roles and participation in the administration of the country; and concretely check and scrutinise of the exercise of state power. It seeks to fix the mechanisms of all political institutions, particularly the Legislature and the Executive, so as to achieve better checks and balances. It also seeks to buttress the courts and the Independent bodies so that they can function with justice and integrity. Above all, this constitution stresses the value and importance of morality and ethics and good governance.

With regard to the protection of individual's right and liberties, the 2007 Constitution also clearly expresses the protection of right to privacy in the line with s.34 Constitution 1997.

S.35 of the 2007 Constitution states that:

A person's family rights, dignity, reputation and the right of privacy shall be protected.

The assertion or circulation of a statement or picture in any manner whatsoever to the public, which violates or affects a person's family rights, dignity, reputation or the right of privacy, shall not be made except for the case which is beneficial to the public.

Personal data of a person shall be protected from the seeking of unlawful benefit as provided by the law.

Moreover, the 2007 Constitution also provides the liberty of communication by lawful means. Disclosure of communication between persons shall be protected.

S.36 of the Constitution 2007 provides that:

A person shall enjoy the liberty of communication by lawful means.

The censorship, detention or disclosure of communication between persons including any other act disclosing a statement in the communication between shall not be made except by virtue of the provisions of the law specifically enacted for security of the State or maintaining public order or good morals.

The 2007 Constitution clearly provides protection of the right to privacy in the line with the 1997 Constitution. In fact, it has protected not only the privacy right, but also expanded it to include a person's family rights, dignity and reputation. It has also defined the manner in which right to privacy could be violated, including the assertion and circulation of a statement to the public. The third paragraph of s.35 stresses again that a person has right to be protected against undue exploitation of personal data. Also, statements communicated between persons are protected from undue disclosure under s.36. Applying to the context of medical confidentiality, there is no doubt that the clear detail under s.35 of Constitution 2007 does protect the communication of confidential medical information as the disclosure of medical record could violate person's family rights, human dignity

and privacy.³

However, there is some doubt that the clear and long detail of the 2007 Constitution does not mean that the fundamental right of people are protected properly. Rather, the constitution reflects the hard fought demands of people for the protection of fundamental rights over a long period of time, notably under military regimes. The lack of trust between public and government led to the demand for clear and long content of law. In fact, the effectiveness of law enforcement does not only depend on the clear content of the provision, but is also depended on law enforcement agencies, such as civil service, police, and court. If the law enforcement agencies or officers do not really understand the law or do not exercise their powers under the law properly, it could have an adverse effect on the protection of individual's fundamental rights. Therefore, apart from the transparent provisions of the Constitution, there is the question of how to enforce the law to protect fundamental rights effectively, which needs to be more concerned by the law enforcement agencies.⁴

It is noted that both Thai and English legal systems recognise medical confidentiality as a principle worth protecting. However, each legal system has developed its own ways of guaranteeing such protection. Whilst medical confidentiality is protected as a constitutional right in Thailand, The protection of such rights under English law is provided by reference to the common law duty, and the other statutes, such as HRA, which also provides the protection of medical confidentiality as fundamental right to privacy.

Whilst constitutional protection of an interest is one way of expressing the protection of fundamental rights, there are still other ways of expressing that principle. This means that medical confidentiality can also receive extensive

³ B. Singkaneti, *Fundamental rights and human dignity under the Constitution*, 2000, 111-115, and see S. Ratanaparinyanont, *The disclosure of patient's information*, 1997, 52-53.

⁴ B. Chokebandanchai, *Freedom of communication in Thai context : The comparative Analysis between Thai and Australian constitutional rights*, 2000,1-6. And see K. Pongpanich, *Southeast Asian Media : Building Freedom in the Midst of Crisis*,1998. 1-7.

protection by means of ordinary law. It follows that the existence of a constitutional guarantee of medical confidentiality is not decisive for the scope of protection accorded to medical confidentiality, and that the protection of medical confidentiality and privacy by ordinary statutes can sometimes play a more important role than constitutional protection. In Thailand, though it has constitutional guarantees of fundamental rights, the protection of medical confidentiality by ordinary law is far more influential particularly in court proceedings. It is in fact ordinary legislation, such as criminal law or tort law, that provide detail related to medical confidentiality for the law enforcement agencies to apply to their duty or decide the case. The ordinary legislations concerning medical confidentiality will be reviewed and discussed in the next topic.

1.2. Protection under criminal law

In Thailand, an important provision in the context of protection of medical confidentiality is in s.323 Criminal Code, which makes it a criminal offence for members of certain professions to breach their duty of confidentiality.

S. 323 Criminal Code states that:

Whoever knows or acquires private information from another person by reason of his functions as a competent official or his profession as a medical practitioner, pharmacist, druggist, midwife, nursing attendant, priest advocate, lawyer or auditor, or by reason of being as assistant in such profession, and then discloses such private secret in a manner likely to cause injury to any person, shall be punished with imprisonment not exceeding six months or a fine not exceeding one thousand bath, or both.

A person undergoing training and instruction in the professions mentioned in the first paragraph who knows or acquires private information of another person during training and instruction in such profession, and discloses such private information in a manner likely to cause injury to any person, shall be liable to the same punishment.'

This makes it clear that physicians and members of the other health care professions are under a duty to maintain medical confidentiality and a breach of

this duty is a criminal offence.⁵ The obligation of medical confidentiality is not limited to what the patient had expressly told his or her the physician, but also includes everything the physician heard, saw or observed in the course of the exercise of his or her profession.⁶ This means all information that the physician gain concerning his or her patient on the grounds of his or her profession is protected under medical confidentiality.⁷ Some experts⁸ also comment that under the criminal code, there is no distinction between the facts that were confided in the physician and facts that the physician found out about in the course of his or her profession, and that, therefore, the duty is not limited to protection of medical facts. Thus, if a patient confides in the physician more general facts about his or her private life that are not directly linked to the patient's medical problem, these confidences are still protected by s.323.⁹ Also, facts are protected without having been confided in the physician by the patient, if they came to the physician's knowledge in the exercise of his or her profession. Thus, if a physician hears a conversation between the patient's relatives, the obligation of medical confidentiality applies, as this knowledge was obtained by the physician in the course of his or her profession.¹⁰ Medical confidentiality is thus not only protected with regard to observations concerning the patient's health, but all other observations with the exercise of the medical profession are protected too. Moreover, medical confidentiality not only encompasses secrets relating to the patient, but also secrets of third parties, if the physician gained knowledge of these secrets in the course of treating his or her patient. Therefore, if a physician is told by his or her patient that his wife has a mental illness or she is having an affair, this information is protected by medical confidentiality and a revelation

⁵ For more detail see K. Vajanaswas, *Criminal Code Part I*, 1996. 45-48.

⁶ W. Ungprapan, *Doctor and Confidentiality*, 1987, 191.

⁷ Ibid.

⁸ S. Niyomsane, *Confidentiality*, 1979, 664-665. And see S. Itavaree, *Ethics and the legal problem of the surgeons*, 1985, 41.

⁹ Niyomsane, 1979, 664-665.

¹⁰ Ibid.

could constitute a criminal offence under s.323.¹¹ It can be seen that the protection of medical confidentiality is not restricted to medical facts but it also extends to general facts about patient's private life that are not directly linked to the patient's health problem, as these facts indirectly support the physician-patient relationship and help create the trust necessary for medical treatment.¹²

There are two reasons behind this broad protection of medical confidentiality in criminal law. Some experts state that s. 323 primary objective is to protect the privacy rights of the individual.¹³ This idea is now supported by s. 35 of the 2007 Constitution, as it expressly provides the protection of right to privacy. According to the hierarchy of law, the interpretation of s.323 must be in line with the constitutional rights that respects the patient's personal and intimate sphere. This lends support to the idea that s.323 is aimed to protect an individual interest, namely right to privacy.¹⁴

Other experts point to another interest which is protected by s.323 – the protection of a more general public trusting in members of the medical professions. Medical confidentiality is very important for society, as patients need to disclose all information in order to seek the best medical treatment.¹⁵ If the patient cannot rely on the discretion of his or her physician, public health might be endangered as patient will then be reluctant to seek medical advice and treatment which will be affected the safety of the society as a whole.¹⁶ From these discussions, it can be concluded that s.323 Criminal Code protects both the patient's privacy interest and the public interest in preserving public health.

¹¹ Niyomsane, 1979, 664-665.

¹² Ibid. The same approach has also been accepted in English law. See Kennedy, Grubb, 2000, 1061-1062.

¹³ Ungprapan, *Patient's rights*, 1994, 12-13.

¹⁴ Ungprapan, *Medical Law : Legal liability of Professional Health Care Services*. 2003, 78-79.

¹⁵ S. Boonchalermvipas and A. Yomjinda, *Medical Laws*, 2000, 128-132. And see the interview of judges in chapter 5, 4.3. And see K. Kertsoontorn, *The Protection of Privacy under Criminal Law*, 1995, 85-87.

¹⁶ Ibid.

1.3 Protection under private law

In Thailand, medical confidentiality is also protected under tort law by section 420 of the Civil Code which provides for compensation to the person whose interest is injured by the wrongful acts.

S. 420 Civil Code states that:

‘A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any rights of another person, is said to commit a wrongful act and is bound to make compensation therefore.’

Under s.420, compensation is available if there is any interference with the life, body, health, liberty or property of a person.¹⁷ Although medical confidentiality is not expressly protected under s.420, some argue that the term “any rights” includes the right to privacy,¹⁸ because the violation of the right to privacy could cause damage to a person.¹⁹ Also, the Supreme Court has interpreted the term “any rights” under s.420 to mean benefits or rights that a person has and which must be protected from violation by others.²⁰ Thus, privacy rights fall within the

¹⁷ The compensation provided under s.420 will be determined under s.438. Civil and Commercial Code s.438 states :

‘The Court shall determine the manner and the extent of compensation according to the circumstances and the gravity of the wrongful act.’

Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages to be granted for any injury caused.’

¹⁸ P. Poonyapan, *The description of Civil and Commercial Code Title V: Wrongful Acts*, 1982, 33.

And see S, Supanit, Susom, *Wrongful Act under Civil Code*, 1990, 45-47.

¹⁹ Ibid.

²⁰ *Supreme Court decision no. 124/ 1944*. See also, J. Tingsapat, *The description of Civil and Commercial Code Title V.*, 1987, 474-486.

scope of ‘any right’ provided in s.420.²¹ Applying this in the context of medical confidentiality, it very strongly implies that medical confidentiality is protected under s.420, as it can be referred to the right of privacy. Some have expressed their view that medical confidentiality is protected under s.420 via s.323 of Criminal Code. This view has been drawn on the presumption that any benefits or rights provided by law are undoubtedly protected under s.420,²² and since s.323 provides that the physician is under a duty to maintain the patient’s secrets, it is clear that a breach of confidence is a wrongful act, and so compensation is available under s.420.²³

At present the protection of privacy rights under private law has been also mentioned as a consequence of the constitutional protection of right to privacy.²⁴ Since both the 1997 and 2007 Constitutions expressly protect the right to privacy, it is thus essential to interpret Civil Code s.420 in the line with the constitution. Medical confidentiality is therefore protected under s. 420, as it could refer to the term “any rights” provided by the law.²⁵

1.4 Protection under Official Information Act 1997

Unlike England, Thailand does not have data protection act. At present the only act that provides the protection of personal information is in the 1997 Official Information Act (OIA). A review of the OIA needs some understanding of the 1997 Constitution, as the primary purpose of OIA is derived from the “right to know” provided by the 1997 Constitution.

²¹ V. Wisarutpitch, *Rights and liberties under the Constitution*, 1995, 21-22, and 32-36

²² K. Kertsoontorn, *The Protection of Privacy under Criminal Law*, 1995.

²³ Poonyapan, 1982, 1-2. And see C. Pintasiri, *The breach of privacy right*, 1982, 49.

²⁴ B. Chokebandanchai, *The media law: prohibited publications*, 2007), 35-37.

²⁵ Ibid.

Alongside the protection of a right to privacy,²⁶ the 1997 Constitution promoted freedom of expression and freedom of communication by enabling access and inspection of information about the administration of state affairs to ensure that accurate information would be freely communicated among people.²⁷ S.58 of the 1997 Constitution states that:

A person shall have the right to access public information in possession of a state agency, state enterprise or local government organisation, unless the disclosure of such information shall affect the security of the state, public safety or interests of other persons which shall be protected as provided by law.

S.59 of the 1997 Constitution states that:

A person shall have right to receive information, explanation and reasons from a state agency, state enterprise or local government organisation before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local community and shall have the right to express his or her opinions on such matters in accordance with the public hearing procedure, as provided by law.

Whereas the 1997 Constitution provided only general principles for the protection of freedom of communication and right to privacy, it was left for the parliament to enact law containing specific details in protecting such rights. The OIA contains the details that were enacted to implement the provisions of the 1997 Constitution. The OIA is the first piece of law related to the protection of right to privacy and freedom of communication under the 1997 Constitution. It has been effective since 9th December 1997, and provides details as to how personal information in health records should be protected by state agencies.²⁸

In fact, the OIA's primary objective is to enable people to access official

²⁶ OIA, s.34.

²⁷ B. Meevongkud, *The interpretation and Enforcement of Thai Constitution*, 1997, 1-7.

²⁸ For more detail see the preamble of Official Information Act, 1997, published in the *Government Gazette*, Vol. 114, part 46a, dated 10th September B.E.2540 (1997).

information regarding the administration of State affairs. The basic aim of the Act is to guarantee people's right to have full access to government information.²⁹

According to the Act, almost all official data and information should be revealed for public perusal, with only some categories of information that the State can still keep confidential, such as information that will jeopardize the national security, international relations or national economic or financial security.³⁰ Should the state agency refuse disclosure of required information, people still have the right to appeal to the Official Information Board (OIB) to reconsider the case.³¹

1.4.1 State agency duties on information disclosure

According to the OIA, a state agency i.e. central administration, provincial administration, local administration, state enterprise, government agency attached

²⁹ For example, OIA, s.7. states that:

'A State agency shall at least publish the following official information in the Government Gazette :

- (1) the structure and organization of its operation;
- (2) the summary of important powers and duties and operational methods;
- (3) a contacting address for the purpose of contacting the State agency in order to request and obtain information or advice;
- (4) by-laws, resolutions of the Council of Ministers, regulations, orders, circulars, Rules, work pattern, policies or interpretations only insofar as they are made or issued to have the same force as by-laws and intended to be of general application to private individuals concerned;
- (5) such other information as determined by the Board.

³⁰ OIA, s.15 states that:

'A State agency or State official may issue an order prohibiting the disclosure of official information falling under any of the following descriptions, having regard to the performance of duties of the State agency under the law, public interests and the interests of private individuals concerned:

- (1) the disclosure there of will jeopardize the national security, international relations, or national economic or financial security'

³¹ OIA, s.13 Official Information Act 1997 states that;

Any person, who considers that a State agency fails to publish the information under section 7, fails to make the information available for public inspection under section 9, fails to provide him with the information under section 11, violates or fails to comply with this Act, or delays in performing its duties, or considers that he does not receive convenience without reasonable cause, is entitled to lodge a complaint with the Board.....

In the case where the complaint is lodged with Board under paragraph one, the Board shall complete the consideration thereof within thirty days as from the date of the receipt of the complaint. In case of necessity, such period may be extended; provided that, the reason therefore is specified and the total period shall not exceed sixty days.

to the National Assembly, courts in respect of affairs unassociated with trials and adjudication of cases, professional supervisory organization, independent agencies of the state, and such other agencies as prescribed in the Ministerial Regulations, is to execute information disclosure through three mechanisms:

(1) Publish the following official information in the Government Gazette³²

1. The structure and organization of its operations.
2. A summary of important powers, duties and operational methods.
3. Contact addresses for the purpose of contacting the State agency in order to request and obtain information or advice.
4. By-laws, resolutions of the council of Ministers, regulations, orders, circulars, rules, work patterns, policies or interpretations only in so far as they are made or issued to have the same force as by-laws and intended to be of general application to private individuals concerned.

A state agency shall, for dissemination purposes, compile and make available the said information for sale, disposal or distribution at its office.

(2) Make available at least the following official information for public inspection³³

1. A result of consideration or a decision which has a direct effect on a private individual, including a dissenting opinion and any order relating thereto.
2. A policy or an interpretation which does not fall within the scope of the requirement of publication in the Government Gazette.
3. A work-plan, project and annual expenditure estimate of the year of its preparation.
4. A manual or order relating to work procedure of State officials which affects the rights and duties of private individuals.
5. A concession contract, agreement of a monopolistic nature or joint

³² OIA, s.7.

³³ OIA, s.9.

venture agreement with a private individual for the provision of public services.

6. A resolution of the Council of Ministers or of such Board, Tribunal, Commission or Committee as established by law or by a resolution of the Council of Ministers, provided that the titles of the technical reports, fact reports or information relied on in such consideration shall also be specified.

(3) Provide information to individual request

If any person makes a request for any official information, other than the official information already published in the Government Gazette, or already made available for public inspection, or already made available for public studies, the responsible state agency shall provide it to such a person within a reasonable period of time.³⁴

Any person who considers that a state agency fails to publish the information in the Government Gazette, or fails to make the information available for public inspection, or fails to provide him or her with the information requested, violates or fails to comply with this Act, or delays in performing its duties, or considers that he or she does not receive information without reasonable cause, is entitled to lodge a complaint with the Board.³⁵

It can be seen that the Act provides several requirements for state agencies to publish and make available of most of official information for people to access freely, in order to certify that most government activities are made transparently.

³⁴ OIA, s. 11.

³⁵ OIA, s. 13.

1.4.2 Protection of Personal information

Not all official information can be released by state agency. The Act also provides restrictions on what information is not subject to disclosure, which includes medical and personal information. As a result, the protection of right to privacy in respect of personal data controlled by state agencies is clearly protected.

According to the Act, medical information is protected as it falls within the definition of “personal information” provided in s.4.

S. 4 of OIA. states that:

In this Act :

“*State agency*” means a central administration, provincial administration, local administration, State enterprise, Government agency attached to the National Assembly, Court only in respect of the affairs which are not associated with the trial and adjudication of cases, professional supervisory organization, independent agency of the State and such other agency as prescribed in the Ministerial Regulation;

“*State official*” means a person performing official duty for a State agency.

“*personal information*” means information relating to all the personal particulars of a person, such as education, financial status, health record, criminal record or employment record, which contain the name of such person or contain a numeric reference, code or such other indications identifying that person as fingerprint, tape or diskette in which a person’s sound is recorded, or photograph, and shall also include information relating to personal particulars of the deceased;

.....

As health records are regarded as personal information under s.4, state officials have been given the right to prohibit the disclosure of such information to the public under s.15.

S.15 OIA states that:

A State agency or State official may issue an order prohibiting the disclosure of official information falling under any of the following descriptions, having regard to the performance of duties of the State

agency under the law, public interests and the interests of the private individuals concerned ;

- (1) Disclosure will jeopardize the national security, international relations, national economic or financial security.
- (2) Disclosure will result in the decline of the efficiency of law enforcement or failure to achieve its objectives, whether or not it is related to litigation, protection, suppression, verification, inspection, or knowledge of the source of the information.
- (3) The information is an opinion or advice given within the State agency with regard to the performance of any act.
- (4) Disclosure will endanger the life or safety of any person.
- (5) The information is a medical report or personal information, the disclosure of which will unreasonably encroach upon another person's right of privacy.

It can be seen that s.15 expressly provides protection of medical confidentiality in the line with Constitutional right. However, some argue that s. 15 is not an absolute restriction to prohibit the disclosure of personal information, because it is still left to the discretion of a state official to decide whether or not such information should be kept secret by considering to the public interests on the one hand and the interest of private individual concerned on the other.³⁶ The problem which needs to be considered is: what should be the standards for state official to decide whether or not the medical information should be kept or disclosed? The lack of skill and knowledge on this matter, especially the methods of exercising the discretion, may lead to an easy infringement of the right to privacy concerning such information.³⁷ It is hoped that the OIA, as a supplement to the Constitution, could bring more efficient to the protection of right to privacy. In doing so, it is necessary to build up understanding of the criteria for the exercise of discretion.³⁸ In this circumstance, the study of the balancing exercise applied by English court will be an essential example for Thailand to examine.

The Act goes on to set out a duty for state agencies in providing and managing a

³⁶ W. Bungkrai, *Disclosure of personal information under the Official Information Act B.E.2540*, 2000, 235-236. And see P. Ratanakarn, *Official Information Broad's Decision Under the 1997 Official Information Act*, 1999. 47-49.

³⁷ Ibid. And see A. Jangyubon, *The Problem related to Public Access to Personal Information Under the 1997 Official Information Act*, 2000, 15.

³⁸ Ibid.

system of personal information, to ensure that all personal information will be kept properly. The Act provides that a State agency shall take the following actions with regard to the provision of a personal information system:³⁹

1. Provide the personal information system only insofar as it is relevant to and necessary for the achievement of the objectives of the operation of the State agency, and terminate the system thereof whenever it becomes unnecessary;

2. Make every effort to collect the personal information directly from the person who is the subject thereof, especially in the case where such person's interests will be directly affected.

3. Examine and correct personal information under its responsibility regularly.

4. Provide an appropriate security system for the personal information system in order to prevent improper use or any use that would be prejudiced to the subject of the information.⁴⁰

In case where the personal information is to be made publicly available, the relevant state agency must notify the person who is the subject of the information.⁴¹ In the case where the personal information is dispatched to any place which, in consequence thereof, may become known to general members of the public, the relevant state agency must notify the person who is the subject thereof, unless it is carried out in conformity with the ordinary nature of the use of the information.⁴² The Act also, provides that the state agency shall not disclose personal information in its control to other state agencies or other persons without prior or immediate consent given in writing by the person who is the subject thereof except for the disclosure in the following circumstance;⁴³

1. The disclosure of personal information is between officials in the same state agency for use it in accordance with the normal purpose of such

³⁹ OIA, s.23.

⁴⁰ Ibid.

⁴¹ OIA, s.23 para 3.

⁴² OIA, s. 23 para 4.

⁴³ OIA, s. 24.

agency.

2. The disclosure of that personal information is within its ordinary use for the objectives of the provision for which the such personal information system exists.
3. The disclosure is to state agencies which operate in the field of planning statistics or censuses and have the duty to keep the personal information undisclosed.
4. The disclosure is for studies or research without mentioning the name, or partly revealing the identity, of the person to whom the personal information is related.
5. The disclosure is to the National Archives Division, Fine Arts Department or other state agencies under s 26⁴⁴ for the purpose of evaluating the value of keeping such information.
6. The disclosure is to state officials for the purpose of preventing violation of the law, and for conducting investigations and inquiries or instituting any legal actions.
7. The disclosure is necessary for the prevention or elimination of hazards to the life or health of persons.
8. The disclosure is made to the court, state officials, state agencies or persons having the power under the law to make a request for such information.
9. Other cases as prescribed by Royal Decree.

The Act further provides the right to access personal information relating to them. When a person makes such a request in writing, the state agency which has control of such information shall allow that person, or their authorized representative, to inspect or obtain a copy of that personal information.⁴⁵

In the case of medical records, the disclosure can be also made only to the doctors

⁴⁴ S.26 concerns the historical information. The state agency shall deliver historical personal information which had been kept for more than twenty years to the National Archives Division and Fine Arts Department.

⁴⁵ OIA, s. 25 para 1.

specified by the person concerned, when a reasonable ground exists.⁴⁶

Any person who considers that any part of any personal information relating to them is incorrect shall have the right to make a request in writing to the state agency in control of such information to correct or delete that part of the information. In this case, the state agency shall consider the request and notify its result to such person without delay.⁴⁷ In the case where the state agency fails to correct or delete the information pursuant to the request, the person shall have the right to appeal to the Official Information Board (OIB) within 30 days from the date of the receipt of the refusal.⁴⁸

There is one interesting case concerning the disclosure of personal information under the OIA that is worth to examine. It is called “The Entrance Examination Result Case”.⁴⁹ In this case, the parents of a student who failed the entrance examination for the Demonstration School of Kasetsart University petitioned the school to disclose the examination result of their daughter and 120 other students in order to inspect whether the exam marking was fair and accurate. The school denied the request. The school claimed that the scores and answer sheets were categorised as personal information and could not be revealed to anyone apart from the individual student. The parents then took the case to the OIB to force the school to disclose the requested information.

The Information Disclosure Tribunals for Social Information (IDT's)⁵⁰ ruled that the parents had the right to see the examination result, but the school, however, declined to comply with the IDT's decision, claiming that they had to consult with

⁴⁶ OIA, s. 25 para 2.

⁴⁷ OIA, s. 25 para 2.

⁴⁸ OIA, s.13.

⁴⁹ *Decision of the Information Disclosure Tribunals for Social Information, no.1/1998.*

⁵⁰ The Information Disclosure Tribunals for Social Information are consisted of people who have special knowledge in social information appointed by the Council of Ministers upon the recommendation of the OIB. (S.35), And see chapter 5, 5.1.

the Council of State, the Attorney General's Office, and the Ministry of University Affairs in order to have guidance on disclosing examination result, which should be set up as a new standard to cope with similar request in the future. Finally, the OIB confirmed the IDT's order and enforced the disclosure. The OIB decided that the exam results had a direct effect on the student, which in this case had caused the failure to gain entrance to the school. This meant the exam results fell within the scope of the OIA s.9(1), which provides that the state agency shall make available the result of any consideration or decision which has a direct effect on a private individual including a dissenting opinion and an order relating thereof. Moreover, the exam results were not personal data, as they had been made by the school under certain criteria for selecting competing students. As a result, the parents had the right to see the examination results.

This case was the first in which people used their right under OIA, and it generated great public interest. After the disclosure order made by the OIB in this case, the cabinet issued a resolution asserting that state agencies had to comply with the OIB's recommendations and the IDT's orders, otherwise they would be punished by disciplinary regulation.⁵¹

Later, the parents of the 120 students who passed the examination filed a case against the IDT's with the civil court, claiming that the disclosure order made by the IDT's was invalid, as the exam papers of other students fell within the scope of personal information under the OIA. This would have meant that the IDT's did not have the right to order the school to disclose exam papers of others students. The civil court held that exam results of other students did not fall within the scope of personal information under s.15 of the OIA and confirmed the decision of IDT's. The claimants then filed the case to the Appeal and Supreme Court respectively. The Supreme Court decided that personal information under s.4 of the OIA means any information relating to all the particulars of a person such as education, health records, financial records, or any information that could be used to identify any person, such as fingerprints. As a result, personal information

⁵¹ C. Opassiriwit, *Thailand : a case study in the interrelationship between freedom of information and privacy*, 2002. 4-6.

should usually mean information indicating the story, history or background of a particular person or any identification that could identify any person from others.⁵² In this case, the answer sheets of the students, though containing names of the students, were official documents provided by the school for the students to express their knowledge. The answer sheets were marked, compared and selected in accordance with appropriate standards set by the school to select the competing students. As a result, the answer sheets of the students were not information that showed the personal story, history or background of any person, and, therefore, the answer sheets did not fall within the scope of personal information protected under s.15 of OIA. The order to disclose the exam results, made by the IDT's, was held to be valid.

The case contributed greatly to the educational system of the country. The examinations held by many institutions have been adapted in compliance with the Act, which brought about fair examinations and a transparent academic system. The Ministry of University Affairs then ordered the school to revise the screening procedures of the examination, making the process transparent and accountable.⁵³

After the parents had seen the examination results, they then submitted a complaint to the Office of the Council of State, as some irregular admittance under uncommon procedure such as the donation was found. The Office of the Council of State considered the acceptance procedure of the school through privileged considerations such as donation, sponsorship or kinship rather than examination score, as discriminatory practices, which was prohibited by the 1997 Constitution.⁵⁴ The Office of the Council of State thus recommended to the government to revise all procedures of the school entrance examination and stated

⁵² *Supreme Court Decision, no.4126/2000.*

⁵³ Circular letter from Ministry of University Affair, no. 0202.6/1666 at 27 January, 1999.

⁵⁴ S.43 Constitution 1997 states that:

A person shall enjoy an equal right to receive the fundamental education for the duration of not less than twelve years which shall be provided by the State thoroughly, up to the quality, and without charge.

In providing education by the State, regard shall be had to participation of local government organizations and the private sector as provided by law.

that the process should be done properly and in the line with the Constitution.⁵⁵

From this case, it was found that the law enforcement agencies lacked knowledge of the law and did not know how to implement the Act. In disclosure of examination results, the score and the answer sheets were quite new at the time and had never been disclosed before.⁵⁶ Disclosure is also contradictory to the traditional practice of the Thai civil service system that has always kept secret all information.⁵⁷ That was why the ruling by the IDT's was resisted in the first place. However, finally, the implementation was successful and has been confirmed by the court.⁵⁸

It can be concluded at this stage that although the OIA has been in force for over ten years, it is still not familiar to Thai people. Neither government officers who have the duty of carrying information services nor the public are familiar with the new principles. Knowledge and understanding in the freedom of information is still limited.⁵⁹ State agencies do not well understand the law and the principles of the people's rights to access to government's information and their right to privacy. They are still not well ready to provide good information disclosure by balancing the interests of the individual and public interest.⁶⁰ In fact, the primary purpose of the OIA is to protect people's right to access to government's information. However, it seems that the state agencies seem to exercise their discretion in favour of non-disclosure rather than disclosure.⁶¹ Some claim that state officials, ranked from the executive and high position level to the servicing level, from policy level down to the implementation level, still lack consciousness

⁵⁵ Office of the Council of State's recommendation, no. 22/2000.

⁵⁶ S. Navatrakunpisut, and P. Pattapong, *The 1997 Official Information Act and the Law Related to Prohibited of Information Disclosure*, 2000, 229-232.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ N. Serirak, *Challenges of Thailand's Freedom of Information*, 2001. 5-9

⁶⁰ Ibid.

⁶¹ Ibid.

in carrying out the task of providing information to the public. They have a negative attitude to the concept of the freedom of information principle, as they feel the Act puts a heavy burden on them. Many feel uncomfortable to have their work under public scrutiny. They feel more difficulties in doing their job in spite of the fact that this principle will make government documentary work more systematic and more convenient, and this should help make official paper work easier indeed.⁶²

With regard to the protection of personal information, since the OIA does not explain how personal information should be disclosed, some suggest that state agencies need more education of how official information, particularly personal information, should be disclosed properly, in order to ensure that personal information will be adequately protected.⁶³ The OIA only delivers a general statement prohibiting the disclosure of personal information taking in to consideration the performance of duties of state agencies under the law, public interests and the interests of the private individuals concerned.⁶⁴ There are no clear explanations and examples given by the law for the officials to apply in their duty of information service to the public. However, the idea of weighing between the interest in maintaining confidentiality and public interest in disclosure was raised by the IDT's in a case about the corruption investigation.⁶⁵ In this case, journalists and non-governmental organisations petitioned the office of the Counter-Corruption Commission to disclose the report of an investigation into corruption involving purchasing decisions regarding drug and health materials made by the Ministry of Public Health. The disclosure of the investigative report of the Commission concerning the corruption scandal was refused on the grounds that it might hamper the efficiency of law enforcement. It was argued that the report was protected by the Counter-Corruption Commission's regulations against

⁶² K. Prokati, *Right to access information under Official Information Act*, (Vinyouchon Press, 1998), 83-85. Kittisak Prokati is an Expert Commissioner of the Official Information Commission.

⁶³ Opassiriwit, 2002, 7-9. And see Bungkrai, 2000, 248-257.

⁶⁴ OIA, s.15.

⁶⁵ *Decision of the Information Disclosure Tribunals for Social Information, no. 15/1999.*

disclosure, and because it concerned witnesses who gave investigative documents on the understanding that their names and the information would be kept confidential. The petitioners submitted an appeal to the OIB and the case was given to IDT's.

The IDT's ruled that the investigation was finalised, and the officials involved had been disciplined and some politicians had been referred for criminal investigation. The IDT's considered that the investigative report was official information. The case had great public interest and disclosure could bring about a positive attitude to the national administration, in particular to the Counter-Corruption Commission itself. The IDT's therefore, decided that the Counter-Corruption Commission should disclose the requested information. The witnesses in this case were high ranking executives and their role as witnesses in this case was part of their official duty, and protected by law. There is a Counter-Corruption Commission regulation against the disclosure of such information to protect the safety of witness, but the IDT's decided in this case that the case was sensitive as the scandal involved a large amount of national budget, was committed by the high ranking officials and corruption in the provision of public health services affects fundamental services to the people, in particular, the poor. As a result, the balance was weighted in favour of the public interest in knowing what had happened. This reasoning by the IDT's could be used as a guide by the state agencies carrying out the task of information disclosure. However, the state agencies' discretion in disclosure may vary as it depends on the individual's knowledge and understanding about the law and the reason behind the law. As a result, more educations and guidelines should be provided for the officers.⁶⁵

All in all, it can be seen that both freedom of information and the protection of right to privacy have been the key issues in deciding whether information should be disclosed. The above cases reflected the tension between freedom to access information and privacy protection. It can be seen that there was some misunderstanding of the competing right to access information and the right to privacy among the government officials who carry out the task of information service, as the two principles are closely related. And since the two principles

often arise in exercising the discretion whether or not the requested information should be disclosed, some scholars suggest that government officials should be encouraged to understand more of the relationship between the two principles in order to provide information and disclose the information properly.⁶⁶ Also, state officials must learn to exercise their discretion by balancing between state duties, public interests and private interests.⁶⁷ In this circumstance, the balancing exercise as performed in English law could be one alternative example for Thailand to consider, as the English court has produced many case studies concerning the issues of how to balance the conflict between individual and public interests in disclosure of particular information, as well as the protection of right to privacy.

2. The disclosure of medical confidentiality in court proceedings

2.1 Medical Privilege

In Thailand, s. 231 of the Criminal Procedure Code provides for a medical privilege in criminal proceedings so that a physician can refuse to give testimony involving medical information that he or she obtained in the course of profession. S.231 Criminal Procedure Code states:

Where any party or person is to give or produce any kind of the following evidence:

- (1) any document or fact which is still an official secret;
- (2) any confidential document or fact which has been acquired by or made know to him by virtue of his profession or duty;
- (3) any process, design or other work protected from publicity by law

The said party or person is entitled to refuse to give or produce such evidence unless he has obtained the permission from the authority or the person concerned with such a secret.

Where any party or person refuses to give or produce the evidence as aforesaid, the Court has the power to summon the authority with such

⁶⁶ Bungrai, 2000, 249-257.

⁶⁷ Opassiriwit, 2002, 4-6.

secret to appear and give explanation in order that the Court may decide whether or not there is any ground to support such refusal. Where the Court is of opinion that the refusal is groundless, it shall order such party or person to give or produce such evidence.

S.234 Criminal Procedure Code also provides:

A witness is not bound to answer questions which may directly or indirectly incriminate himself. When there is such a question, the Court shall warn the witness.

Unlike England, Thai law provides medical privilege for the physician. Under s.231 physicians have the right to refuse to testify in court about confidential information obtained in the course of their profession. Although, the word “physician” is not clearly stated in s.231, the word “profession” under s.231(2) has been interpreted to be included all medical professions.⁶⁸ Also, s.234 gives a right to the witness to refuse to answer question which may directly or indirectly incriminate him or herself. Therefore it is clear that a physician may refuse to say anything that might incriminate him or herself.

The reasons behind granting medical privilege have been discussed in several aspects. Some experts give the opinion that the protection of patient’s privacy rights is the interest behind granting of this legal privilege to physicians.⁶⁹ This argument is been supported by referring to the content of s231 (2) which provides that a physician can disclose confidential document only if he or she has obtained the permission from the patient concerned with such secret.⁷⁰ This means the patient’s privacy is paramount, as it could be waived to release physician from legal obligation. However, at present, many argue that the protection of individual’s privacy rights is not just a private interest. Society as a whole has an interest in the protection of individual freedom. Society could be in danger if individual privacy can be invaded by others, as people could not live peacefully.

⁶⁸ S. Ratanaparinyanont, *The disclosure of patient’s information*, 1997, 61-62.

⁶⁹ *Ibid.*, 59-60.

⁷⁰ Boonchalermvipas and Yomjinda, 2003, 128-132.

So, the protection of fundamental rights also lies in the public interest.⁷¹

On the other hand, some have argued that the objective of granting medical privilege can not be based only on patient's privacy right but also lies in the interest of the members of medical profession. Without medical privilege, members of the medical profession could not exercise their role successfully, as it is typical that a patient's confidential information will be confided in them.⁷²

Moreover, as physicians are obliged by professional ethics to maintain medical confidentiality, the obligation to testify in court would put physicians in the position to disregard either their professional or their legal obligation. Thus, medical privilege is partly aimed at protecting physicians from this type of conflict.⁷³ As the disclosure of patient medical information constitutes a criminal offence under Criminal Code s.323, it is justified to say that medical privilege under Criminal Procedure s. 231 partly aims to enable a physician to fulfil this legal obligation in the court room.⁷⁴ Another argument is that without medical privilege, patients are more reluctant to seek medical advice and less forthcoming with information that is essential for effective medical treatment. As a result, the exercise of the medical profession would be hindered by the non-existence of medical privilege.⁷⁵ This argument lies in the public interest in promoting public health as a whole, because if people are reluctant to seek medical treatment, society as a whole will be in danger by the spread of disease.

With regard to public interest in promoting public health, at present, this concept has been incorporated in the 2007 Constitution which has added significant value to the protection of the interests of the members of medical profession.

S.51 of 2007 Constitution states that:

⁷¹ Ibid.

⁷² Ungprapan, *Medical Confidentiality*, 1971, 371-372.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

A person shall enjoy an equal right to receive standard public health service, and the indigent shall have the right to receive free medical treatment from State's infirmary.

The public health service by the State shall be provided thoroughly and efficiently.

The State shall promptly prevent and eradicate harmful contagious diseases for the public without charge.

S.80 of 2007 Constitution states that:

The State shall act in compliance with the social, public health, education and culture policies as follows:

- (1)
- (2) promoting, supporting and developing health system with due regard to the health promotion for sustainable health conditions of the public, providing and promoting standard and efficient public health service thoroughly and encouraging private sector and the communities in participating in health promotion and providing public health service, and the person having duty to provide such service whose act meets the requirements of professional and ethical standards shall be protected as provided by law.

It can be seen that the 2007 Constitution contains the principle of promoting public health. This principle was also provided in the 1997 Constitution. This means the promotion of public health has been guaranteed as the constitutional right for ten years. The laws ensure that people shall enjoy the right to receive standard public health service and the government shall provide a standard public health service efficiently and thoroughly. In doing so, medical confidentiality and medical privilege are very important for members of medical professions to exercise their duty effectively. Without medical confidentiality and medical privilege, patients may be reluctant to seek medical advice and treatment. It follows that the absence of medical confidentiality and medical privilege would harm individual health. Also, society as a whole could then be threatened by individuals who are discouraged from seeking medical advice and treatment, as this might lead to a spread of disease. It can be concluded that medical confidentiality and medical privilege could be interpreted in the line with the objectives of Thai Constitution in promoting standard of public health service.

All in all, from the above discussion, it can be said that medical privilege serves different purposes; it protects the privacy of the patient, the professional integrity of the physician, the physician-patient relationship and the public interest in respecting the individual's fundamental rights and in promoting public health service under the principle provided by the 2007 Constitution.

S. 231 also provides that the disclosure of medical confidentiality can be found by patient's consent. Under s.231, the physician can give or produce the confidential medical information to the court, if he or she has obtained the permission from the patient. As a result, when the patient has waived his or her right to medical confidentiality and consented to disclosure, the physician is no longer bound by the duty of medical confidentiality. In such a case, no criminal offence under Criminal Code s.323 will be committed by physician if he or she discloses confidential patient information. This leads to problems when the information confided to the physician by the patient relates to a third party, such as the information relating to the patient's spouse. In that case, some argue that the physician still has the duty of confidentiality, as the physician has learned confidential information of the third party in the course of his or her profession.⁷⁶ This means that, even though there is no physician-patient relationship between the physician and the third party, the principle under s.323 Criminal Code and s.231 Criminal Procedure Code still applies. Also, Criminal Code s.323 provides for the protection of confidential information in broad term, which is not only private information of the patient but also secrets of another person that the physician has obtained in the course of his or her functions.⁷⁷ Criminal Code s.323 also clearly states that the disclosure of such private information in a manner likely to cause injury to any persons, shall be punished with imprisonment. In this circumstance, according to s.231 and s.234 Criminal Procedure Code, the physician is entitled to refuse to give testimony unless he or she has obtained the permission from the person concerned.⁷⁸ At present, there is no Supreme Court

⁷⁶ Ratanaparinyanont, 1997, 59-60.

⁷⁷ Ibid.

⁷⁸ Ibid., 70-71.

decision on this issue: this might be because the criminal offence under s.323 is the compoundable offence. Once the litigants settle a dispute before or during the court proceedings, the litigation is terminated, and the prosecutor is no longer has the right to initiate or continue the case.⁷⁹

2.2 The disclosure of medical confidentiality by court's order

S. 231 Criminal Procedure provides medical privilege for physician to refuse to give or produce any confidential document or fact which has been acquired by or made known by virtue of his or her profession or duty. However, the law also gives the court the power to summon the physician with such a secret to appear and give an explanation of the refusal in order to decide whether or not there is any ground to support it. Where the court is of the opinion that the refusal is groundless, it shall order the physician to give or produce the confidential medical document or fact. This leads to the problem of what is the appropriate discretion that can be exercised by the individual judge in ordering the disclosure of medical information.⁸⁰ As the discretion of individual judge may vary, the clear criteria should be applied to ensure that the right of patient's privacy would not be infringed as well as the duty of the physician to maintain medical confidentiality.⁸¹ In cases that the physician has been compelled to disclose medical information by virtue of court's order, the physician will be exempted from the legal duty to maintain medical confidentiality under s.323 and there will be no criminal offence for the physician to breach of medical confidentiality.

Some have suggested that the court should not have an absolute power to direct the physician to disclose confidential medical information.⁸² The court can only direct the physician to disclose confidential medical information where there is clearly evidence that the information is relevant and material to the case, and that

⁷⁹ K. Na nakorn, *Criminal Procedure Code*, 1996, 157-158.

⁸⁰ Kertsoontorn, *The Protection of Privacy under Criminal Law*, 1995, 57-59.

⁸¹ Ibid.

⁸² Pintasiri, *The breach of privacy right*, 1982, 77-98. And see Kertsoontorn, 1995, 57-59.

irrelevant information must be excluded.⁸³ However, this raises the question of what is the evidence that should be excluded, as it is very important to make all existing evidences available to the court to ensure that the truth be established when the court making a decision. Some also argue that the public interests in the administration of justice are not limited to the interest in finding the truth. Rather, they also included the unimpeded exercise of defence rights by the accused, and the interest in the dissipation of unfounded suspicions against the innocent.⁸⁴ Therefore, to achieve all the interests of the administration of justice, it is necessary to make all existing evidence available to the court for making the right decision and to prevent a miscarriage of justice.

There are several Supreme Court judgments relating the issue of disclosure of medical confidentiality by court order. In the Supreme Court judgment no.2236-7/2007, the court decision came down in favour of ordering the disclosure of medical confidentiality rather than protect individual privacy in order to maintain the public interest in an unimpeded administration of justice. In this case, Dr. Wisut Boonkasemsanti, a gynecologist, was charged for the premeditated murder of his estranged wife, Dr. Phassaporn Boonkasemsanti. The fact was that the couple were reportedly in a bitter marital conflict after Dr. Wisut allegedly had an affair with a female patient since 1998. Dr. Wisut was seen by CCTV of the restaurant escorting his wife, who looked drowsy, out of the restaurant. And she has never been seen since. The evidence against Dr. Wisut was largely circumstantial. No one saw the murder take place and the victim's body was never found.

That same day, Dr Wisut checked in at Witthayaniwet Residence Hall at Choulalongkorn University, where he is believed to have killed his wife and dismembered her body. The following day, he left the university accommodation and checked in at the Sofitel Central Plaza Hotel. He had booked the room for

⁸³ Ratanaparinyanont, 1997, 70-71.

⁸⁴ Kertsoontorn, 1995, 72-75. And see Na nakorn, *Criminal Code and Moral*, 1980, 69-75.

over a week. The court believes Dr. Wisut disposed of his wife's remains by cutting up the flesh and flushing the pieces down the toilet at the university accommodation and later at the hotel. Pieces of flesh were found in the septic tanks at both sites and DNA tests confirmed they belonged to Dr. Phassaporn. Just before the restaurant appointment, Dr. Wisut had bought packages of small and large black plastic bags, 30 sedative pills and a large amount of toilet paper and odor-controlling tablets. The court believes he used the items to cover up the murder. The Supreme Court agreed with the verdict of a lower court, which established that Dr. Wisut had a motive to murder his wife.

During the testimony in the court proceedings, many medical records of Dr. Wisut's patients had been called from the hospital to be presented in the court, as it was claimed that Dr. Wisut had been having an affair with one of his female patients. Mrs. X, one of Dr. Wisut patients alleged that she had been a victim of the violation of medical confidentiality, as the disclosure of such medical data could cause the injury to her private and family life. She then asked the court to exclude her medical record from the trial. The court rejected her claim by giving the reason that a fair trial should be conducted on the ground that all relevant documentary evidence is available. The public interest in finding the truth could be not existed in the court proceedings if the relevant documents are excluded. The purpose of protecting the interests in the administration of justice can only be achieved if all existing evidence is available to the court when making a decision. Some stressed that, it was very necessary for the court to obtain all relevant evidence in this case, as the evidences against the defendant were largely based on circumstantial evidence. No one saw the murder take place and the body of the victim was ever found. Therefore, all the patient files must be called for the testimony to prove the motive of the murder, as the defendant was alleged to be having an affair with one of his female patients.⁸⁵

According to the judgement, the court seems to exercise the discretion under s.231 in favour of disclosure of medical confidentiality. The principle of how to balance

⁸⁵ See the interview of Judges in chapter 4, 8.

the competing interests between public interest in the administration of justice and the interest in maintaining medical confidentiality are not mentioned in the judgment. This may lead to the conclusion that the court is likely to order the person to give or produce all evidences without balancing the competing interest or consider whether the evidence is really relevant or material to the issue of the case.

However, recently, in the case between Pemika and Dr.Prakitpao's family,⁸⁶ the court excluded some confidential medical information in order to prevent the violation of right to privacy.

This case was initiated by Ms. Pemika Veerachatraksit, who was very close to Dr.Prakitpao, the prominent tutor in physics, with a Bt 100 million (£1.9 million) a year tutorial business. She had complained to the police that Dr.Prakitpao was forced by his family to undergo mental treatment at Sri Thanya Hospital, the public mental health hospital, despite being perfectly sane. She told the police that Dr. Prakitpao called her from the hospital asking for help. Therefore, she sought court order for Dr.Prakitpao, to be released from the hospital. The police then took the case to Criminal Court asking for the release of Dr.Prakitpao from Sri Thanya Hospital.

Meanwhile Dr.Prakitpao's family claimed that Dr.Prakitpao was insane as he was found wearing bullet proof jacket and had in possession about 50 guns. According to his family, he always said somebody wanted to hurt him, and he said that he was protected from danger by sacred things. Dr. Prakitpao's wife and mother and elder brother need him to be confined in the hospital for mental treatment.

The criminal court then had to consider whether Dr.Prakitpao had a mental disorder and whether he should be confined to the mental institution for treatment. However, during the trail, the court had ordered immediate transfer of Dr.Prakitpao from Sri Thanya hospital to Kallaya Ratchanakarin, another public

⁸⁶ *The application, (Special Case) no.2/2007.*

mental health institution, as the doctors at Sri Thanya hospital were criticised for being close to Dr. Prakitpao's family.

The court had summoned the doctors and the directors of both Sri Thanya hospital and Kallyaya Ratchanakarin to an inquiry. A group of judges also visited to both hospitals, and a meeting between the judges, legal experts and psychiatrists had been organised as part of hearing to see whether there are sufficient reasons to believe that Dr.Prakitpao had mental disorder and, if he did, should he be confined in the hospital for treatment.

The psychiatrists who examined Dr.Prakitpao agreed that he has mental problems. They expressed full confidence in a diagnosis that he was suffering from mental illness. The chair of three member panel from Royal College of Psychiatrists, Professor Nogpha-nga Limsuwan, declined to disclose more details of Dr.Prakitpao's diagnosis, due to the professional obligation of medical confidentiality. But she confirmed that:

No psychiatrist will label a normal person as mentally ill because it's a sin and will cause additional burden to psychiatrists who already have to take care of many patients'...and some mentally ill patients are unaware that they are sick.

After the inquiry, the court held that there were enough reasons to believe that Dr.Prakitpao has mental disorder and need to remain in the mental health institute for treatment. Then the complaint lodged by Pemika was suspended. The court also declined to disclose the actual reason which has caused the mental illness of Dr.Prakitpao, as his private and family's life could be violated. The court held that the evidences from the experts and psychiatrists from Sri Thanya hospital; and Public Health's mental institute, Kallaya Ratchanakarin clearly establish that Dr. Prakitpao has suffered a mental illness and it is necessary for him to stay in the hospital for certain metal treatment. Once there is enough evidence for the court to decide for not releasing Dr.Prakitpao from the hospital, the complaint lodged by Pemika is suspended. There is no need to find out that what is really the cause of

Dr.Prakitpao's mental illness as his privacy and family's life, which must be protected under the law, could be infringed. As a result, it is necessary to exclude evidence and medical records that are not relevant to the case. Moreover, since the case is concerned with a mental illness patient, the patient's privacy and family's life must be protected. Therefore the media must report the case carefully in order to prevent any adverse effect which could occurred and cause injury to the patient, his family, and public mental health institute. The best suggestion for the media is to report only the facts and medical information derived from the judgment in court proceedings.

According to the judgement, although the Constitution did not refer by the court, the protection of privacy and family life was mentioned in the case. The court also used discretion to exclude evidence which is not relevant to the issue of the case. The most interesting thing is the meeting between psychiatrists, legal expert and the judges which had been organised as part of the hearing to discuss the issue of the case. This meeting may have allowed the judge more understanding of the issues relevant to make the decision of how the medical confidentiality should be protected and what kind of medical information should be excluded or not mentioned, as it could cause an injury to patient's private and family life. Moreover, the court expanded its concern towards medical confidentiality by warning the media to publish only fact and decision made by the court, which excluded some medical information.

From the two cases mentioned above, it is clear that the discretion of the judges can be really different. In Dr.Wisut's case, the court made the discretion to disclose all medical evidence for making the decision. The principle of balancing the interest in private life and the interest of the administration of justice in finding the truth had not been mentioned. Rather, the court made exercised discretion in favour of disclosure of medical confidentiality on the ground that the interest of finding the truth must be protected. In contrast, in Dr.Prakitpao's case the court clearly mentioned the protection of privacy and family life of the patient. The court had made the discretion to exclude the medical evidence that were not relevant to the issue of the case and may cause the injury to patient's private and

family life. The court went on further to warn the media not to publish any information that could cause adverse effect to the patient, his family and public mental health institutes.

The outcome of Dr. Wisut's case might have been decided differently if the balancing exercise performed by English court mentioned in chapter two had been applied. As mentioned, English court will balance the competent interest and decide in favour of disclosure where the information is relevant and material to the issue of the case. The court will also take into account whether the disclosure of medical confidentiality is necessary by considering whether the reasons adduced to justify the disclosure are relevant and sufficient and whether the disclosure are proportionate to the legitimate aims pursued. Therefore, applying the principles from English law, it is doubted that the disclosure of Dr. Wisut's patients records were really necessary and relevant to the issue of the case. The court should also consider whether the disclosure were proportionate to the legitimate aims pursued.

The court judgement in Dr. Prakitpao's case would have given more precise reason for the protection of fundamental right to privacy, if the principle under English was applied. Under English law, the DPA provides that personal data must be processed "fairly and lawfully" which means the processing must comply with all relevant legal obligations such as common law duty of confidence and the HRA. The HRA also requires that any public authority, including the court must act in a way which is compatible with the Convention rights. Applying the principle into Thailand, the court in Dr. Prakitpao's case should decide the case by considering all relevant laws. For example, the court should act to give the effect of human rights by referring to the Thai Constitution which clearly provides the protection of right to privacy.

3 Conclusion

In Thailand, medical confidentiality is protected as part of the constitutional right to privacy. However, ordinary law, such as criminal law, plays an important role in protecting medical confidentiality, as it provides that breach of confidence constitutes a criminal offence.

With regard to the issue concerning the disclosure of medical confidentiality in court proceedings, s.231 of Criminal Procedure provides medical privilege for the physician to refuse to give testimony. However, the law also provides the court with discretion to direct the physician to disclose medical confidentiality.

According to the court judgements in recent cases, it can be assumed that the exercise of the judge's discretion under s. 231 may vary dramatically in ordering the disclosure of medical information, as different judges hold different views of the protection of medical confidentiality. Moreover, the discretion also depends on personal background and knowledge towards the law and the reason behind it. This raises the problem of how the discretion should be exercised in order to ensure that all medical confidentiality will be protected to the same standard.

Comparing to English law, it is clear that the HRA requires the court to interpret the law to conform to the Convention rights, which includes the protection of right to privacy. With regard to the disclosure of medical confidentiality in judicial proceedings, English court has performed balancing exercise by weighting between the interest in maintaining medical confidentiality and the interest of justice. The court will also consider to disclose medical information in the court proceedings where it is relevant and material to the case. Though medical privilege is not provided under English law, the court still has the discretion whether or not to direct the physician to answer the question that may breach of the duty of confidence.

The criteria gained from the study of English law in the issue mentioned above could be one of the measures to be adopted for Thailand, in order to ensure that the judge's discretion for disclosure of medical confidentiality should be exercised

under some certain criteria. And it is the purpose of this thesis to find out the appropriate measure to support the judge to exercise the discretion with respect to the disclosure of medical confidentiality in the court proceedings. The researcher argues in this stage that the board discretion provided under s.231 could affect the protection of medical confidentiality in the court room, as the judges' discretions may vary. Therefore, there should be some measures to support the judge in exercising the discretion towards the disclosure of medical confidentiality to ensure that the same standard of discretions would be exercised under the similar cases.

The research method is based on reviewing and analysing English and Thai law as in chapter 2 and chapter 3, and the empirical study in order to explore the various important stakeholders' views, which are the public, physicians and judges about the protection of medical confidentiality in the courtroom, and to find out whether those stakeholders agree or disagree with the argument that the criteria should be provided to support the judge in exercise the discretion consistently. The balancing exercise and relevant criteria found in English law are given to the public in the survey in order to find out whether the public agree with the criteria. The survey results will be shown in the next chapter.

Chapter 4 The 2007 survey

1. Introduction

The 2007 Survey studies the protection and disclosure of medical confidentiality in court proceedings of Thailand. This topic has been little studied in Thailand, and the information in this survey has not been found in any published material. This chapter details the process of the survey: its objectives; research designs; the survey process; and problems of doing the survey.

The purpose of doing the survey is, having regard to the analysis set out in previous chapters, to explore the publics, physicians and judges views about the laws concerning the protection and disclosure of medical confidentiality in judicial proceedings in Thailand, and what should be the best suggestion to enable medical confidentiality to be protected in court proceedings. It is noted that the data is not being used to test hypotheses and not relating to statistic significance. It merely provides some exploratory information about the knowledge and opinions of various important stakeholders about the relevant laws in order to give better insight into what needs to be done and what would fine acceptance in relation to proposals for law reform, and what obstacles might need to be overcome in order to get acceptance of a policy that would conform to international standards.

The survey has been approved by Ethics and Data Protection Peer Review Group of Durham Law.

2. Objective and Benefit of the Survey

A framework for doing this survey in Thailand had been developed between June and December 2006. The survey was conducted in Thailand during the period of March- August 2007. This survey is referred hereinafter as 'The 2007 Survey'. It is hoped that the survey results may provide useful in producing guidelines to strengthen and improve the protection of medical confidentiality in the court

proceedings in Thailand.

The 2007 Survey was designed with the following objectives:

1. To find out public awareness and general knowledge towards the law concerning medical confidentiality.
2. To find out the public's and physicians' views about the protection of medical confidentiality under s.323 Criminal Code.
3. To find out public's and physicians' views about the protection of medical confidentiality under s.231 Criminal Procedure Code.
4. To find out public's and physicians' views about the measures for supporting the judge in exercising the discretion whether or not medical confidentiality should be disclosed in court proceedings.
5. To find out the judges' views about the protection of medical confidentiality under s.231 Criminal Procedure Code.
6. To find out the judges' views about the measures for supporting the judge in exercising the discretion whether or not medical confidentiality should be disclosed in court proceedings.

3. Research Designs

The 2007 Survey was intended to deliver questionnaires with random sample of the public, physicians and to conduct structured interviews with the judges in Thailand. The Survey was administered to a random sample of people and physicians in some provinces across Thailand which has a central public hospital.

The questionnaire of the 2007 Survey¹ was created according to the objectives mentioned above. The principle under English mentioned in chapter 2 is brought into the questionnaire which is the balancing exercise performed by English court that shows the clear reason of how confidential information should be disclosed. It is the one of the main purposes of the research to find out the best suggestion for Thailand in the law reform process. Therefore the balancing exercise performed

¹ See the questionnaires at Appendix.

by English court and relevant factors such as necessity, proportionate and safeguard against abuse would be the key issue for Thailand to learn and bring into the law reform process. The important stakeholders such as the public, physicians and judges will be asked to choose the measure which includes the balancing exercise performed by English court in order to find out their opinions what will be the best solution for Thailand to protect medical confidentiality.

The questionnaire type is a combination of closed questions and open-ended questions. The multiple choice questions were designed to be short and easy to understand. This was to ensure that the respondents could really understand all questions and to persuade them to complete it in a very short time. A series of questions was designed using closed questions to limit the possible responses, of which at least one must be ticked. This was to enable the questionnaire to address clear points and allow uncomplicated analysis of the results. Some open-ended questions were also introduced so that respondents could be more expansive and express their views freely.

A pilot study was performed to detect any problems with the questions in November 2006 with a sample of fifteen people. These were Thai students who studying in different fields, including medicine, at the University of Sheffield. The pilot study showed that the respondents took around twenty to thirty minutes to complete the questionnaires. However, some respondents reported that it was hard to understand legal terms. In response to this information, the questionnaires were modified by using simpler words and explanations in the questions relating to the law. These modified questionnaires were then completed and used for conducting the survey in Thailand at the beginning of 2007.

3.1 The Survey Samples

The focus of the 2007 Survey was the people and physicians in the provinces which have central hospitals in all regions across Thailand, which are Bangkok, Chiang Mai, Phitsanulok, and Songkhla. These provinces are the central of all government services across the country including health services, and all facilities

in these provinces have been organised for the nearby provinces. Since these provinces has been established nearly the same as the capital city in each part of Thailand, the people and physicians in these provinces will have more experiences in dealing with medical services. As a result, people and physicians in these provinces suit the criteria for survey sample of this research.

3.2 The interviews

The interview was conducted with 15 judges, and the duration of each interview was nearly forty-five minutes. Some interviews were conducted in the office of the judge, whereas others were conducted by telephone as some of the judges agreed to save time and travel expense. The records of the interviews have been kept confidential on cassette tapes and notes written in shorthand taken during the interview. Some judges kindly allowed their name to be disclosed in the thesis. However, the researcher decided to report their views anonymously. It was hoped that interviews with the judges would provide more precise information on how discretion would be exercised in protecting medical confidentiality in the courtroom, allowing the research to be analysed in greater depth.

4. The Survey Process

The questionnaires for physicians were sent to the directors of each of the central hospitals which was the subject of the research. The formal letters introduced the researcher and asked for co-operation. Having been approved by the directors, the questionnaires were then circulated to the physicians by the secretaries of the hospitals. Some questionnaires were returned directly by post to the researcher, and some were returned to the secretaries who, very kindly, collected the questionnaires and returned them to the researcher. The questionnaire was produced for 50 copies for physicians of each hospital and each questionnaire was numbered for sending to each hospital. The first page of questionnaire briefly introduced the researcher, explained the purpose of the questionnaire, gave guidance how to complete the questionnaire, and stated that the respondents' information would be given in confidence. The physicians were given four weeks,

until the end of April 2007, to complete the questionnaires. After allowing time for a response, one hundred and twenty - two of questionnaires were given back to the researcher in the middle of May.

With regard to the questionnaires for the public, Professor Somkuan Kaviya, Associate Professor Chalong Chatruracheevin, Mr. Jatupoom Bhoomboonchoo, Mrs. Samaporn Megpung, Mrs. Wipa Intrarasuk and Mrs. Chanida Leamsakul, the academics staff from public universities in Thailand, managed distribution to people in the provinces identified for the research. Four hundred copies of the questionnaire were provided for each province. Five to ten students from various universities were hired to distribute the questionnaires to people. However, people who are under twenty years old were excluded from this study, as they are not yet become *sui juris* under the law.² Most of the students who assisted researcher are doing bachelor of law, and they were trained for understanding the purpose of the research, and legal terms to be able to explain the respondents who may have question during the survey. However, the students reported that the respondents only want more explanation of the survey's purpose, but no report of any problem about the questions.

Most of the questionnaires were distributed by the students in various places. The respondents were kindly asked by the students for filling questionnaires and they waited for questionnaire return at the survey point. The respondents were given small gifts, such as key rings, and pencils which provided by the researcher. Each student could distributed around 4-6 questionnaires per day. Some questionnaires were sent to some private companies, government and non government organisations, especially in the North of Thailand, which have good relationship with the researchers. Therefore, the questionnaires were return with high rate.

The questionnaires for this subject group were administered between March and July 2007. Finally, there were 1,248copies of questionnaire returned to the

² S. 19 of Civil and Commercial Code, provides that:

‘A person, on the completion of twenty years of age ceases to be minor and becomes *sui juris*’.

academic staff and researcher.

5. Problems encountered during the survey

The most important problem was that the collecting of data in Songkhla which is located in the South of Thailand. There is political unrest,³ and people have been killed in fighting. Some parts of this area have been under martial law. Therefore, it was very hard to collect the data in Songkhla, so the duration for collecting data was extended for an extra six weeks, as the survey could not be conducted every day and the survey site was limited to where the military would allow.

Regarding the interview, unsurprisingly there were some difficulties appointments with the judges, who are very busy. During every interview, there were several interruptions by telephone and for urgent documents that the interviewee had to sign. However, a good point of those interviews was that they allowed eye contact and had a more informal style. This was beneficial, especially when discussing sensitive issues. All in all, the data collected from the interviews was very useful, as the judges raised some very useful points about the court system that are not known to the public.

6. The survey results: public's views

A lot of interesting and useful information came out from the 2007 Survey. The results are presented by means of statistics and tables, which show the frequency and factor information. Comments from the respondents are quoted or paraphrased.

6.1. Survey response rate

The survey response rate for the public is shown as follows:

³ There has been the problem at the south of Thailand about the Islamic terrorists which have the aim of separating the south of Thailand for establishing the new state called "Pride Pattani".

Table 4.1: Survey response rate (Numbers and %)

| Provinces | Locations | No. of sending questionnaires | No. of responses | Percentage of responses |
|-------------|---------------|-------------------------------|------------------|-------------------------|
| Chaing Mai | North | 400 | 349 | 87.25 |
| Phitsanulok | Upper Central | 400 | 365 | 91.25 |
| Bangkok | Capital | 400 | 312 | 78.00 |
| Songkhla | South | 400 | 222 | 55.50 |
| Total | 4 locations | 1,600 | 1,248 | 78.00 |

Table 4.1 shows that 1,600 questionnaires were sent to people in 4 provinces which are located in various parts of Thailand. One thousand two hundred and forty-eight questionnaires, 78.00 %, were sent back to the researcher. It is acknowledged that the overall rate of 78 % is very good.

The most notable response rate came from people in Phitsanulok, the province where the researcher lives, with a response rate of 91.25 %, which was the highest figure compared to other provinces. This figure reflects the help the researcher received from people of all sectors in the province to answer questionnaires. In contrast, the lowest response rate came from Songkhla, 55.50 %, which reflects the difficulties mentioned above. However, extending of the data collection period provided fair response rate of slightly more than half of the questionnaires were sent back. Chaing Mai had the second highest response rate, at 87.25 %, where Bangkok came third at 78 %.

6.2. Gender and age categories of respondents

Gender and age categories of the respondents are shown as follows:

Table 4.2 Gender (Numbers and %)

| Gender | No. of Responses | Percentage of responses |
|---------------|-------------------------|--------------------------------|
| Male | 454 | 36.38 |
| Female | 794 | 63.62 |
| Total | 1,248 | 100 |

Table 4.3 Age Categories (Numbers and %)

| Age categories | No. of responses | Percentage of responses |
|-----------------------|-------------------------|--------------------------------|
| 21-25 | 103 | 8.25 |
| 26-30 | 122 | 9.78 |
| 31-35 | 155 | 12.42 |
| 36-40 | 208 | 16.67 |
| 41-45 | 187 | 14.98 |
| 46-50 | 179 | 14.34 |
| 51-55 | 122 | 9.78 |
| 56-60 | 92 | 7.37 |
| 60> | 80 | 6.41 |
| Total | 1,248 | 100 |

Table 4.2 and 4.3 show gender and age categories of the respondents. The majority of the respondents is female. There were seven hundred and ninety-four women or 63.62 % who answered questionnaires, whereas the response rates from males was only four hundred and fifty four, or 36.38 %. With regard to the age of the respondents, the numbers of respondents were not much different between each age category.

The range of age in this study is between twenty-one to sixty-plus. The highest response rates came from people aged between thirty-six to forty, which were two hundred and eight or 16.67 % . , The second highest response rates came from people aged between forty- one and forty-five, (187, or 14.98 %). 179 people (14.34 %) aged between forty-six and fifty responded to the questionnaires at the

amounts of one hundred and seventy-nine percent which were similar to the amounts of the second highest group. The numbers of respondents aged between twenty-six and thirty were equal to the age between fifty-one and fifty-five, which were 122, or 9.78 %. The numbers of respondents aged between twenty-one and twenty-five were 103, or 8.25 percent which were slightly higher than the respondents of aged between fifty one and fifty-five, which were 92 or 7.37 %. The smallest numbers of respondents came from people aged over sixty years old, which were eighty or 6.41 percent.

Table 4.4: General questions: Public awareness and knowledge towards medical confidentiality.

| Questions | Yes | No | Unsure |
|---|-----------------|---------------|---------------|
| 5.Are you aware of protection of medical confidentiality | 1,129 90.46% | 119 9.54% | 0 0% |
| 6.Do you know that there are several laws such as Constitution, private law, criminal law concerning medical confidentiality? | 689 55.20% | 359 28.04% | 200 16.02% |

Table 4.4 shows questions five and six of the questionnaires relating to the subject's awareness and general knowledge of medical confidentiality. The question types were multiple-choice to be answered yes, no or unsure. The questionnaire informed the respondents that there was no right or wrong answer. The respondents could answer the questionnaires freely.

Question five asked the respondents if they were aware of the protection of medical information. There were one thousand two hundred and forty-eight respondents. The total sum of respondents who were aware about this matter was one thousand one hundred and twenty-nine, or 90.46 %. Only one hundred and nine-teen, or 9.54 % did not have knowledge of the protection of medical confidentiality. This are quite impressive results, showing that most people were aware of the protection of medical confidentiality.

Question six was another question of looking for the public's general knowledge of the laws concerning medical confidentiality such as the Constitution, private law, criminal law and official information act. The subjects were asked if they knew that there are several laws such as the Constitution, private law, criminal law and official information act concerning the protection of medical confidentiality. The results show that most respondents, which were six hundred and eighty-nine, or 55.20 % knew that there are several laws concerning medical confidentiality, whereas 350 people, or 28.04 %, did not know that protection of medical confidentiality is mentioned under the laws. Moreover, there were 200 respondents, or 16.02 %, who were not sure whether there are these laws concerning medical confidentiality.

6.3 Public knowledge of the laws concerning medical confidentiality

Table 4.5: Public knowledge of the laws concerning medical confidentiality.

| Laws | Publics' knowledge of the laws concerning medical confidentiality | | |
|---|---|---------------|----------|
| | Know | Don't know | Not sure |
| S.35 Constitution (Right to privacy) | 240 34.83% | 449 65.16% | 0 0 |
| S.420 Civil and Commercial Code (Right to ask for compensation) | 408 59.21% | 281 40.78% | 0 0 |
| S.323 Criminal law (Criminal offence to the physician who disclose medical information) | 467 67.77% | 222 32.22% | 0 0 |
| S.231 Criminal Procedure Code (Medical Privilege and the interest of justice) | 314 45.57% | 375 54.42% | 0 0 |
| S.15 Official Information Act (The protection of personal data) | 67 9.72% | 622 90.27% | 0 0 |

Table 4.5 shows question seven of the questionnaires relating to further knowledge of the respondents regarding various laws concerning medical confidentiality. It is noted that only the 689 respondents who answered question

six affirmatively could answer this question. They were asked whether they knew about the laws with regard to medical confidentiality, which are Constitution,⁴ S.420 Civil and Commercial Code, S.323 Criminal Code, S.231 Criminal Procedure Code and S.15 Official Information Act. The question types were multiple-choice to be answered yes, no or not sure. The results show that two hundred and forty respondents, or 34.83 %, knew that the Constitution contains protection of the right to privacy, whereas four hundred and forty-nine respondents or 65.16 % did not know. This means that almost two-thirds of the sample did not have knowledge of the protection of medical confidentiality as the constitutional right. As s.35 of the 2007 Constitution is identical to s.34 of the 1997 Constitution, the questionnaire provided that the respondents can answer this question from their knowledge of s.34, 1997 Constitution.

With regard to right to ask for compensation under S.420 Civil and Commercial Code, more than half of people (four hundred and eight or 59.21 %) knew about the law, whereas five hundred and nine, or 40.78 % did not . Knowledge of S.323 Criminal Code which makes it a criminal offence for the physician to disclose medical information was quite impressive. More than half of respondents – four hundred and sixty-seven or 67.77 % knew of this offence, whereas two hundred and twenty-two respondents or 32.22 % did not know. This is quite an interesting figure, as it suggests that Thai people are more aware of criminal law than constitutional or civil law. However, when asked knowledge regarding medical privilege and the interest of justice under S.231 Criminal Procedure, more than half of respondents (three hundred and seventy-five or 54.42 %) did not know of the law, whereas three hundred fourteen respondents, or 45.67 %, did.

It is noted that most of the respondents did not have knowledge concerning the protection of personal data under S.15 Official Information Act. There were six hundred and twenty-two respondents, or 90.27 %, who did not have knowledge with regard to the protection of personal data under s.15 Official Information,

⁴ It is noted that the questionnaire provided the information that s.35 of 2007 Constitution is identical to s.34 of 1997 Constitution. Therefore, where the questionnaire mentioned about s.35 of 2007 Constitution, the respondents can answer from their knowledge of s.34, 1997 Constitution.

which was the highest figure comparing to other laws. Only sixty-seven respondents (9.72 %) answered that they had knowledge of the law.

6.4 Public views and attitudes towards the constitution and private laws concerning medical confidentiality

Table 4.6: publics' views and attitudes towards the constitution and private laws concerning medical confidentiality.

| Questions | Yes | No | Others |
|--|--------------|-----------|---------------|
| 8. Do you understand s.35 Constitution when you have read it? | 1248 100% | 0 0 | 0 0 |
| 9. Do you agree with s.35 constitution section? | 1248 100% | 0 0 | 0 0 |
| 10. Do you understand s.420 Civil and Commercial Code when you have read it? | 1248 100% | 0 0 | 0 0 |
| 11. Do you agree with s.420 Civil and Commercial Code? | 1248 100% | 0 0 | 0 0 |
| 12. Do you understand s.15 Official Information Act when you have read it? | 1248 100% | 0 0 | 0 0 |
| 13. Do you agree with s.15 Official Information Act? | 1248 100% | 0 0 | 0 0 |

Table 4.6 shows the results from questions 8-13 of the questionnaire regarding views and attitudes towards the constitution and private laws concerning medical confidentiality. The questions aimed to explore people's understanding of and attitudes to the constitution, civil law and official information act. The survey started by giving the content of s.35 Constitution, s.420 Civil Code and s.15 Official Information Act for the respondents to read before answering whether they understood the content of the laws and whether they agreed or disagreed with the laws. All one thousand, two hundred and forty eight respondents were required to answer these questions whether or not they answered that they had knowledge

of the laws concerning medical confidentiality in question six. The results show that 100 % of respondents understood the content of all the laws when they had read them, and all stated that they agreed with all of the laws. These are very positive results, as it can be seen that people could understand the content of the laws concerning medical confidentiality. Although many respondents had never known or heard about the laws concerning medical confidentiality, it can be assumed that people were satisfied with the protection of medical confidentiality provided by the existing laws when they had read them.

6.5 Public views and attitudes towards criminal laws concerning medical confidentiality

Table 4.7: publics' views and attitudes towards criminal laws concerning medical confidentiality.

| Questions | Yes | No | Others |
|---|----------------|---------------|--------------|
| 14.Do you understand s.323 Criminal Code when you have read it? | 1248 100% | 0 0 | 0 0 |
| 15.Do you agree with s.323 Criminal Code? | 1248 100% | 0 0 | 0 0 |
| 16.Do you understand s.231 Criminal Procedure Code when you have read it? | 1248 100% | 0 0 | 0 0 |
| 17.Do you agree with s.231 paragraph one which awards physicians the right to refuse to testify in court about confidential medical information? | 1248 100% | 0 0 | 0 0 |
| 18.Do you agree with s.231 paragraph two which gives the court the discretion in disclosure medical confidentiality in the court room? | 933 74.76% | 191 15.30% | 124 9.94% |
| 19.Do you think that some criteria should be set up to support the judge in exercise the discretion whether confidential medical information should be disclosed in the court room? | 1208 96.79% | 40 3.21 | 0 0 |

Table 4.7 shows the results from question 14-19 of the questionnaires with regard to views and attitudes towards criminal laws concerning medical confidentiality, which are s.323 Criminal Code and s.231 Criminal Procedure Code. As mentioned in chapter 3, these criminal laws are the most important part in protecting medical confidentiality in Thailand, so it is important to explore the public's attitude to these laws.

Under s.323 Criminal Code, physicians and members of the other health care professions mentioned in the law commit a criminal offence if they reveal patient confidences which come into their knowledge in the course of their profession. Question 14 and 15 explored whether people agreed or disagreed with this section. The survey started in question 14 by giving the respondents the content of s.323 Criminal Code for to read and then answer whether they understood it. The results show that 100 % of respondents understood the content of the law when they had read it. These are quite positive results, as clear understanding of the content of section 323 was required for further consideration in question 15, in which the respondents were asked whether they agreed or disagreed with it. The results show that all of the respondents agreed with the section.

As mentioned in chapter 3, the researcher assumed from the study of s.231 Criminal Procedure Code that there should be some criteria to support the judge in his exercise of discretion with regard to the disclosure of medical confidentiality in court proceedings, so that the discretion will be exercised consistently. Questions sixteen to eighteen were designed to explore public attitudes towards the protection of medical confidentiality under s.231 Criminal Procedure Code, and find out what the public think about the court having discretion regarding the disclosure of medical information. There is a follow-up to this in question 19.

Questions 16 to 18 aimed to find out whether the respondents agreed or disagreed with the law. For question sixteen, the respondents were given the content of s.231 Criminal Procedure Code to read and then asked whether they understood the content of the law. The results show that, once again, all respondents understood the content of s.231 Criminal Procedure Code when they had read it. The

respondents were then asked in question seventeen whether they agreed or disagreed with s.231 Criminal Procedure Code paragraph one. It is interesting that 100 % of respondents agreed with the law concerning medical privilege which awards the physicians the right to refuse to testify in court with respect to confidential medical information obtained in the course of his or her profession.

With regard to question eighteen, the respondents were asked whether they agreed or disagreed with s.231 Criminal Code paragraph two which provides the judge with the discretion to order the disclosure of medical confidentiality in court proceedings. 933 respondents, or 74.76 %, agreed with s231 Criminal Code paragraph two, whereas 191, or 15.30 % disagreed with the law. It is interesting that one hundred and twenty-four respondents or 9.94 % answered “others” and explained it as “not sure”

According to s.231 Criminal Procedure Code, the court has the discretion to direct the physician to give or produce confidential medical documents or facts which has been obtained by the physician by virtue of his or her profession. As a result, the exercise of the judge's discretion under s.231 may vary. This raises the problem of how the discretion could operate under certain criteria in order to ensure that medical confidentiality will be protected to the same standard in all court proceedings. Question nineteen was designed to explore people's attitude toward the problem of how this discretion should be exercised, and whether s.231 is clear enough for judges to be able to exercise the discretion consistently, or whether some criteria should be introduced to ensure that medical confidentiality will be protected to the same level in every case. This question aimed to explore the respondents' attitude no matter they had answered ‘yes’ or ‘no’ in questions seventeen and eighteen. The results show that most respondents, (1208 or 96.79 %) agreed that some criteria should be set up, whereas only forty respondents or 3.21 % disagreed. Some respondents who disagreed gave further comment that they were quite sure that the judge would exercise the discretion properly.

It can be concluded in this stage that the argument that some criteria should be set up for supporting the judge in the exercise of this discretion was supported by the

public opinions. In the next step of the survey, many measures that could be used to support the judge in exercising the discretion were provided for the respondents to choose, in order to find out which measure would be the most preferable measures among the public.

6.6 Publics attitudes towards measures for assisting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in court proceedings.

Table 4.8: Public attitudes towards the measures for supporting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in the court proceedings. Numbers and percentage of those who selected only one measure.

| Measures | No. and % of responses |
|--|-------------------------------|
| A. Amend Criminal Procedure Code section 231 by adding the phrase "the court should direct the person (including physician) to disclose confidential information (including medical information) only in the circumstance that the information is relevant and material for the case". | 173 14.32% |
| B. Amend Criminal Procedure Code section 231 by adding the phrase "the court should direct the person to disclose confidential information by balancing the interest in maintaining confidentiality on the one hand and the interests of justice in finding the truth on the other". | 240 19.87% |
| C. Appoint committee with specialist knowledge to scrutinise whether or not the court should direct the person to disclose confidential information in the court proceedings. | 78 6.46% |
| D. Appoint experts in the area of medical confidentiality such as physicians to a panel of judges for considering cases concerning the protection of confidential information. | 191 15.81% |
| E. Do not need to change anything | 0 0.00% |
| F. Others | 0 0.00% |
| Total | 682 56.45% |

Question twenty gave several possibilities in the form of multiple choices from which the respondents could choose. The measures mentioned in the question came from the study of English law, Thai law and discussions with judges and physicians. The respondents who could answer this question were the 1,208 who agreed in question nineteen that some criteria should be set up to support the judge to exercise the discretion whether or not the physicians should be directed to disclose confidential medical information in the court room. The respondents could select more than one measure and were given the opportunity to suggest other measures that they might think of.

Table 4.8: shows the number of respondents who chose only one measure that they thought might be suitable to enable a judge to exercise discretion regarding disclosure of medical confidentiality in court proceedings. The results show that, six hundred and eighty-two respondents or 56.45 % chose one measure. Among these respondents, one hundred and seventy three respondents or 14.32 % chose measure A ; amending s.231 by adding the phrase that “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue case”.

Two hundred and forty respondents, or 19.87 %, chose measure B; amending s.231 by adding the phrase that “the court should direct the person to disclose confidential information by balancing the interest in maintaining confidentiality on the one hand and the interests of justice in finding the truth on the other”.

Seventy-eight respondents or 6.46 % chose measure C; appointing committee with specialist knowledge to scrutinize whether or not the court should direct a person to disclose confidential information in the court proceedings. This measure came from the discussion between the researcher and some experts in health care services. They suggested that in some cases the judge should consult with experts such as physician or psychiatrists before exercising the discretion with regard to the disclosure of medical confidentiality.

The last measure was measure D; appointing experts in the area of medical confidentiality such as physicians to become a panel of judges for considering cases concerning the protection of confidential information. This measure came from the model of specialist court in Thailand, such as Intellectual Property and International Trade Court of Thailand. In the specialist court, the panel consists of career judges and appointed judges working in other relevant professions, such as scientists or academic experts who have the good knowledge in intellectual property or international trade. This measure is different from measure C, as the expert is appointed to a panel of judges considering the case, along with the career judge, whereas the committee in measure C will work together with the judge outside the court room. 191 respondents or 15.81 % chose this measure.

Among the respondents who chose one answer, most of them (19.87 %) preferred measure B, amending s.231 Criminal Procedure Code by adding the phrase “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”, and the second most, 15.81 % was measure D; appointing an expert in the area of medical confidentiality to a panel of judges for considering whether or not medical information should be disclosed in the court proceedings. However, 14.32 % of respondents chose measure A; amending s.231 Criminal Procedure Code by adding the phrase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”, which were not much different to the respondents who chose measure D. (More details about the measures will be discussed in chapter 5)

Table 4.9 : Public attitudes towards the measures for supporting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in the court proceedings. Numbers and percentage of those who selected two measures.

| Measures | No.and % of responses |
|-----------------------------------|--------------------------------------|
| People who chose measures A and B | 95 7.86% |
| People who chose measures A and C | 78 6.46% |
| People who chose measures A and D | 121 10.02% |
| People who chose measures B and C | 17 1.41% |
| People who chose measures B and D | 43 3.56% |
| People who chose measures C and D | 33 2.73% |
| Total | 387 32.03% |

Table 4.9: shows the results of the 387 respondents, or 32.03 %, who chose two measures for supporting the judge to exercise discretion with respect to the disclosure of medical confidentiality in the court proceedings. Of all these respondents who chose two answers, one hundred and twenty one, or 10.02 % chose measures A and D; amend s.231 Criminal Procedure Code by adding the phrase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”, and “Appoint experts in the area of medical confidentiality such as physicians to a panel of judges for considering cases concerning confidential information”.

Ninety-five respondents, or 7.86 %, chose measures A and B; amend s.231 Criminal Procedure Code by adding the phrase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”, and Amend s.231 Criminal Procedure Code by adding the phrase “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”.

Seventy-eight respondents, or 6.46 %, chose measures A and C; amend Criminal Procedure Code section 231 by adding the phrase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”, and appoint committee with specialist knowledge to scrutinise whether or not the court should direct a person to disclose confidential information in court proceedings.

Forty-three respondents, or 3.56 % chose measure B and D; amend Criminal Procedure Code section 231 by adding the phrase “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”, and appoint experts in the area of medical confidentiality such as physician to become panel of judges for considering the case concerning the protection of confidential information.

Thirty three respondents, or 2.73 % chose measures C and D; appoint committee with specialist knowledge to scrutinise whether or not the court should direct a person to disclose confidential information in the court proceedings, and appoint experts in the area of medical confidentiality such as physicians to a panel of judges for considering cases concerning the protection of confidential information.

Finally, only seventeen respondents, or 1.41 % chose measures B and C; amend

s.231 Criminal Procedure Code by adding the phrase “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”, and appoint committee with specialist knowledge to scrutinise whether or not the court should direct a person to disclose confidential information in the court proceedings.

According to survey results, it can be concluded that a combination of measures A and D was the most preferable to respondents in this group. The second most preferable combination was measures A and B. The third was A and C, and the combination of measures B and D came fourth. The least preferable combination was B and C.

Table 4.10: Public attitudes towards the measures for supporting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in the court proceedings. Numbers and percentage of those who selected three measures.

| Measures | No. and % of responses |
|--------------------------------------|-------------------------------|
| People who chose measures A, B and C | 17 1.41% |
| People who chose measures A, B and D | 43 3.56% |
| People who chose measures A, C and D | 29 2.40% |
| People who chose measures B, C and D | 12 0.99% |
| Total | 101 8.36% |

Table 4.11: Public attitudes towards the measures for supporting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in the court proceedings. Numbers and percentage of those who selected four measures.

| Measures | No. and % of responses |
|---|------------------------|
| People who chose measures A, B, C and D | 38 3.15% |
| Total | 139 11.50% |

Table 4.10 and table 4.11 show the results of the respondents who chose three and four measures for supporting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in the court proceedings. There were 101 respondents, or 8.36 % chose three measures. Of these respondents, forty-three , or 3.56 % , chose measures A,B and D; twenty-nine , or 2.40 % , chose measures A, C and D; seventeen , or 1.41 % , chose measures A, B and D; and only twelve , or 0.99 % , chose measures B, C and D. It can be seen that the most preferable measures chose by the respondents in this group were A, B and D and the second most preferable measures were measures A, C and D, whereas measure A, B and C came third.

There were only thirty-eight respondents, or 3.15 % chose all four measures.

6.7 Other viewpoints of respondents

Finally, the respondents were given the opportunity to make their own comments in question thirteen. There were three hundred and thirty-seven respondents or 27 % made comments which are paraphrased below:

Some said that they were not aware of the protection of medical confidentiality under the law before. Now their opinion had changed, and they wanted to learn more concerning the issue of medical confidentiality and patients' rights.

Some stated that they would prefer to be told by physicians that medical secrets could be disclosed before commencing treatment.

Many respondents expressed their views that they are really happy with s.231 Criminal Procedure Code which provides medical privilege for the physician to refuse to give evidence concerning medical confidentiality. However, they would like the physician to exercise the privilege in court as much as possible in order to ensure that patient's secret would be protected properly.

Many respondents said that they never knew that the law confers the judge with the power to order physicians to disclose confidential medical information in the court room. They expressed further concern that, if the judge could make the discretion without any limitations or reasonable grounds, use of the discretion could be detrimental to the relationship between physician and patient, and could be detrimental to public confidence in seeking medical treatment.

Many respondents expressed their concern toward the judges' discretion, as broad discretion would affect public confidence in the administration of justice. They also mentioned about personal background and knowledge of the judge towards medical confidentiality that could affect the standardisation of discretion. They went on to stress that the judges' opinion about appropriate disclosure may vary, as judges, with different background of knowledge, may hold different views of the protection of medical secrets. They further stated that the individual right to privacy may be intruded upon by the judge's discretion if no limitations were placed clearly by the law.

Some respondents suggested that they want the judicial system to be improved, particularly the level of judges' knowledge. The judges should be sent abroad to

study the issue of medical law, and training courses about the balancing test should be organised for all judges. Respondents expressed their concern that although they would like the balancing exercise to be provided by the law, they still worried about individual judges' knowledge of and experience in the area. Therefore, case studies from foreign countries should be learned, so that the judge could gain knowledge about the balancing test and thereby exercise their discretion properly.

Some respondents also suggested that if the judges, who have to decide all types of cases, are unable to gain special expertise in medical law, lay people with specialist knowledge in particular issues should be appointed to a panel of judges. Hearings conducted under the judges and experts in the matter of the case would create more public confidence in the administration of justice.

Many suggested that s.323 Criminal Code should be revised to provide more consequences for a person who breaches the duty of confidence.

Many respondents also suggested that the law should be revised as soon as possible to provide necessary criteria for the judges to exercise their discretion regarding medical confidentiality in the court room. They went on to express that they wanted a speedy process to revise the law, in order to ensure that their privacy would not be intruded into by improper use of discretion. As a result, the government should revise s.231 Criminal Procedure Code as soon as possible.

Several respondents confirmed that the government should provide and promote more knowledge of medical confidentiality to people, as many people had never known of their individual right and were not aware of medical confidentiality.

Many respondents said that they have never heard about the OIA. Some respondents also confirmed that although they work in various government services, they have never known about the protection of right to privacy under the OIA. Therefore, the government should provide and promote more knowledge about the OIA, so that they can carry out their task of information service

effectively.

Many respondents suggested that, at present, although the law does not provide limitations on the judges' decision whether or not medical confidentiality should be disclosed in the court room, in practice, a meeting and discussion should be organised between the judge and experts such as a physician or psychiatrist before any decision would be made.

Some noted that the lack of communication between the judge, physician and patient will cause a problem. If they were the patients whose information was going to be disclosed, they would like to know what was going on in the court room. And they suggested that there should be more communication between the judge, physician and patient whose information was going to be disclosed.

Some respondents thought that the physician should not release information about a patient to the court without the patient's properly informed consent.

Some respondents would like to see the judge and psychiatrist express more concerns about the protection of medical information of psychiatric patients than patients with physical illness.

Many respondents said further that although they accepted that medical confidentiality could be disclosed in certain circumstances, the physician should not offer all information to the court. They added that the court should gather and consider other evidences related to the case as much as possible rather than decide to disclose medical information.

Many respondents suggested that they would like to see the balancing exercise conducted by the judge in line with international standards.

Some respondents went on to give their further opinion that they would like the state to start working out a system of choosing the experts in the area of medical

confidentiality to a panel of judges for considering cases together with career judge.

7. The survey results: physicians' views

The questionnaire for physicians contained 18 questions. It started with two questions about demographic information and two questions about general knowledge about the protection of medical confidentiality under the laws. There were then twelve questions about the physician's views and attitudes towards the laws concerning medical confidentiality. One question about the attitudes toward the measures which should be applied to fulfilled the protection of medical confidentiality in court proceedings, and the rest one question was the open-ended questions designed for freely comments.

7.1 Survey response rate

The survey response rate for physicians is shown below:

Table 4.12: Survey response rate

| Provinces | Locations | No. of sending questionnaires | No. of responses | Percentage of responses |
|-------------|---------------|-------------------------------|------------------|-------------------------|
| Chaing Mai | North | 50 | 33 | 66.00 |
| Phitsanulok | Upper Central | 50 | 37 | 74.00 |
| Bangkok | Capital | 50 | 31 | 62.00 |
| Songkhla | South | 50 | 21 | 42.00 |
| Total | 4 samples | 200 | 122 | 61.00 |

Table 4.12 shows that two hundred questionnaires were sent to physicians in 4 provinces which are located in various parts of Thailand. One hundred and twenty-two questionnaires or 61.00 % were sent back to researcher. It is acknowledge that the over all of 61 % is a good response rate.

Again, the most noticeable figure of response rate came from physicians in Phitsanulok, the province where the researcher lives. There were thirty-seven respondents, or 74 % from Phisanulok, while Chaing Mai came second most as

the figure of thirty- three respondents, or 66 %. Thirty-one physicians who live in Bangkok or 62 % responded the questionnaires. The physicians in Songkhla province were again the smallest group of respondents which were twenty-one, or 42 %.

7.2 Gender and age categories of respondents

Gender and age categories of the respondents are shown below:

Table 4.13: Gender

| Gender | No. of Responses | Percentage of responses |
|---------------|-------------------------|--------------------------------|
| Male | 68 | 55.74 |
| Female | 54 | 44.26 |
| Total | 122 | 100.00 |

Table 4.14: Age Categories

| Age categories | No. of responses | Percentage of responses |
|-----------------------|-------------------------|--------------------------------|
| 21-25 | 4 | 3.28 |
| 26-30 | 18 | 14.75 |
| 31-35 | 15 | 12.30 |
| 36-40 | 21 | 17.21 |
| 41-45 | 20 | 16.39 |
| 46-50 | 19 | 15.57 |
| 51-55 | 8 | 6.56 |
| 55-60 | 6 | 4.92 |
| 60> | 11 | 9.02 |
| Total | 122 | 100.00 |

Table 4.13 and 4.14 show gender and age categories of the respondents. According to the total samples of physicians, there were fifty-four females or 44.26 % answered questionnaires whereas the numbers of male respondents were sixty-eight or 55.74 % which were slightly higher than female respondents. With regard to the age of the respondents, it was decided to circulate the questionnaires to physicians of all ages, with a range of twenty-one to more than sixty.

According to the results, most of respondents (93, or 76.22%) were aged between twenty-six and fifty. The highest response rates came from physicians aged between thirty-six and forty (21, or 17.21 %). The second highest response rates came from physicians aged between forty-one and forty-five (20, or 16.39 %). Nineteen physicians, or 15.57%, aged between forty-six to fifty responded to the questionnaire and the response rate of physicians aged between twenty-six and thirty was eighteen, or 14.75 %. Physicians aged between thirty-one to thirty-five, answered questionnaires in the amount of fifteen, or 12.30 %.

Twenty-five physicians (20.50%) in the age-range fifty-one to more than sixty responded to the questionnaire. In this group, the physicians aged more than sixty were the highest respondents (11, or 9.02 %). The number of physicians aged between fifty-one and fifty-five and aged between fifty-five and sixty were eight (6.56 %), and six (4.92 %) respectively. The smallest number of respondents came from physicians aged between twenty-one and twenty-five which amounted to 4, or 3.28 %. This might be the group of physicians who have just graduated, of which there are not many in hospitals in all parts of Thailand.

7.3 physicians' general knowledge towards the laws concerning medical confidentiality

The physicians were given questions 3 and 4 concerning their general knowledge about the protection of medical confidentiality under the law. The results are shown below:

Table 4.15: Physicians' general knowledge about medical confidentiality.

| Questions | Yes | No | Not sure |
|---|-----|----|----------|
| 3. Do you know that there are several laws such as Constitution, Private law, Criminal law and Official Information Act concerning medical confidentiality? | 122 | 0 | 0 |
| | 100 | 0 | 0 |

Table 4.16: Physicians' knowledge about the laws concerning medical confidentiality.

| Laws | Physicians' knowledge towards the laws concerning medical confidentiality | | |
|--|---|--------------|----------|
| | Know | Don't know | Not sure |
| S.35 Constitution (Right to privacy) | 91 74.59% | 31 25.40% | 0 0 |
| S.420 Civil and Commercial Code (Right to ask for compensation) | 122 100% | 0 0 | 0 0 |
| S.323 Criminal Code (Criminal offence to the physician who disclose medical information) | 122 100% | 0 0 | 0 0 |
| S.231 Criminal Procedure Code (Medical Privilege and the interest of justice) | 122 100% | 0 0 | 0 0 |
| S.15 Official Information Act (The protection of personal data) | 82 67.21% | 40 32.78% | 0 0 |

Table 4.15 and 4.16 show question 3-4 of the questionnaire relating to physicians general knowledge towards the laws concerning medical confidentiality. The question types were multiple-choice to be answered yes, no or unsure. The questionnaires informed the physicians that there were no right or wrong answer. The physicians could answer the questionnaires freely.

Table 4.15 shows question 3, in which the physicians were asked if they know that there are several laws such as the Constitution, private law, criminal law and Official Information Act concerning the protection of medical confidentiality. The

results show that all physicians knew that there are several laws such as the Constitution, private law, criminal law and official information act concerning the protection of medical confidentiality.

Table 4.16 presents question 4 of the questionnaire which was aimed to explore further knowledge of the physicians about the various laws concerning medical confidentiality. The physicians were asked whether they knew about the laws with regard to medical confidentiality, which were s.35 Constitution, s.420 Civil law, s.323 Criminal law, s.231 Criminal Procedure Code and s.15 Official Information. The question types were multiple-choice to be answered know, don't know or not sure. The results show that ninety-one physicians, or 74.59 %, knew that the Thai Constitution contains protection of the right to privacy whereas thirty-one physicians, or 25.40 %, did not know. It can be seen that one quarter of physicians did not have knowledge of the protection of medical confidentiality as the constitutional right. With regard to right to ask for compensation under s.420 Civil law, all respondents knew about the law. When asked about s.323 Criminal law which makes it a criminal offence for the physician to breach the duty of confidence, all also knew about that. All one hundred and twenty-two physicians stated that they had knowledge of s.231 Criminal Procedure Code concerning medical privilege and the interest of justice.

However, when asked about knowledge towards s.15 Official Information Act, which provides for protection of personal data, only eighty-two physicians, or 67.21 % had knowledge of the law, whereas forty physicians or 32.78 % did not know about the law. The results show that around one third of physicians do not have knowledge concerning the protection of personal data under Official Information Act. This means Official Information Act is the most unrecognisable law among the physicians.

7.4 Physicians' views and attitudes towards the constitution and private law concerning medical confidentiality

According to the results in 7.3, it shows that all of the physicians have general knowledge of s.420 Civil law and S.323 Criminal law, whereas some physicians do not have knowledge about s.35 Constitution and s.15 Official Information Act. The questionnaire was designed to explore further the attitude of the physicians to the laws even if they did not have previous knowledge of the laws. The physicians were given the content of the laws to read, and then asked to express whether they agreed or disagreed with the laws. Questions five to ten allowed for one of three optional answers; 'yes', 'no' and other which were designed for the physicians to make their own comments. The questionnaires also informed the physicians that there were no right or wrong answers, so they could answer the questionnaires freely. The results are shown below:

Table 4.17: physicians' views and attitudes towards the constitution and private laws concerning medical confidentiality.

| Questions | Yes | No | Others |
|--|-------------|--------|--------|
| Do you understand Constitution section 35 when you have read it? | 122 100% | 0 0 | 0 0 |
| Do you agree with constitution section 53? | 122 100% | 0 0 | 0 0 |
| Do you understand Civil Code section 420 when you have read it? | 122 100% | 0 0 | 0 0 |
| Do you agree with Civil Code section 420? | 122 100% | 0 0 | 0 0 |
| Do you understand Official Information Act section 15 when you have read it? | 122 100% | 0 0 | 0 0 |
| Do you agree with Official Information Act section 15? | 122 100% | 0 0 | 0 0 |

Table 4.17 shows the results from questions 5-10 of the questionnaires with regard to physicians' views and attitudes towards the constitution and private laws concerning medical confidentiality. The results uniformly show that all of the respondents understood the content of all laws given to them when they had read it, and that they all agreed with the laws presented to them. These are quite positive results as it can be seen that physicians could understand the content of the laws concerning medical confidentiality, and their clear understanding of the laws would make them contribute their further attitude towards the laws accurately. It is noted that although many physicians had never known or heard about the laws concerning medical confidentiality, it can be assumed that physicians were satisfied with the protection of medical confidentiality provided by the existing laws when they had read it.

7.5 Physicians' views and attitudes towards criminal laws concerning medical confidentiality

Table 4.18: physicians' views and attitudes towards criminal laws concerning medical confidentiality.

| Questions | Yes | No | Others |
|---|----------------|--------------|--------|
| 11. Do you understand s.323 Criminal Code when you have read it? | 122 100% | 0 0 | 0 0 |
| 12. Do you agree with s.323 Criminal Code? | 86 70.49% | 36 29.51% | 0 0 |
| 13. Do you understand s.231 Criminal Procedure Code when you have read it? | 122 100% | 0 0 | 0 0 |
| 14. Do you agree with s.231 paragraph one which awards physicians the right to refuse to testify in court about confidential medical information? | 122 100.00% | 0 0 | 0 0 |
| 15. Do you agree with s.231 paragraph two which gives the court the discretion in disclosure medical confidentiality in the court room? | 109 89.34% | 13 10.65% | 0 0 |
| 16. Do you think that some criteria should be set up to assist the judge in exercise the discretion whether confidential medical information should be disclosed in the court room? | 111 90.98% | 11 9.02% | 0 0 |

Table 4.18 shows the results from question 11-16 of the questionnaires with regard to physicians' views and attitudes towards the criminal laws concerning medical confidentiality which are s.323 Criminal Code and s.231 Criminal Procedure Code. As mentioned in Chapter 3, the criminal laws are the most important part in protecting medical confidentiality in Thailand, so it is important to explore physicians' attitude with regard to the laws. The survey in this part involved questions 11 to 16.

Under s.323 Criminal Code, physicians and members of the other health care professions mentioned in the law commit a criminal offence if they reveal patient

confidences which came into their knowledge in the course of their profession. Question eleven and twelve were aimed to explore whether physicians agreed or disagreed with this section. The physicians were given the content of s.323 to read and answer whether they understood the content of s.323 Criminal Code. The results show that 100 % of the physicians understood the content of the law when they had read it. These were quite positive result, as the clear understanding of the content in Criminal Code section 323 were required for further consideration in question twelve.

In question twelve, the physicians were then asked whether they agreed or disagreed with s.323 Criminal Code. The results show that eighty-six respondents or 70.49 %, agreed with section 323, whereas thirty-six respondents, or 29.51%, disagreed with section 323. It is interesting that people's views toward section 323 were quite different from physicians' views. All respondents of the people's questionnaires agreed with section 323, whereas almost one third of the physicians did not agree with this section. The physicians who did not agree with section 323 commented that breach of medical confidentiality should not constitute a criminal offence, as compensation is available under private law. On the other hand, from public views, many people stated that more criminal punishment should be placed for those who breach of medical confidentiality. As a result, there were different views in s.323 Criminal Code between the physicians and public.

As mentioned in chapter 3, the researcher argued from the study of s.231 Criminal Procedure Code that there should be some criteria to assist the judge to exercise the discretion with regard to the disclosure of medical confidentiality in court proceedings, so that the discretion would be exercised to the same standards. In order to test the argument, questions 13 to 15 were designed to explore the physicians' attitudes towards the protection of medical confidentiality under s.231 Criminal Procedure Code, and find out what they think about the court discretion towards the disclosure of medical information. The respondents will be asked further whether they agreed that some criteria should be set up to assist the judge to exercise the discretion of medical confidentiality disclosure in question sixteen.

S.231 Criminal Procedure Code paragraph one concerning medical privilege awards physicians the right to refuse to testify in court about confidential information obtained in the course of their profession. However, the law also gives the court the power to summon the physician with the information to appear and explain the refusal in order to decide whether or not there is any ground to support such refusal. Where the court is of the opinion that the refusal is groundless, it shall order the physician to give or produce the confidential medical document or fact which has obtained by the physician by virtue of his or her profession. Questions 13 to 15 aimed to find out whether the physicians agreed or disagreed with the law. For question 13, the physicians were given the content of s.231 Criminal Procedure Code to read and then asked whether they understood the content of the law. The results show that there were one hundred and twenty-two physicians, understood the content of s.231 when they had read it. The physicians were then asked in question 14 whether they agreed or disagreed with s.231 Criminal Procedure Code paragraph one. The results show that all of the physicians agreed with the law concerning medical privilege which awards the physicians the right to refuse to testify in court with respect to confidential medical information obtained in the course of his or her profession.

Regarding s.231 Criminal Procedure Code paragraph two, in question 15 the physicians were asked about their attitudes towards the law. Under s.231 Criminal Procedure Code, the court has the discretion to order the physicians to give or produce confidential medical document or fact obtained by the physicians by virtue of his or her profession. The results show that there were one hundred and nine physicians, or 89.34 % agreed with s.231 Criminal Code paragraph two, whereas thirteen physicians, or 10.65 % disagreed with the law. It is interesting that of 109 physicians who agreed with s.231 paragraph two, eleven physicians indicated in their further comments that the judge should consult the physician in all cases before any decision be made, and twelve physicians want the law to provide clear limitations on the judge's discretion. This means although the physicians agreed with s.231, they also wanted the limitation of the judge's discretion.

Question 16 was designed to explore physicians' further attitudes towards the problem of the judge's discretion in ordering the physician to disclose medical information in the court room. The problem that needed to be considered was whether the content of the Criminal Procedure is clear enough for the judge to exercise their discretion, or whether some criteria should be set for the judge in making the decision to ensure that medical confidentiality will be protected to the same standard in every case. The physicians were asked in question 16 whether they agreed or disagreed that some criteria should be set up to assist the judge in deciding to direct the physician to disclose confidential medical information in court proceedings. It is noted that the question aimed to explore physicians' attitudes no matter they had answered 'yes' or 'no' in question 15. The results show that most physicians (111, or 90.98 %) agreed that some criteria should be set up for the judge in the exercise the discretion, whereas eleven physicians, or 9.02 % disagreed. Of the 11 physicians who disagreed, four commented that they did not believe that any criteria would change the individual judge's attitude toward medical confidentiality. They thought that the judicial system as a whole should provide certain knowledge about the protection of medical confidentiality to all judges, so that all judges will have the same knowledge and understanding of the protection of medical confidentiality.

It can be concluded in this stage again that the argument that some criteria should be set up for assisting the judge to exercise the discretion with regard to the disclosure of medical confidentiality is supported by the results of the physicians' opinions towards the judge's discretion under s.231. This means both the public and physicians agreed that the judge's discretion should be limited by providing certain criteria to assist the judge in exercising the discretion. In the next step of the survey, measures that could be used to assist the judge in exercising the discretion were provided for the physicians to chose, in order to find out which measure would be the most preferable among the physicians.

7.6 Physicians' views towards the measures for assisting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in court proceedings.

Question 17 of the questionnaire contains various measures for the judge in the exercise of the discretion to order the disclosure of medical confidentiality in court proceedings. The physicians were given the opportunity to choose the measures which they think suitable for the protection of medical confidentiality in court proceedings. 111 physicians who agreed in question 16 that some criteria should be set up were required to answer question seventeen. Eleven physicians who disagreed to set up the criteria were not required to answer the question and they were asked to go on to answer the rest questions of the questionnaires. In question seventeen, the physicians were given the opportunity to choose the measure which they think suitable for the protection of medical confidentiality. The results are shown in table 4.19.

Table 4.19: Question seventeen: physicians' views towards the measures for assisting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in court proceedings. (Numbers and percentage of respondents who chose one measure)

| Measures | No. and % of responses |
|--|-------------------------------|
| A. Amend Criminal Procedure Code section 231 by adding the phrase "the court should order the person to disclose confidential information only in the circumstance that the information is relevant and material for the case". | 22 19.82% |
| B. Amend Criminal Procedure Code section 231 by adding the phrase "the court should order the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other". | 2 1.80% |
| C. Appoint committee with specialist knowledge to scrutinise whether or not the court should direct the person to disclose confidential information in court proceedings. | 0 0.00% |
| D. Appoint experts in the area of medical confidentiality such as physician to become the panel of judges for considering the case concerning the protection of confidential information. | 2 1.80% |
| E. Do not need to change anything | 0 0.00% |
| F. Others | 0 0.00% |
| Total | 26 23.42% |

Table 4.19 shows the number of physicians in choosing the measure, which they think might be suitable for assisting the judge to exercise the discretion whether or not confidential medical information should be disclosed in court proceedings. The measures which are contained in question 17 are the same measures in question twenty of the questionnaire for the public. The measures mentioned in the question came from the study of English law and the discussion between the researcher, some judges and physicians. The physicians were given the chance to select for more than one choice and freely suggest other measures that they might have.

The results show that, from the total amount of one hundred and eleven physicians, there were twenty-six , or 23.42 % , who chose one answer. Of these, twenty-two chose measure A; amending Criminal Procedure Act section 231 by adding the phrase that “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”. Two physicians, or 1.80 % chose measure B; amending Criminal Procedure Act section 231 by adding the phrase that “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”. And another two physicians, or 1.80 % chose measure D; appointing experts in the area of medical confidentiality such as physicians to a panel of judges for considering cases concerning the protection of medical confidentiality. It is interesting that no physicians who selected only one measure chose measure C; appointing the committee with specialist knowledge to scrutinize whether or not the judge should direct a person to disclose confidential information in court proceedings. It can be seen that of all physicians who chose one answer, the numbers of the physicians who chose measure A; amending s.231 Criminal Procedure Code by adding the phrase that “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”, were significantly higher than other measures (twenty-two physicians). The number of physicians who chose measure B ; amend s.231 Criminal Procedure Code by adding the phrase "the court should order the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other" and D; appoint experts in the area of medical confidentiality such as physician to become panel of judges for considering the case concerning confidential information, were equal (two physicians).

Table 4.20: Physicians' views towards the measures for assisting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in court proceedings. (Numbers and percentage of physicians who chose two measures)

| Measures | No. and % of responses |
|---------------------------------------|------------------------|
| Physicians who chose measures A and B | 12 10.81% |
| Physicians who chose measures A and C | 5 4.50% |
| Physicians who chose measures A and D | 20 18.02% |
| Physicians who chose measures B and C | 0 0.00% |
| Physicians who chose measures B and D | 2 1.80% |
| Physicians who chose measures C and D | 6 5.41% |
| Total | 45 40.54% |

Table 4.20 shows the results of the respondents who chose two measures for assisting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in court proceedings. 45 physicians, or 40.54 %, chose two measures. Of these, 20, or 18.02 %, chose measures A and D; amending Criminal Procedure Act section 231 by adding the phrase that “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”, and appoint experts in the area of medical confidentiality such as physicians to a panel of judges for considering cases concerning confidential information. 12, or 10.81 %, chose measures A and B; amending s.231 Criminal Procedure by adding the phrase that “the court should direct a person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”, and amend s.231 Criminal Procedure Code by adding the phrase “the court should direct a person to disclose confidential information by balancing

between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”.

There were six physicians, or 5.41 % who chose measures C and D; appointing the committee with specialist knowledge to scrutinize whether or not the court should direct a person to disclose confidential information in the court room, and appoint experts in the area of medical confidentiality such as physicians to a panel of judges for considering cases concerning confidential information.

Five physicians, or 4.50 % chose measures A and C; amending s.231 Criminal Procedure Code by adding the phrase that “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”, and appointing the committee with specialist knowledge to scrutinize whether or not the court should direct a person to disclose confidential information in court proceedings.

There were only two physicians, or 1.80 % who chose measures B and D; amend s.231 Criminal Procedure Code by adding the phrase “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”, and appoint experts in the area of medical confidentiality such as physicians to a panel of judges for considering cases concerning confidential information. There were no physicians who chose measures B and C.

For physicians who chose two measures, measures A and D were the most preferable measures. It is noted that measures A and D were the most preferable measures selected by both physicians and public who chose two measures. The second most preferable measures for physicians in this group were measures A and B. It is interesting that measures A and B were again the second most preferable measures selected by both physicians and public who chose two. Moreover, it is noted that the least preferable measure selected by both physicians and public in these groups were the same which were measure B and C. There were only 1.41 % of people who chose measures B and C, whereas no physicians

selected measures B and C.

Table 4.21: Physicians' views towards the measures for assisting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in court proceedings. (Numbers and percentage of respondents who chose three measures)

| Measures | No. and % of responses |
|--|-------------------------------|
| Physicians who chose measures A, B and C | 7 6.31% |
| Physicians who chose measures A, B and D | 12 10.81% |
| Physicians who chose measures A, C and D | 9 8.11% |
| Physicians who chose measures B, C and D | 5 4.50% |
| Total | 33 29.72% |

Table 4.22: Physicians' views towards the measures for assisting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in court proceedings. (Numbers and percentage of respondents who chose four measures)

| Measures | No. and % of responses |
|---|-------------------------------|
| Physicians who chose measures A, B, C and D | 7 6.31% |
| Total | 7 6.31% |

Table 4.21 and table 4.22 show the results of the physicians who chose three and four measures for assisting the judge to exercise the discretion with respect to the

disclosure of medical confidentiality in court proceedings. There were 33 physicians, or 29.72 % who chose three measures. Seven physicians, or 6.31 % chose measure A,B and C, twelve physicians, or 10.81 % chose measure A,B and D, nine physicians, or 8.11 % chose measure A,C and D, five physicians, or 4.50 % chose measure B,C and D.

There were seven physicians, or 6.31 % chose four measures, which were measures A,B,C and D.

7.7 Other viewpoints of physicians

Finally, the physicians were given the opportunity to make their own comments in question nine. 36 physicians, or 29.5 %, made comments which are classified and paraphrased below:

Many physicians suggested that it should not be a criminal offence for physicians or health care staff who breach their duty of confidence, as they were already under professional duty to maintain medical confidentiality. A breach of medical confidentiality can amount to serious professional misconduct and trigger disciplinary sanctions. They went on to stress that compensation is already available under s.420 Civil Code, so there is no need for further criminal sanctions.

Many physicians expressed their concern about judicial knowledge of, and attitudes toward, medical confidentiality. They commented that different judges hold different views about medical confidentiality. The discretion of a judge depended on personal background and knowledge. As a result, the discretion in deciding whether or not medical confidentiality should be disclosed may vary which could affect public confidence in the administration of justice.

Some stated that, in a case in which the court wanted to order a physician to disclose medical secrets, the court should give very good reasons for the decision, so that physicians could explain to their patients in order to maintain the trust of

patients and the public. Also, the clear reason given by the court will prevent physicians from being embarrassed in their professional duty of confidence.

Some noted that in some areas, for example in psychiatric medicine, confidentiality could be of greater importance than in general medicine, so it is important for the judge to bear in mind that physicians' obligation may vary in different areas of medical practice. They went on to stress that consultation between physicians and the judges should be organised before deciding whether or not medical confidentiality should be disclosed in the court room.

Many suggested that the idea of appointing experts to the panel of judges in the hearing would be one of the best measures to guarantee that medical confidentiality would be protected properly and efficiently, as the case will be considered from the beginning to an end by person who has special expertise. This would also create an atmosphere of trustworthiness and fairness, as the public will gain more confidence that their secret will be protected properly.

Many physicians suggested that although the law may be revised by adding measure A or B, the knowledge and understanding of the judge about the measures should not be overlooked. Thailand has always had a problem with law enforcement agencies who did not really understand the principle or reason behind the law, and that led to inefficient law enforcement. They went on to suggest that the judges should be sent to study abroad, or study more the foreign cases about medical law, as there are no experts in this area of law in Thailand right now. They also suggested that physicians and judges should work together to hold seminars or training courses about the protection of medical confidentiality, so that the judges would gain more knowledge and could exercise the discretion properly.

Some physicians suggested that more studies should be done about the system of appointing experts to a panel of judges by adapting the system of specialist courts which use an associate judge with special expertise.

Many physicians suggested that s.231 Criminal Procedure Code should be revised by adding the criteria to assist judges in the exercise of their discretion when deciding whether or not medical information should be disclosed in the court room.

One physician made a fascinating comment that it is difficult to change the Thai judiciary system. People who were qualified to be judges in Thailand were those who finished bachelor degree in law and pass the examination. They have legal education but no experience is demanded in this career. Many judges were too young with no experience and knowledge in other disciplines. As a result, although s.231 Criminal Procedure Code could be revised to set up clear criteria for the judge to decide whether or not medical information should be disclosed, it still depends on the individual judge's knowledge and attitude toward medical ethics. This means even if we have clear and good law, this does not guarantee that individual rights would be protected properly, as the law enforcement agencies may not really understand the reason behind the law. The respondent stressed that it is quite important to change the judges' attitude as well as revise the law.

8. The interviews

8.1 The judges' views towards the discretion of confidential disclosure

The interview of the judges' opinions was different from the questionnaire for public and physicians. The interview mainly focused on the court discretion of confidential disclosure and the appropriate measure that the judge think should be set up to enable the consistent of discretion. Therefore, the judges' views of the issues are discussed combined with publics and physicians' views in this section.

Fifteen judges were asked of their opinion about the discretion and how the discretion should be exercised efficiently and properly under s.231 Criminal Code. The individual judge's comment will be paraphrased below.

Judge number one, gave his opinion that the judge should carefully exercise the discretion, as a patient's right may be intruded upon. He accepted that the relationship between physician and patient is very important, as a patient may refuse to seek medical treatment or not give all information relevant to his/her illness if secrets could be disclosed to a third party, including the court, easily. This would have an adverse effect on public health as a whole. As a result, he said, the interest of public health, in general should outweigh the interest in finding the truth. The court should not exercise the discretion in disclosure of medical confidentiality without reasonable grounds. The judge concluded that the court should only direct the physician to disclose confidential medical information in the circumstance that the information was really relevant and material to the issue of the case and no other evidence can be substituted.

Judge number two gave the opinion that the judge had the duty to maintain the public interest in finding the truth, and as a result, in principle, all relevant information should be made available to the court. The administration of justice could be affected if any evidence was excluded from the hearing. The judge went on to confirm that the necessity of maintaining the interest of administration of justice should outweigh other interest. He raised Dr. Wisut case⁵ in which the court had to order all medical information to prove of Dr. Wisut guilty, as there were no eye-witness or any other direct evidence. Without all these medical records, particularly those of the female patient who, it was claimed, had an affair with the accused, it would be difficult to prove Dr. Wisut's motive for murdering his wife. The judge stated further that traditionally, in criminal cases, the judges considered a wide variety of factors in deciding the case. The accused's motive for committing the crime was one important factor that can determined the guilt or innocent of a person. In this case, no direct evidence such as eyewitness, murder weapons or a dead body were found. Therefore, all the patient files had to be called to prove the motive for murder. The judge gave further comment that the disclosure of medical confidentiality should not be limited only to information that is relevant and material to the case, as sometimes general information could

⁵ *Supreme Court Decision, no.2236-7/2007*, and see chapter 3, 2.2.

be linked to other relevant and material evidence which could help the court to consider the case justly. However, The judge expressed his concern about the judge's discretion in disclosure of medical confidentiality, as the judges with different background and knowledge could exercise their discretion in different ways.

Judge number three, gave opinion that the interests of justice and the interest of maintaining secrets should be well balanced, as both interests are equally important. He stressed that it is true that all evidence should be made available to the court to guarantee that the case would be decided justly, however the court should also exercise the discretion to order disclosure of medical secrets carefully, as public health may be adversely affected if patients with transmissible diseases do not seek medical treatment due to the risk of disclosure of their secrets. The judge accepted that each judge's ability to exercise the discretion may vary due to his personal view, knowledge and background. As a result, in order to solve the problem, physicians should help the court by claiming their privilege under the law and refuse to give testimony every time they think it would breach their duty of confidence. The physicians should try to suggest to the judges to what extent medical information should be disclosed. The physicians should not let the judges exercise the discretion alone. He suggested that it is necessary for the judges and physicians to work together before any order of disclosure of medical information was made.

Judge number four made the comment that the disclosure of medical confidentiality under s.231 should be considered as three elements. Firstly, the court should consider whether medical information is relevant to the case. Secondly, the court should balance between the interest in maintaining medical secret and the interests of justice. Thirdly, if necessary in certain situations, the proceedings should be heard *in camera* in order to protect both interests of justice and individual private life.

Judge number five gave the opinion that the court should exercise its discretion by considering whether or not medical information was relevant and material to the

case. If the information was necessary to prove the truth in the case, the information should be disclosed, but if the information did not have any direct effect on the case, the court should not direct the physician to testify. The judge also gave further comment that all medical documents attached to the file should be kept secret from third parties and should not be published.

Judge number six commented that the judge should exercise the discretion with regard to confidential disclosure by considering whether the medical information was relevant and material to the issue of the case. If the information was directly related to the facts in dispute, the confidential information should be disclosed. He also stressed that in this circumstance the judge should consider the interests of justice, which would be adversely affected by the excluded evidence. Therefore, the court should not allow the exclusion of any medical evidence if such exclusion would have an adverse effect on the fairness of the proceedings.

Judge number seven gave the opinion that in order to achieve the interest of justice, it is necessary for the court to gather all evidences in order to find the truth. He agreed that all evidence should be made available to the court to maintaining fairness, as sometimes it is difficult for the judge to decide which evidence should be excluded. Therefore, the court should exercise the discretion to disclose medical information so that all evidence is made available for the hearing.

Judge number eight gave the short opinion that the court should exercise the discretion in disclosure of medical information in the circumstance that the information is relevant to the case. If the information is not relevant to the case, it should not be disclosed.

Judge number nine commented that, in exercising the discretion with regard to the disclosure of medical confidentiality, the court should consider whether or not it was relevant and material to the issue of the case. However, even if the information is relevant to the issue of the case, then the court should consider further whether or not the disclosure of the information would cause any damage

to the person who is the subject of the information. The judge also gave further comment that, if possible, the court should call individuals who would be affected by disclosure and explain why the information should be disclosed. In this case it would be good if the court and physician could ask for prior consent from those who are the subject of confidential information. The judge went on to stress that the consultation between the judge, physician and patient was necessary in all cases.

Judge number ten would like the judge to order disclosure of medical information in the court room only in the circumstance that the information was relevant to the issue of the case. Also, the judge should disclose the information only as necessary for considering the case in order to protect the individual's right to privacy. The judge suggested that, in order to protect individual right to privacy, the file which contained medical information should not be copied by a third party or published to the public.

Judge number eleven gave similar comments to judge number ten. The judge stated that the court should exercise the discretion to disclose medical confidentiality only in the circumstance that the information was relevant and material to the issue of the case. Without this information, it will be difficult for the court to find the truth, which would affect the judicial system as a whole. However, the court should also provide appropriate measures to prevent damage that would be occurred by those who are the subject of confidential information. He suggested that an easy measure would be for the court to order the prohibition of any dissemination of the information to third parties. He stressed that this measure would be easy and fair enough to protect individual right to privacy. Judge number twelve gave the opinion that the interests of justice should outweigh the interest of maintaining medical confidentiality in all circumstances. The judge said that, in principle, the court has the duty of finding the truth and maintaining the fairness in the case. Therefore, all evidences including medical information should be made available to the hearing. In finding the truth, it is possible that sometimes the information disclosed in the court room would cause adverse effect to third party. The results of any adverse effect caused to the third

party were not a reasonable consideration to exclude the evidence from the hearing that could affect fair trial. The court should use other measures to reduce or prevent further damage which could be suffered by the person who is the subject of the confidential information rather than exclude confidential information. He suggested that the measure should be, for example, that the court should make the decision to sit *in camera* and prohibit any dissemination of confidential information.

Judge number thirteen gave the opinion that in exercising the discretion of medical confidentiality disclosure, he would like to have consultation between the judge, physician and patient who is the subject of confidential medical information before any decision would be made. The consultation should be made on a case-by-case basis. He thought that the consultation would help the judge exercise the discretion in disclosure of medical confidentiality properly, and the patient would understand the situation and would have a chance to give prior consent which would help the judge and physician perform their duty without being embarrassed.

Judge number fourteen expressed that the court should exercise the discretion of medical confidentiality on a case-by-case basis, as different cases contain different facts. However, the court should put the interests of justice first. The interest in maintaining medical confidentiality should be considered second, as the court needs to maintain the administration of justice in order to ensure public confidence in the judicial system as a whole.

Judge number fifteen commented that she would like the physicians to do their duty by claiming the privilege provided by the law in every case. The physician should insist on not testifying if he or she felt that the duty of confident will be breached. The court sometimes did not know how important it is that the information in question should be kept secret. As a result, when physicians expressed their view about medical confidentiality, it would be very helpful for the judge to reconsider the exercise of the discretion. The judge also suggested that consultation between the judge and physician was very necessary to help the

judge exercise the decision properly.

8.2 The judges' views towards appropriate measure

The judges were asked their opinion about the appropriate measures to be used for deciding whether or not medical confidentiality should be disclosed. The judges had been given the list of measures A to D from the public and physicians survey to read and then asked for their opinions as to whether or not they agreed with the measures.

Judge number one said that he would chose measure A (revision of s.231 Criminal Code by adding the phase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the case”) was appropriate. The judge went on to comment that measures C and D were not appropriate for the court system. The judge said that the appointment of a committee to scrutinise whether or not medical confidentiality should be disclosed would cause problems of time and cost. The issue of an appointment of the expert to become panel of judges was raised in the interview. The judge confirmed that the appointment of an expert to become an associate judge was necessary only in the beginning of establishing the IPITC, as there were few judges with enough knowledge about intellectual property or international trade matters at the time. Now, after many judges have been given the chance to study abroad in the area of intellectual property and international trade, there is no need to have associate judges to consider cases alongside career judges. The appointment of associate judges has problems. Since associate judges tend not have legal grounding and knowledge, cases were delayed for the career judge to explain the legal terms and procedures. The judge concluded that the best way is to give more knowledge directly to the judges about the protection of medical confidentiality. The judge also suggested that he would like experts in medical confidentiality to give their knowledge to the judges rather than become associate judges. The judge accepted that training courses for the judges in the issue of medical confidentiality would be necessary at the beginning. However, the judge confirmed that in the long run the court system could be improved by

sending the judges to study abroad to gain knowledge of medical law. He also gave further suggestion that in the long run knowledge about medical law and medical confidentiality should be given to the public as a whole, as well as the physicians, so that all interest parties would know their rights and know how they should be protected properly.

Judge number two accepted that judges' discretion may vary on the disclosure of medical confidentiality, due to personal background and knowledge about medical confidentiality. Similar cases could therefore have different decisions. He accepted that measure A: amend s.231 Criminal Procedure Code by adding the phase "the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case", would be an appropriate measure to help the judge in exercising the discretion consistently because all judges would need to find out whether medical information is relevant and material to the issue of the case. The judge gave a further suggestion that, where the law has not been revised, the court should arrange for a formal or informal consultation between the judge and the physician in the case before any discretion would be exercised.

Judge number three agreed with measure A; amend Criminal Procedure Code section 231 by adding the phase "the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case". The judge further stated that he would like the court to consult the physician in all cases before exercising the discretion whether or not medical confidentiality should be disclosed.

Judge number four commented that the law should not be revised. He would like to leave the court the discretion with regards to the disclosure of medical confidentiality. The judge commented that in some cases, it was very difficult to decide whether the information was relevant and material to the case. Moreover, sometimes all the indirect evidences were very important to the court, as it could be linked to the final result of the case. The judge gave Dr. Wisut's case as an example of this. The case did not have any direct evidence, as a result, the court

had to gather all circumstantial evidences, including many medical records, to prove that Dr. Wisut was guilty of killing his wife. The judge commented that revising the law would not solve the problem properly, as different cases had different features. Therefore, the judge suggested that the best way is to leave the court to exercise the discretion on a case-by-case basis.

Judge number would like to select measure A; amend s.231 Criminal Procedure Code by adding the phrase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”. The judge said that this could reduce the variation in the judges’ approach to considering cases that have similar features. The judge gave further comment that, although the law could be revised as mentioned, the judge would still need to consider whether medical information should be excluded from the hearing. She stressed that some evidences may be important to the case, as it could link to the final result of the case even it were not relevant and material to the case. Therefore, the judge should consider this matter carefully.

Judge number six selected measure A; amend Criminal Procedure Code section 231 by adding the phrase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”. The judge thought this measure should be enough to solve the problem of various approaches to disclosure of medical secrets in similar cases made by different judges.

Judge number seven did not want the law to be revised. The judge would like to leave it up to the court to exercise the discretion whether or not medical information should be disclosed openly. The judge was confident that the court could balancing all relevant interests about the case properly. Any limitation provided by the law could make it more difficult to exercise the discretion, as different cases contain different facts that need to be considered on a case-by-case basis.

Judge number eight did not want the law to be changed, and did not want an expert to be appointed to consider the case together with the judge. The judge said that judge should consider the case independently. The appointment of an associate judge would be too complicated, and that sometimes an associate judge who does not have law background could not decide the case fairly. The judge confirmed that, in general, judges would exercise their discretion whether or not medical confidentiality should be disclosed by balancing all the relevant interests. The judge added that all judges usually perform their duty by considering the fairness for all interested parties all the time. Therefore, there is no need to set up criteria for the judges to use for exercising their discretion about medical confidentiality.

Judge number nine agreed the use of measure B; amend Criminal Procedure Code section 231 by adding the phrase that “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”. The judge said the case would be delayed if the law required a committee to scrutinise the issue of whether or not medical confidentiality should be disclosed. The judge further commented that if the public would like experts to consider the case together with the judge, the rules, procedure, and conditions for the selection of the experts would be important problems that would need to be studied and would take a very long time to complete. The judge believed that, in practice, it would not be easy to find an expert proficient in the particular issue to appoint to a panel. An expert without an understanding of the law could not decide the case properly, which would lead to conflict between the associate judge and career judge. As a result, the judge suggested that the revision of s.231 Criminal Code would be more appropriate in practice, and it would be easier for the judge to apply rather than appointing associate judge.

Judge number ten selected measure B; amend Criminal Procedure Code section 231 by adding the phrase that “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the

other”. The judge said this would be the most appropriate measure and could be applied easily in practice. The judge said that the appointment of a committee or expert to a panel of judges are not appropriate responses, as the case may be delayed and it could cause unnecessary expense.

Judge number eleven choose measure A; amend Criminal Procedure Code section 231 by adding the phase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”. The judge also gave further opinion that, even if medical information was relevant and material to the case, the judge still needed to consider any damage that could be incurred by the disclosure. He commented further that the judges also have to think of ways to protect a person who is the subject of medical secret, such as by not allowing dissemination of the information.

Judge number twelve did not agree with change to the law to set up criteria for the judge to apply in deciding whether or not medical confidentiality should be disclosed in court proceedings. The judge would like the issue to be considered on a case-by-case basis. The judge confirmed that, in principle, judge should have the power to exercise the discretion independently. However, if the physician or patient thought that the disclosure could cause any damage to their rights, they should tell the court and ask for consultation between all interested parties. In this circumstance, he said, the court should listen to the physician and patient carefully, and weight all interests in the balance before making a decision with regard to the disclosure of medical confidentiality. He concluded that changing the law to set up criteria for the judge to apply would be too strict, as different cases contained different facts and features that sometimes could not be considered by applying the same criteria.

Judge number thirteen would like to choose measure A; amend s.231 Criminal Procedure Code adding the phase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”. The judge went on to say that, although

some criteria would be provided under the law, the judge would still need to consider carefully in the exercise of the discretion whether or not medical confidentiality should be disclosed. The judge stressed that, in fact, the judge needs to consider the right to privacy of the person who is the subject of confidential medical information and also the professional obligation of the physician before any decision would be made. The judge confirmed that in considering whether or not medical confidentiality should be disclosed, he would certainly call the physician and person who is the subject to the information for a meeting and consult whether or not the information should be disclosed.

Judge number fourteen would like to select measure B; amend s.231 Criminal Procedure Code by adding the phrase that “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”. She gave further comment that the judge should balance the interest of maintaining medical confidentiality and interests of justice carefully. She would like the balancing exercise to be performed fairly, and for this more study of foreign cases may be needed.

Judge number fifteen did not want to change the law to provide the criteria for the judge to apply in exercising the discretion whether or not medical confidentiality should be disclosed in the court proceedings. The judge said that the appointment of the committee and experts to consider the issue together with the judge are also unnecessary. The judge stated that s.231 provides the right for the physician to claim privilege and refuse to testify in a case where he or she thought the disclosure would breach their professional duty. Therefore, in all cases, the physician should claim the right provided by law, so that the judge would have a chance to consider together with the physician whether or not there were enough grounds to exclude medical information from the hearing. If a physician ignored his or her right under the law, it would be at the risk of improper disclosure of medical information. She stressed that the physician should pay more attention to the privilege granted by law and should not leave it to the judge’s discretion to decide whether or not medical confidentiality should be disclosed.

9. Conclusion

According to the results, it is clear that physicians have more knowledge towards the law concerning medical confidentiality than the public. Both physicians and public seems to be satisfied with the laws concerning the protection of medical confidentiality, as most of them agreed with the content of the laws. Among the public, s.323 Criminal Code is the most recognisable, and the public gave their further opinion that they want the law to set up more consequence for breach of duty of confidence. In contrast, some physicians do not agree with criminal offence provided for breach of duty of confidence.

With regard to the disclosure of medical confidentiality by court order, the public and physicians have different views in choosing the measures that could assist the judge to exercise discretion with respect to the disclosure of medical confidentiality in the court room. According to table 4.9, the public prefer to use one measure to solve the problem to more than one measure. More than half of public chose one measure to assist the judge in the use the discretion. Of these measures, measure B; Amending s. 231 Criminal Procedure Code by adding the phrase “the court should direct a person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”.

In contrast, according to table 4.21, the physicians prefer to use two measures to solve the problem to one measure. There were around 40 % of physicians would like to chose two measures for the judge to be used to exercise the discretion. Of these measures, measure A and D; Amend s.231 Criminal Procedure Code by adding the phrase “the court should order the person (including physician) to disclose confidential information (including medical information) only in the circumstance that the information is relevant and material to the issue of the case” and Appoint experts in the area of medical confidentiality such as physician to become a panel of judges for considering the case concerning confidential information. More discussion of the survey results will be brought to chapter 5.

Chapter 5 Analysis of data and discussion

1. Introduction

The object of this chapter is the analysis and discussion of the data from the 2007 Survey combine with the issues of English and Thai laws that have been raised in chapter 2 and 3, as the purpose of the survey was aimed to explore various important stakeholders about the relevant laws in order to give the better insight into what needs to be done and what would find acceptance in relation to proposals for law reform. The judge's opinions towards the discretion of medical confidentiality disclosure are brought in to further evaluate the results.

The survey response rates to the 2007 Survey are 78.00% for public's views and 61.00% for physicians' views, both good response rates for such exercises. Apparently, the good relationship between the researcher and many research networks, particularly in the northern area such as Phitsanulok and Chaing Mai, is one of the main reasons for this. The good relationship between several judges and hospitals' directors also helped the researcher to gain co-operation from the physicians and judges.

The survey results in chapter four will be grouped and considered in light of each objective of the 2007 Survey, and the related issues from English and Thai laws will also be discussed.

2. Public awareness and general knowledge about the law concerning medical confidentiality

2.1 Public awareness of medical confidentiality

The first objective was to find out whether the public were aware of medical confidentiality. According to table 4.4, the responses indicate that 90.46% of the public were aware of medical confidentiality. The results reflect public awareness of the protection of medical confidentiality. However, only 55.20% of respondents knew that medical confidentiality is protected under several different

laws, i.e. Constitution, private law, and criminal law. This means there were 28.04% of the public who did not know that there are several laws concerning the protection of medical confidentiality. 17 % of respondents were not sure if they had the knowledge about the laws. Some respondents confirmed in comments made that they were not aware of the protection of medical confidentiality under the law before. Now their opinion had changed, and they wanted to learn more concerning the issue of medical confidentiality and patients' rights and suggested that the government should provide and promote more knowledge of medical confidentiality to the public.(chapter 4, 6.7)

In contrast, with regard to physicians' general knowledge about medical confidentiality, table 4.15 shows that all of physicians knew that there are several laws concerning medical confidentiality. The reason of this result is that the physicians are normally provided the course about the laws and regulations concerning their profession in the curriculum. The course is relating to the study of private law, criminal law that they should know in the course of their profession, including professional ethics. Therefore, it can be seen in table 5.1 below that all physicians will have knowledge about private and criminal law concerning medical confidentiality, as the breach of these laws will have direct adverse affect to their profession. However, some laws, such as Constitution, OIA are not included in the course.

The survey also wanted to find out what depth of knowledge the public and physicians have about the laws concerning medical confidentiality. The respondents were given questions about five laws concerning medical confidentiality and were asked whether they recognised the laws. The researcher assumed that the respondents may not know all five laws; as a result, the researcher want to find out which law was the most recognisable law. The results are discussed in the next topic.

2.2 Publics' and physicians' knowledge about the laws concerning medical confidentiality

Table 5.1 The comparison between public and physicians' knowledge about the laws concerning medical confidentiality.

| Laws | Public | | Physicians | |
|---|----------|----------------|------------|----------------|
| | Know (%) | Don't know (%) | Know (%) | Don't know (%) |
| S.35 Constitution (Right to privacy) | 34.83 | 65.16 | 74.59 | 25.4 |
| S.420 Civil law (Right to ask for compensation) | 59.21 | 40.78 | 100 | 0 |
| S.323 Criminal law (Criminal offence to the physician who disclose medical information) | 67.77 | 32.22 | 100 | 0 |
| S.231 Criminal Procedure Code (Medical Privilege and the interest of justice) | 45.57 | 54.42 | 100 | 0 |
| S.15 Official Information Act (The protection of personal data) | 9.72 | 90.27 | 67.21 | 32.78 |

Constitution

In Thailand, the right to privacy is clearly protected under the Constitution. Disclosure of private information which violates or affects individual's reputation, dignity and privacy shall not be made except for the interest of the public.¹

From table 5.1, it can be seen that physicians had more knowledge about the laws concerning medical confidentiality than the public. Regarding the s.35 of the 2007 Constitution, which contains the protection of right to privacy, 34.83%, or only

¹ Constitution 2007, s.35.

around one third, of the public had the knowledge about the law, whereas 65.16% did not.

Also, not all the physicians knew of the protection of privacy under the Constitution. The figure of the physicians shows that 74.59% of physicians had knowledge of the constitutional protection, whereas 25.4%, or about a quarter, of physicians did not. This means most people who have these rights guaranteed under the law were still not familiar with the principles in the Constitution. Knowledge and understanding of the right to privacy are still limited.² Since physicians have the duty to maintain patient's secrets, people may expect that all physicians should have clear knowledge of how medical confidentiality is protected under the law, particularly the Constitution which provides the general right to privacy that has some connection to medical confidentiality.³ However, some argue that the lack of knowledge concerning general principle under the Constitution does not usually mean that physicians will reluctantly maintain patient's information. It is because physicians pay more attention to their professional obligation to maintain medical confidentiality. As a result, although some physicians do not have knowledge of the Constitution, medical confidentiality may still be protected via professional obligations.⁴

² C. Ititumvinit, S. Lertpadungkulchai and V. Veerasuntorn, *Patients' legal rights : perspectives from health care members and patients of university hospitals in Bangkok*, Research paper supported by National Research Board, 1997, 88-89. The research found that patients still have limited knowledge in their rights including the right to privacy.

³ Ungprapan, 1994, 12-13. And see Veerasuntorn, *Patients' legal rights : perspectives from health care members and patients of university hospitals in Bangkok*, 1997, 140-141. And see the discussion in chapter 3, 8.

⁴ Ititumvinit, Lertpadungkulchai and Veerasuntorn, 1997, 88-89.

As mentioned in chapter 3, not only the Constitution protects individual's right to privacy, but also requires that the government shall thoroughly provide and promote a standard and efficient public health service.⁵ In general, there are many ways in promoting efficient public health thoroughly over the country. One important way is to promote public awareness and knowledge about the protection of medical confidentiality and individual right to privacy under the Constitution.⁶ Medical confidentiality is in fact vital to the physician and patient relationship, as patients may be reluctant to seek medical treatment if they cannot rely on the discretion of his or her physician.⁷ An efficient public health service cannot be established if people are reluctant to seek medical advice and treatment. Reluctance in seeking medical treatment could harm both the individual and society, as society as a whole could then suffer the adverse consequences of a spread of disease. As a result, more awareness of the individual rights to privacy protected under the Constitution should be promoted thoroughly if the goal of providing a standard and efficient public health service under the Constitution is to be achieved.⁸

Civil law

Under S.420 Civil Code, compensation is available if there is an violation to the life, body, health, liberty, property or any right of any person. Although medical confidentiality is not expressly protected under Civil Code s.420, the Supreme

⁵ Constitution 2007, s.80 states :

The State shall act in compliance with the social, public health, education and culture policies as follows:

(2) promoting, supporting and developing health system with due regard to the health promotion for sustainable health conditions of the public, providing and promoting standard and efficient public health service thoroughly and encouraging private sector and the communities in participating in health promotion and providing public health service, and the person having duty to provide such service whose act meets the requirements of professional and ethical standards shall be protected as provided by law.

⁶ Ungprapan, 2003, 191-192.

⁷ Ibid.

⁸ C. Ititumvinit, S. Lertpadungkulchai and V. Veerasuntorn, 1997, 100-102. The research suggested that health care members should inform the patients clearly about their rights of privacy and encourage them to seek all treatments with confident that all of their information will be kept secret. And the efficiency of public health system will be strengthened as a whole by this mean.

Court has interpreted that the term “any rights” under s.420 includes the right to privacy, and the compensation is available for a breach.⁹ As a result, the disclosure of medical confidentiality which could intrude on an individual’s private life will fall within the scope of “any rights” under the law.

According to table 5.1, all of the physicians had knowledge about s. 42 Civil Code which was quite an impressive figure, as it could confirm that all physicians knew that the violation of right to privacy could constitute a wrongful act and is bound to make compensation. On the other hand, only 59.21% of the public had knowledge of this law, meaning that nearly half of the people did not know about their right to ask for compensation if their private information were exposed. These results are in accordance with some other research which has shown that patients had very limited knowledge and awareness of their rights to compensation from health care professionals.¹⁰

Criminal law

S. 323 Criminal is very important in the context of medical confidentiality. The law makes it a criminal offence for a member of the health care professions to fail to maintain medical confidentiality.

According to table 5.1, all physicians know about s. 323 Criminal Code, whereas 67.77% of the public have the knowledge of the law. This means a third of the public are ignorant of the protection of medical confidentiality under criminal law. However, it is noted that s.323 Criminal law was the most recognisable law among the public. As s.323 plays an important role in the protection of medical confidentiality, this section had been separately provided in the survey to explore

⁹ *Supreme Court decision no. 124/1944*, And see Poonyapan, 1982, 33. And see Wisarutpitch, *Rights and liberties under the Constitution*, 1995, 21-22, and 32-36.

¹⁰ Ititumvinit, Lertpadungkulchai and Veerasuntorn, *Patients’ legal rights : perspectives from health care members and patients of university hospitals in Bangkok*, 1997, 75. The research found that patients rated their views about their right to ask for compensation from the healthcare members under the law at only 2.88%, which were very low score. This means most people do not pay attention in their rights of asking for compensation from the physicians.

public views. The results of public views concerning s.323 Criminal Code will be further discussed below in 3.

Criminal Procedure Code

S.231 Criminal Procedure Code provides a medical privilege in criminal proceedings. Physicians have the right to refuse to testify in court concerning confidential information obtained in the course of their profession, unless they obtain permission from the patient. The law does, however, give the court the power to summon the physician to appear and give an explanation for the refusal in order to decide whether or not there is any ground to support such refusal. Where the court is of the opinion that the refusal is groundless, it shall order the physician to give or produce confidential medical information obtained in the course of their profession.

According to the survey results, all physicians had knowledge about s.231 Criminal Procedure Code, whereas only 45.57% of public knew about it. Worryingly, this means that over half of the people asked did not know about the fact that a court can order a physician to disclose information. It is noted that s.231 Criminal Procedure Code plays an important role in protecting medical confidentiality, so this section had been provided separately in the survey to explore public views about medical privilege and the interest of justice which will be further discussed in 3 below.

Official Information Act (OIA)

As mentioned in chapter 3, state officials have been given the right to prohibit the disclosure of personal information, which includes medical records, to the public under s.15 of the OIA. It is interesting from the survey results that both physicians and public did not have much knowledge about this protection of personal data. Only 67.21% of physicians knew of it, whereas 32.78%, or one third, of physicians did not. A mere 9.72% of the people were aware of s.15 OIA. The respondents also stated in the comments made that they have never heard about

the OIA and some confirmed that they are the government's officials but they have never known about the protection of right to privacy under the OIA and they required that the government should provide and promote more knowledge about the OIA, so that they can carry out their task of information service effectively.

Therefore, the results reflect that both physicians and public are lacking knowledge about Official Information Act, where the protection of personal data has been protected.

As mentioned, although the primary purpose of the OIA is to ensure public access to state agencies' information,¹¹ the protection of personal information possessed by state agencies is clearly protected as one of the exceptions of the law. The disclosure of medical records and personal information cannot be done as it will unreasonably encroach upon the right to privacy.¹² The OIA also requires of state agencies that they shall provide a personal information system only insofar as it is relevant to and necessary for the achievement of their objectives.¹³ Therefore, the lack of knowledge and understanding of state agencies in carrying out the task could cause a deficiency in the protection of personal information.¹⁴

The results also show that, despite the OIA having been in force for ten years, around 90% of the public still lack knowledge of the law. People, who have the rights guaranteed by the Act, do not know their right to privacy is protected. Some experts stated that the public lack of knowledge of their rights under the law means that no-one has ever asked to inspect the processing and storing systems for personal information provided by the state agencies.¹⁵

¹¹ The preamble of OIA, 1997.

¹² OIA, 1997, s.15 (5).

¹³ OIA, 1997, s.23.

¹⁴ Bungkrai, 2000, 248-257. And see, C. Sawangsak, *The Description of the 1997 Official Information Act*, 1997, 15.

¹⁵ Prokati, 1998, 83-85. And see A. Yaisawang, V. Chaisarn, *Right to Access to Government Information Under 1997 Official Information Act*, 2001, 72-75.

Therefore, from the survey results, it is quite clear that the principles under the OIA are still new to both state officials and the public. Thai society clearly needs some time to learn how to put the law into practice. State officials have to understand more clearly the substance and procedures of the law, so that they can provide information services and disclose information to meet public requests as well as provide appropriate security system for personal information.¹⁶

Meanwhile, people should be enabled to recognize their own rights and know how to utilize the Act as a means to access state information as well as to know how their personal information should be, and is, kept to prevent improper use that could cause damage to the person who is the subject of the information.

3. Publics' and physicians' views about the protection of medical confidentiality under s.323 Criminal Code

As mentioned in chapter 3, a very important provision in the context of medical confidentiality is s.323 Criminal Code, which makes it a criminal offence for members of certain professions to breach their duty of confidentiality. In general, the Constitutional protection of medical confidentiality is not the only way to express the significance of the protection of medical confidentiality, as it receives extensive protection by means of ordinary law. S.323 Criminal Code is the most important provision in the context of medical confidentiality, as it clearly provides that breach of medical confidentiality by members of the health care professions constitutes a criminal offence.

¹⁶ K. Kamonthamvong, *Two Years of the Enforcement of the 1997 Official Information Act*, 2000, 9-11.

Table 5.2 The comparison between public and physicians' views about s.323 Criminal Code.

| Law | Public | | Physicians | |
|---------------------|--------|-----------|------------|-----------|
| | Agree | Not agree | Agree | Not agree |
| S.323 Criminal Code | 100% | 0% | 70.49% | 29.51% |

Table 5.2 shows the comparison between public and physicians' views about s.323. The survey started by giving the respondents the text of s.323 to read, and then asking if they understood the content of the law. According to table 4.8 and 4.9, all respondents understood the content of the law when they had read it. These are positive results, as clear understanding of the law was important for the analysis of the public's views about the protection of medical confidentiality under criminal law. When asked whether they agreed or disagreed with s.323, table 5.2 shows that all of the public agreed that medical confidentiality should be protected under criminal law. Moreover, some suggested in comments made that s.323 should be revised to provide more consequences for physicians or members of other health care professions who disclose secrets of another person acquired in the course of their profession.¹⁷

On the other hand, the physicians had different views about the issue. 70.49% of physicians agreed with section 323, whereas 29.51% disagreed with this section. Those who did not agree with the law, commented that breach of medical confidentiality should not constitute a criminal offence to the physicians or health care staff. The physicians were already under professional duty to maintain confidentiality and the breach of confidentiality can amount to serious

¹⁷ See chapter 4, 6.7.

professional misconduct and trigger disciplinary sanctions. Also, as compensation is available under private law, there is no need for further criminal sanctions.¹⁸

It is interesting that the public and physicians have different views concerning the criminal offence provided in s.323. The public want more consequences on physicians and members of other health care professions who breach medical confidentiality, whereas some physicians stressed that the law should not make it a criminal offence to breach the duty of confidence.

As mentioned in chapter 3, although medical confidentiality is guaranteed as a constitutional right, the protection of medical confidentiality via s.323 plays a very important role. According to the results, the public seems to pay more attention to criminal law than to others laws, as s.323 Criminal Code was the most recognisable law among the public. The consequences under criminal law have attracted attention, as the public may think that it would be the efficient mean in protecting their right.¹⁹ While the Constitution can deliver general principles for the protection of medical confidentiality, ordinary substantive law, such as s.323, has more influence on people through having an observable effect on people act rather than the general principles of the Constitution. This is supported by the survey result that only 34.83% of people had knowledge of constitutional protection whereas 67.77% had knowledge of Criminal Code section 323. Equally, all of physicians know about s.323, while 74.59% know about the Constitutional guarantee of medical confidentiality. Therefore from publics' views, the consequences of prosecution under criminal law are efficient measures in prohibiting health care members from disclosing patients' secrets.²⁰ It is doubted that professionals would maintain their duty of confidence properly only

¹⁸ S. Sakdapolchai, *Medical Professional Liability Under Wronful Act*, 1993. And see chapter 4, 7.7.

¹⁹ A. Weerachalie, *Patient's rights*, 1991, 67-80. The author confirmed that criminal law is the most important law for the protection of patient's right, including right to secrecy.

²⁰ Ibid.

by means of general principle of medical confidentiality under the Constitution.²¹ However, some are not agree with this, as physicians are under professional obligation to maintain confidentiality.²² Nevertheless, it seems that substantive law containing clear consequences would generate more public confidence than general principles delivered by the Constitution.²³

Although the constitutional principle of right to privacy could be referred by the court in deciding a case involving medical confidentiality, ordinary legislation could provide a more precise point of reference for the court. It is doubted that the general right to privacy under the Constitution will be really referred by the court, as there is still no Supreme Court judgement concerning the issue. At present, although there are academic arguments that confirm that medical confidentiality is protected as a constitutional right,²⁴ the clear content of medical confidentiality in ordinary law such as s.323 still plays an important role for the court to decide a case. There is no doubt that s.323 makes it a criminal offence for members of the health care professions to breach medical confidentiality. On the other hand, the protection of privacy under the Constitution could produce only general arguments in supporting the principle of medical confidentiality, but with no statutory consequences for those who breach their duty of confidence.

In English law, the most important legal basis for the protection of medical confidentiality is the common law duty, which provides that a doctor must respect the confidences of his/her patient. Unlike Thailand, violation of medical confidentiality is not a criminal offence. However, this does not affect the protection of medical confidentiality, contravention of which gives rise to a claim for compensation.²⁵ In contrast, in Thailand, though medical confidentiality has been clearly protected in criminal law, this does not mean that medical

²¹ Ibid.

²² Ungprapan, 2003, 371-372.

²³ Weerachalie, 1991, 67-80.

²⁴ See chapter 3, 1.1.

²⁵ *Attorney General v Guardian Newspapers Ltd and others* (2) [1998] 3 All ER 545.

confidentiality is necessarily *really* protected. The lack of knowledge and understanding of medical law among the law enforcement agencies, such as police, prosecutors, and even judges may lead to the inefficient protection of medical confidentiality.²⁶ This needs to be addressed by the judges, as discretion may vary in deciding how medical information should be protected in various situations.

Since the penalties under criminal law are strict, the possibility of proving a breach of medical confidentiality is limited. A person will be criminally liable only when he/she commits an act with intention,²⁷ and it is the plaintiff who bears the burden of proof on the fact pleaded by him/her which is not admitted by the defendant. S.323 Criminal Code also provides the limitation that only the disclosure of medical confidentiality in a manner likely to cause injury to other person will be punished, and this again raises the burden of proof on the plaintiff.²⁸ The very limited number of criminal cases in this area indicate that breaches of medical confidentiality are rarely prosecuted, and hardly ever lead to a criminal conviction.

Some suggest that protection of medical confidentiality under private law, such as Civil Code section 420, would provide an alternative way for seeking other remedies.²⁹ Although, medical confidentiality is not expressly protected under s.420, the Supreme Court has interpreted the term “any rights” in the section to include the right to privacy, and therefore compensation is available.³⁰ Since the wrongful act under s.420 covers both wilful or negligent acts by any person, the burden of proof required by private law will not be so strict as criminal law.³¹

²⁶ Ratanaparinyanont, 1997, 101-106.

²⁷ Criminal Code s.323.

²⁸ Ratanaparinyanont, 1997, 105-106.

²⁹ Weerachalie, 1994, 103-107.

³⁰ See chapter 3, 1.3.

³¹ Weerachalie, 1994, 103-107.

From the above discussion, it can be seen that the protection of medical confidentiality via criminal or private law does not have any great impact, in principle, on the efficiency of medical confidentiality protection. However, protection via criminal law places more of the burden of proof on the plaintiff compared to private law. According to the survey results, it can be seen that people want more consequences to be placed on a physician who discloses their secrets, whereas physicians gave slightly different views. The above discussion and the study of English law have shown that criminal law may not be the only means of protecting medical confidentiality. Private law is also a good way for the protection of medical confidentiality, as private law remedies give rise to a claim of compensation with fewer burdens of proof on those who had been injured by the violation of secrets.

4. Publics', physicians' and judges' views about the protection of medical confidentiality under s.231 Criminal Procedure Code

Table 5.3 The comparison between the public and physician's views about s.231 Criminal Procedure Code.

| Laws | Public | | | Physicians | | |
|--|--------|-----------|----------|------------|-----------|----------|
| | Agree | Not agree | Not sure | Agree | Not agree | Not sure |
| S.231 paragraph one (medical privilege) | 100% | 0% | 0% | 100% | 0% | 0% |
| S.231 paragraph two (the court discretion of information disclosure) | 74.76% | 15.30% | 9.94% | 89.34% | 10.65% | 0% |

Table 5.4 The comparison between the public and physicians' views about the criteria that should be used to support the judge to exercise the discretion.

| Opinion about the criteria | Public | | Physicians | |
|---|--------|-----------|------------|-----------|
| | Agree | Not agree | Agree | Not agree |
| The criteria for the judge to exercise the discretion with respect to the disclosure of medical confidentiality | 96.76% | 3.21% | 90.98% | 9.02% |

4.1 Medical Privilege

Table 5.3 shows the comparison between the public's and physicians' views about s.231 Criminal Procedure Code. Both the public and physicians were given the full content of s.231, and all respondents were asked whether they understood the content of the law. Clear understanding was required for a further question on whether they agree or disagree with the law.

The respondents were asked their views about s.231 paragraph one in order to explore their views about medical privilege. S.231(1) awards physicians the right to refuse to testify in the court concerning confidential information obtained in the course of their profession. According to table 5.3, all respondents, both public and physicians, understood the content of s.231 when they had read it. These were the impressive results, as the clear understandings of the respondents were required for expressing their views about the law. All of the public and physicians agreed with the law. Many respondents confirmed in the comment made that they are satisfied with s.231 which provides medical privilege for the physicians to refuse to give evidence concerning medical confidentiality. And they would like the physicians to exercise the privilege in court as much as possible in order to ensure that patient's secret would be protected properly.³² This shows that the public may feel that medical privilege is a way of protecting their privacy rights. If

³² Chapter 4, 6.7.

physicians have the right to refuse to answer any questions asked by the court concerning patient's secret, their privacy will be protected³³. Some argued that the objective of granting medical privilege also base on the interest of medical profession as it enable the physicians to exercise their professional obligation of confident successfully,³⁴ However, the results of public' views reflect that medical privilege generates public confidence of their right to privacy with regard to their medical history. The law also provides that the disclosure of secret information cannot be made unless permission is granted by the person concerned. This makes the public feel confident that they have some control. Some respondents also confirmed their opinions that there should be no exceptions to the principle of no disclosure of confidential medical information without the patient's consent.³⁵

From the results of physicians' views, table 5.3 shows that physicians were also satisfied with the medical privilege provided by s.231, as all physicians agreed with the law. This can be supported the above argument stating that the reason to confer medical privilege is based on the interest of health care profession.³⁶ Therefore, it is quite clear that s.231 provides the physicians the mean to achieve their professional duty.

Finally it can be concluded that both the public and physicians are satisfied with medical privilege provided under s.231.

³³ Boonchalermvipas and Yomjinda, 2003, 128-132. The authers comment that the reasons behind granting medical privilege is to protect patient's privacy rights. As a result, public views about medical privilege from the survey results confirmed this argument, as people feel confident that physicians are not allowed to disclose their medical secret without patient's consent.

³⁴ Ungrapan, 1971, 371-372. And see Chapter 3, 2.1.

³⁵ See chapter 4, 6.7.

³⁶ See chapter 3, 2.1.

4.2 The court's discretion of disclosure of medical confidentiality

As mentioned above, s.231(1) provides medical privilege for physicians. However, the right is not absolute. Under s.231(2), the court has the power to summon physicians to give reasons supporting the refusal to testify. In a case where the court decides that there is no ground to support such refusal, it has the power to order the physicians to give or produce evidence involving medical confidentiality.

No criteria or guidelines have been given for exercising this discretion. This leads to the problem of when the discretion should be used. Should the law leave the court to make the decision without providing any limitations or criteria, or should there be some criteria for the court in exercising the decision? As mentioned in chapter three, the researcher argues that there should be some criteria to support the judge to exercise the discretion with regard to the disclosure of medical confidentiality in the court proceedings. The issues concerning the court's discretion were raised in the survey to explore whether the important stake holders agreed or disagreed with the argument. The survey was aimed to explore public, physicians' and judges' opinions about the disclosure of medical confidentiality under s.231(2).

The survey started by giving the respondents the content of s.231(2) to read. All of them understood the content of the law. According to table 5.4, the results show that 74.76% of the public agreed with s.231(2), whereas 15.30% disagreed with the law. 9.94% selected "others" and explained it as "not sure". The respondents were then asked if they agreed that some criteria should be set up to support the judge in the exercise of the discretion to order disclosure of medical confidentiality. Table 5.4 shows that 96.76% of the public agreed that some criteria should be provided. Some made further comment in the survey that the disclosure of medical confidentiality in all circumstances should be made only when the patient's consent had been obtained.³⁷ Many respondents expressed

³⁷ See chapter 4, 6.7.

their concern about judges' knowledge of medical confidentiality, stating that there will be a difference in judges' personal background and knowledge of medical confidentiality, which could lead to variations in exercising of the discretion to order disclosure. Some judges may have a high threshold for protection of medical confidentiality, whereas some may not.³⁸ Many respondents suggested that the law should be revised as soon as possible to provide criteria for the judges to exercise their discretion about medical confidentiality to the same standard.³⁹ Some people suggested that, although the law does not provide any limitation on the judge's discretion, in practice a meeting and discussion should be organised between the judge and physician before any ruling. The respondents also commented that, although they accepted that medical confidentiality could be disclosed in certain circumstances, the physicians should not offer all information to the court. They added that the court should gather and consider other evidence related to the case as much as possible rather than decide to disclose medical information.⁴⁰

All in all, these results show that although most of people agreed with Criminal Code section 231, limitation on the court's discretion to order the disclosure of medical confidentiality was requested.

For the physicians' views, 89.34% of physicians agreed with the law whereas 10.65% disagreed. The respondents were then asked whether criteria should be set up to support the judge in the exercise of the discretion with regard to the disclosure of medical confidentiality. Table 5.4 shows that 90.98% of the physicians agreed that some criteria should be set up. The comments made by physicians were similar to those made by the public. Some expressed concern about any given judge's knowledge and attitude towards medical confidentiality, as each individual judge may have different views about medical confidentiality. Some may pay more attention to medical confidentiality than others. As a result,

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

different standards of judgment could be made that would undermine public confidence in medical confidentiality.⁴¹ Moreover, the physicians would like the court to give clear explanations when it decides in favour of information disclosure, so that they can explain to their patients in order to maintain the trust of patients and the public.⁴² Some physicians suggested that s.231 should be revised to include criteria for the judges to evaluate their decision on whether or not to order disclosure of medical information in the court room.⁴³ A special concern was raised regarding specific medical treatment. In some areas of medical treatment, such as psychiatric medicine, confidentiality can be of greater importance than in general medicine. As a result, it is important for the judge to bear in mind that physicians' obligations may vary in different areas of medical practice. Consultation between physicians and judges may necessary in some cases before the judge makes the decision whether or not medical confidentiality should be disclosed in the court room.⁴⁴ The judiciary system was also criticised that it is necessary to change the judge's attitude towards the issue of confidentiality as well as the law. Although the laws should be revised to contain criteria needed, the law enforcement agencies are the key issue that could enable the law enforcement system flow effectively. The suggestion also made to improve the judge's knowledge that the foreign cases should be studied more and training courses about medical confidentiality should be provided to improve the judge's knowledge.⁴⁵

From this, it can be concluded that the argument the researcher made in chapter three that some criteria should be provided to enable the judges to exercise the discretion consistently was supported by publics' and physicians' views.

⁴¹ See chapter 4, 7.7.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

4.3 The judges' views towards the discretion of confidential disclosure

From publics and physicians' views, it is clear that the disclosure of medical confidentiality by court's order under s.231 generate public concern. Both the public and physicians share a concern that the discretion exercised by the judge may not have the reasonable ground, because individual judge may have different attitudes towards medical confidentiality. There was great interest in criteria being provided by the law to help the individual judge in exercising the discretion to the same standards. From this, it can be seen that the argument that some criteria should be set up for supporting the judge in the exercise of the discretion to order the disclosure of medical confidentiality was supported by the survey results.

With regard to the judges' views, it can be seen that the judges also raise the issue concerning the protection of right to privacy which is in accordance with publics' views mentioned above. It is interesting that no judge mentioned about the Constitution where the protection of right to privacy provided. This reflects the reason why the principle of fundamental right under the Constitution rarely mentioned in the judgement. Therefore, it is necessary that the court should interpret the ordinary law as much as possible to give effect of Constitutional rights, as the principles lie in the Constitution are protected in international level.

An overview of the judges' opinions shows that the judges gave really differing opinions about exercising the discretion whether or not medical confidentiality should be disclosed under s.231 Criminal Procedure Code. Some judges accepted that, in similar cases, the result of the judge's discretion could be different, and this depended on the individual judge's knowledge and background in particular issue. Some said they would exercise the discretion by balancing the interest of maintaining medical confidentiality and interests of justice. Some would decide to disclose medical information only if the information is relevant and material to the case. Whereas, some judges gave the opinions in favour of medical confidentiality disclosure, as the interest of fair trial is the paramount interest. Therefore, all evidences should be made available to the hearing, as the indirect evidence could sometimes lead to the final result of the case such as Dr. Wisut case. Some prefer

the physicians to exercise their privilege as much as possible, so that the judge can reconsider to exercise the discretion. The consultation between the judges and physicians was raised to support the exercise of discretion.

These opinions reflect the fact mentioned above that the exercise of the judge's discretion in confidential disclosure may vary, as judges, with different background of knowledge, may hold different views of the protection of medical secrets. Therefore, it would have adverse affect on individual right to privacy that the public has expressed their concerns about the judge's discretion. From this, the results from publics, physicians and judges' views can be used to support the argument the researcher made that the exercise of judge's discretion with regards to the disclosure of medical confidentiality can vary.

The Supreme Court judgement mentioned in chapter 3 clearly show the mentioned problem. The case of Dr. Wisut⁴⁶ and Dr. Prakitpao,⁴⁷ show that the judge's discretions can be really difference. In Dr. Wisut case, it can be seen that the court seems to exercise the power under s.231 Criminal Procedure Code in favour of disclosure of all medical confidentiality, as the medical records of many of Dr. Wisut's patients had been called from the hospital to be presented in the court room.⁴⁸ Although the patients had claimed that the disclosure of medical record would violate their right to privacy, the court insisted on a decision in favour of disclosure, because fair litigation should be conducted on the basis that all relevant documentary evidence is available before the court. On the other hand, in Dr. Prakitpao's case the court had made the discretion to exclude medical evidences that are not relevant to the issue of the case by referring to the protection of right to privacy and family life of the patient.

⁴⁶ *Supreme court judgment no.2236-7/2007.*

⁴⁷ *The application, (Special Case) no.2/2007.*

⁴⁸ Chapter 3, 2.2.

Some judges⁴⁹ comment that, in Dr. Wisut's case, it was necessary for the judge to disclose confidential medical information, as there was no direct evidence available for the court to consider in the case. Traditionally, in criminal cases, the judges usually consider a wide variety of factors in deciding the case. The accused's motive for committing the crime was one important factor that can determine the guilt or innocence of a person. In this case, no direct evidence such as eyewitness, murder weapons or even a dead body were found. Therefore, all the patient files must be called to prove the motive of the murder. According to the case, the court exercised its discretion under s.231 in favour of disclosure of medical confidentiality rather than the maintenance of an individual's secret. The constitutional guarantee of right to privacy was not mentioned by the court.⁵⁰ It seems that ordinary law such as s.231 plays a more important role for the protection, or not, of medical confidentiality than the Constitution. This might be because the clear content provided by ordinary law can be applied directly to the case rather than the general principle of right to privacy delivered by the Constitution.⁵¹

Moreover, the principle of how the balance between the competing interests was made was not explained in the judgment. As has been described previously, medical information should only be called where there is clear evidence that it is relevant and material to the case, and any irrelevant information must be excluded.⁵² There was no reason *specific to this case* given for the order of disclosure: the court merely stated that the interests of justice can only be achieved if all existing evidence is available to the court when exercising a decision.

In this circumstance, the study of English law could be an example for Thai court to consider how discretion should be exercised, as English law has long

⁴⁹ See the interview above.

⁵⁰ Meevongukod, 1997, 1-7.

⁵¹ Ibid.

⁵² Ratanaparinyanont, *The disclosure of patient's information*, 1997, 70-71.

experiences in dealing with the issues. As mentioned, in England, the protection of individual right to privacy has been clearly mentioned in English court where the court need to decide whether or not medical confidentiality should be disclosed, particularly when the HRA has been enforced.⁵³ This is worth for Thailand to examine, as the protection of right to privacy is the principal lines in international level. Therefore, Thai court should interpret the ordinary law, such as criminal law, insofar as possible, to give effect of Constitutional right to privacy.

With regard the disclosure of medical confidentiality in judicial proceedings, once a physician is called to give testimony as a witness and requested to supply confidential medical information, English court has to consider whether it *should* be disclosed. In doing so, a balancing exercise will be performed by the court to decide whether or not relevant information is to be disclosed to the court. This exercise will find the balance between the interest in the administration of justice on the one hand and the interest in maintaining medical confidentiality on the other.⁵⁴ If the confidential information is relevant and material to the issue and the interests of justice outweigh the interest in maintaining medical confidentiality, the court will direct physician to disclose the information. Even if the information is necessary to the case, the court will respect confidence as far as possible and only direct a doctor to provide information that is relevant and necessary to the course of justice.⁵⁵ Therefore, it can be seen that the court has shown itself willing to consider the exclusion of confidential medical information from judicial proceedings as long as this information is not relevant and material for a just decision of the case. Confidential information will thus be protected if it does not affect a fair trial.

On the other hand, in Thailand, rules governing the balancing exercise have never been mentioned by the court, nor has the consideration of whether or not

⁵³ *Cambell v MGN* [2004] UKHL 22.

⁵⁴ Chapter 2, 2.3.

⁵⁵ *Attorney-General -v- Mulholland* [1963] 2 QB 477.

confidential document is relevant and material to the issue of the case. In the Dr. Wisut case, the court ordered all relevant documents to prove of the accused murdered motive without mention of whether the documents were relevant and material to the case. Many medical records of Dr. Wisut's patients were called, as the court said that therein was important evidence proving that Dr. Wisut had an affair with a female patient which led to the instability of his married life. It is doubted that whether or not all medical records called by the court were relevant and necessary to the trial, as the court did not mention this issue. If some medical records were not relevant to the case, or were relevant but would not adversely affect the fairness of the proceedings, then the public interest in maintaining medical confidentiality had been violated. It is clear that this will affect public confidence concerning medical confidentiality and privacy, as public will be concerned that their medical records can be the subject of intrusion without very good cause. This view was clearly been supported by public's attitude to the courts' discretion in the survey, and the request for limitation of the courts' discretion.

5. Appropriate measures for supporting the judge to exercise the discretion with respect to the disclosure of medical confidentiality in court proceedings.

5.1 Publics' and physicians' views of appropriate measure

This thesis aims to find appropriate measures to support the exercise of the courts' discretion in the way that both public interest in maintaining medical confidentiality and interest of justice will be protected properly under the same standards. As a result, some measures, including the balancing exercise conducted by English law, were included in the survey. The public and physicians were asked to give their opinion which measures that they would like to solve the problem in Thailand.

As mentioned, the researcher argued that some criteria should be in place to support the judge in the exercise of the discretion with regard to the disclosure of medical confidentiality was supported by both public and physicians' opinions.

The researcher aimed to find out further details about what measures could be introduced to achieve this end. Therefore, several measures adapted from the study of English and Thai law were created and provided in the questionnaires. The purpose of the questionnaire in this part was to find out what would be the most preferable measure among the public and physicians. It is hoped that the results from the survey can be used as the guideline for the Thai government to improve protection of medical confidentiality in court proceedings.

According to the questionnaires, the respondents were allowed to select more than one measure which they thought appropriate to solve the problem. The results will be discussed below.

Measure A and B

Table 5.5 Comparison between public and physicians' views about measure A. and B. (There were 56.45% of public and 23.42% of physicians chose one measure)

| Measures | Public | Physicians |
|--|--------|------------|
| A. Amend Criminal Procedure Code section 231 by adding the phase "the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case". | 14.32% | 19.82% |
| B. Amend Criminal Procedure Code section 231 by adding the phase "The court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and the interest of justice in finding the truth on the other". | 19.87% | 1.80% |

These two measures were adapted from English law, as discussed above. The balancing exercise and the consideration of the relevant evidence to the case have

been adapted as a means of supporting Thai court decisions with regard to the disclosure of medical confidentiality. The respondents were asked to consider which measure they preferred, or they could select both of them. The researcher expected that there would be a lot of respondents who would select both of the measures, as they can be used to support each other.

According to table 5.5, 56.45% of public chose one measure which means more than half of public prefers one measure to more than one measure, whereas only 23.42% of physicians selected just one measure. For measure A, 14.32% of the public showed a preference, and 19.82% of the physicians. Measure B was chose by the public at 19.87%, whereas only 1.80% of physicians selected it on its own. It can be seen that, among the public respondents who chose only one measure, measure B was the most preferable measure, whereas measure A was the most popular measure chose by physicians. (compared to table 5.6 below)

Measure C and D

Table 5.6 Comparison between public and physicians' views about measure C and D.

| Measures | Public | Physicians |
|---|--------|------------|
| C. Appoint committee with specific knowledge to scrutinise whether or not the court should direct a person to disclose confidential information in the court proceedings. | 6.46% | 0.00% |
| D. Appoint experts in the area of medical confidentiality such as physician to become the panel of judges for considering the case concerning the protection of confidential information. | 15.81% | 1.80% |

Measure C and D were adapted from Thai law and Thai judicial system.

Measure C

In some specific areas of law, committees are appointed to investigate a specific issue provided under the law. For example, the Official Information Act 1997, provides that the Council of Ministers, upon the recommendation of the Official Information Board, have the power to appoint experts in appropriate fields to 'Information Disclosure Tribunals' to consider and decide an appeal against an order prohibiting the disclosure of official information possessed by state agency. The tribunals will be appointed from the persons who have specific knowledge in specialised fields, such as the field of national security, national economy and finance or law enforcement. Each tribunal consists of such number of persons as necessary,⁵⁶ but not less than three persons.⁵⁷ For example, if any person requests any information from state agency related to medicine or public health, and the request had been rejected, the person has the right to appeal against the prohibited order. A tribunal will then be appointed from persons who have specific knowledge in this field, such as physicians and lawyers with knowledge of medical law, to consider whether there is any reasonable ground for state agency to refuse disclosure of the official information.⁵⁸

At present, there are five areas in which Information Disclosure Tribunals can be appointed: national security and foreign affairs; economics and finance; social affairs and public administration; medicine and public health; and science,

⁵⁶ OIA, s.35 states that:

There shall be Information Disclosure Tribunals in appropriate fields, which are appointed by the Council of Ministers upon the recommendation of the Official Information Commission, having the power and duty to consider and decide an appeal against an order prohibiting the disclosure of information under section 14 or section 15, order dismissing an objection under section 17 and order refusing the correction, alteration or deletion of personal information under section 25.

The appointment of Information Disclosure Tribunals under paragraph one shall be made on the basis of the specialised fields of the official information, such as the fields of national security, national economy and finance or law enforcement.

⁵⁷ OIA, s.35-36.

⁵⁸ OIA, s.37-38 provide the power and duty to consider any appeal made by any person against the state agency relating to the disclosure of official information. And see K. Prokati, Kittisak, *Legal Aspect of Official Information Board and In Formation Disclosure Tribunal*, 2000, 195-222.

technology, industry and agriculture.⁵⁹ The Information Disclosure Tribunal shall consider the complaint made by any person against a state agency, and report within thirty days from the date of the receipt of the complaint. If necessity, this period may be extended, provided that the reason is specified and the total period does not exceed sixty days.⁶⁰ The decision of the Information Disclosure Tribunal shall be deemed final under Official Information Act, and the state agency will be bound by the decision.⁶¹ However, there is a right to appeal the tribunal's decision to court. For instance, if a tribunal decides in favour of the state agency in prohibiting disclosure of the information request by any person, the person who requested the information can appeal to the court. Or if the tribunals decide in favour if the tribunals decide in favour of the state agency of disclosure any personal information, the person who thought his or her interest may be affected by such disclosure has the right to appeal to the court.

The establishment of the Information Disclosure Tribunals aimed to ensure that all cases between the public and state agency in disclosure of official information would be solved promptly and efficiently.⁶² The decisions made by the tribunals are expected to be fair and acceptable to the publics, as they came from people with specific knowledge. These proceedings would also reduce the number of cases taken to the court.⁶³

However, in case the person whose interest is affected by the tribunal's decision filed a lawsuit against it, the court seems to decide the case in the line with the tribunal's decision, possibly because the reasons given for the decision will

⁵⁹ Royal Thai Government Regulation Concerning the Appointment Information Disclosure Tribunals in Different fields. (21 April, 1998).

⁶⁰ OIA, s.37 and s.13.

⁶¹ OIA, s.37.

⁶² From the preamble of Official Information Act, 1997 and from Official Information Act, 1997 which provides that the tribunals should have specific knowledge in particular issue. The law also provides that the tribunals should complete their consideration within 30 days from the date of receiving the complaint.

⁶³ Ratanakarn, 1999, 79-81.

usually be clearly explained, as it decided by experts in specific field,⁶⁴ which will be the ground for the court to consider the case as well. This view is supported by the entrance examination case.⁶⁵ The case in which the Demonstration School of Kasetsart University denied to disclosed the examination results to the parent of a student who failed to enter the school. The Tribunal for Social Affair and Public Administration ruled that the parent had the right to see the examination results. The decision which was decided in favour of the parent was really help them to achieve their need in the short time without initiating the case to the court.

However, the parents of other students (the students who passed the exam and their parents did not want their exam papers to be disclosed) whose interest had been affected by the disclosure of examination results filed a lawsuit against the tribunal's decision to the Civil Court.⁶⁶ In the appeal, the Civil Court⁶⁷ upheld he Information Disclosure Tribunal's decision in ruling that the score and answer sheets of all students were official information that could be disclosed was legally. This was ultimately confirmed by the Appeal Court and the Supreme Court. The Supreme Court affirmed the reasoning of the tribunal that the answer sheets, although they contained the names of the students, were official documents provided by the school for the students to express their knowledge.⁶⁸ Therefore, in this case, it can be seen that the reason made by the Tribunal was also clearly adopted by the court.⁶⁹

⁶⁴ Ibid.

⁶⁵ *Decision of The Information Disclosure Tribunals for Social Information, No. 1/1998*. And see chapter 3, 1.4.2. And see Prokati, 2000, 195-222.

⁶⁶ *Supreme Court Decision, no. 4126/2000*.

⁶⁷ Ibid., And see V. Uthai, *Case Commentary of the Entrance Examination Case*, 1999, 4-5.

⁶⁸ See chapter 3, 1.4.2.

⁶⁹ Uthai, 1999, 4-5.

The idea of the tribunals has been adapted into the survey as Measure C. ‘appoint committee with specific knowledge to scrutinise whether or not confidential information should be disclosed in the court room’. The committee would be consisted of experts in the specific field of confidential information. It is hoped that the committee would decide, on reasonable grounds, whether or not the confidential information should be disclosed in court proceedings. Surprisingly, according to table 5.6, only 6.46% of the public chose this measure, whereas no physicians chose it. It can be concluded that for the respondents who chose one measure, measure C was the least preferable measure, with no further comments given.

Measure D

Measure D came from the structure of specialist courts in Thailand. In December 1997, the Intellectual Property and International Trade Court (IPITC) was established.⁷⁰ The court is empowered to hear and determine cases concerning intellectual property and international trade cases, such as trademarks, copyrights, patents, trade names, sales, international services, insurance and other related acts. The specific panel of judges are required in IPITC. Three judges are required to form a quorum, two of whom must be career judges with expertise in intellectual property or international trade matters, and the third is an associate judge who is a lay person with expertise in intellectual property or international trade matters.⁷¹ The structure of the panel of judges is aimed to guarantee the specialization of the

⁷⁰ The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court, 1996. The Act was the culmination of a joint effort between the Ministry of Justice and the Ministry of Commerce in the wake of negotiations between Thailand and the United States as well as the European countries on trade related aspects of intellectual property rights. In fact Thailand is exceeding its obligation under Article 41(5) of the Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) by establishing the court. Article 41 (5) states;

‘It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general... Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general’.

⁷¹ The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court, 1996, s.30.

court in order to ensure that the specific case will be determined fairly and appropriately.⁷²

The main reason for the establishment of the IPITC was that intellectual property and international trade cases are distinct from the usual criminal and civil cases. These cases were previously assigned to Civil Court judges who heard all types of cases. Therefore, the judges did not have special expertise in intellectual property or international trade matters, which led to a large number of delayed cases.⁷³ Having judges with the relevant expertise preside in such cases seemed not only appropriate but would also lead to a more efficient conduct and swifter conclusion of the cases.⁷⁴

This idea of a panel of judges was adapted from the IPITC as measure D in the survey: Appoint experts in the area of medical confidentiality such as physicians to a panel of judges to consider cases concerning confidential medical information. This aims to create a fair and appropriate hearing process, as there will be at least one person who has special expertise in medical confidentiality. Having an associate judge with such knowledge should lead to more efficient consideration of the case.

According to the survey results in table 5.6, 15.81% of public chose measure D. It is noted that measure D was the second most preferable among the public who chose one measure. However, only 1.80% of physicians chose measure D, but 40.54% of the physicians preferring to use two measures to solve the problem chose it (measure D). And measures A and D were selected most among the physicians who chose two measures. The results will be analysed in the next step.

⁷² V. Ariyanuntaka, *Intellectual Property And International Trade Court : A New Dimension For Intellectual Property Rights Enforcement In Thailand*, 1998, 1-10.

⁷³ S. Taveechaikarn, *Intellectual Property and International Trade Court*, 1998, 1-3. This article confirmed that, in the past, there had been lots of complaint made by private sectors and international business companies due to the lack of the judge knowledge and understanding about intellectual property and international trade matters that cause inefficient protection of intellectual property in the same standard with international level.

⁷⁴ P. Vipamaneerut, *Intellectual Property and International Trade Court*, 1997, 1-3.

In conclusion, there were 23.42% of physicians prefer one measure to more than one measures, whereas 56.45% of public prefer one measure to more than one. This means most public like to use one measure to set up the criteria for the judge to decide whether or not medical information should be disclosed, and the most preferable measure was measure B: amend s.231 Criminal Procedure Code by adding the phase “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality and interest of justice in finding the truth”, whereas measure D: appoint experts in the area of medical confidentiality such as physicians to a panel of judges for considering the case concerning the protection of confidential information, came second.

The public also gave further comment about measure B that the law should be revised as soon as possible to provide criteria for judges to effectively exercise their discretion with regard to the disclosure of medical confidentiality. There was also concern expressed that their private life could be intruded upon by any delay of in the law making process.⁷⁵ Respondents went on to stress that the judges’ discretion about appropriate disclosure may be vary, as individual judge may have different view of protection of medical confidentiality.⁷⁶ Finally, the respondents commented that although they would like the balancing exercise to be provided by the law, they still worried about the judge knowledge and experiences about the issue. Therefore, case studies from foreign countries should be examined, so that judges can gain knowledge about the balancing test and can exercise their discretion properly. They also suggested that the judge should be sent abroad to study the issue.

Regarding the appointment of experts in medical confidentiality to a panel of judges for hearings, many respondents expressed that, if the judges, who have to decide all types of cases, are unable to gain special expertise in medical law, a lay

⁷⁵ See chapter 4, 6.7 and 7.7.

⁷⁶ Ibid.

person with specialist knowledge appointed. This would create more public confidence in the administration of justice.⁷⁷ Therefore, there should be the study of the system of choosing an expert to become panel of judges for considering the cases together with career judge.⁷⁸

Two Measures

Table 5.7 Comparison between the figures of public and physicians who chose two measures. (There were 32.03% of public and 40.54% of physicians chose two measures)

| Measures | Public (%) | Physicians (%) |
|----------|------------|----------------|
| A and B | 7.86% | 10.81% |
| A and C | 6.46% | 4.50% |
| A and D | 10.02% | 18.02% |
| B and C | 1.41% | 0% |
| B and D | 3.56% | 1.80% |
| C and D | 2.73% | 5.41% |
| Total | 32.03% | 40.54% |

Table 5.7 compares the percentage of public and physicians who chose two measures which should be used as the criteria for the court in deciding whether or not medical confidentiality should be disclosed in the court room. It is noted that 40.54% of physicians chose two measures which was the highest figure comparing to the physicians who chose one measure, three measures and four measures. The most preferable measure for physicians in this group was a combination of measure A: amend s.231 Criminal Procedure Code by adding the

⁷⁷ Ibid.

⁷⁸ Ibid.

phase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material for the case”, and measure D: appoint experts in the area of medical confidentiality such as physician to become the panel of judges for considering the case. As a result, it can be concluded that there is a clear preference amongst the physicians for two measures to support the judge to exercise the discretion with regard to the disclosure of medical information.

The physicians also gave suggestions supporting the measures.⁷⁹ They suggested that in some areas of medicine, such as psychiatric medicine, confidentiality can be of greater importance than in general medicine. It is very important for the judge to bear in mind that physicians’ obligations may vary in different areas of medical practice. As a result, consultation between the judge and physician is very important before deciding whether or not medical information should be disclosed. Moreover, the idea of appointment of experts to a panel of judges in the court hearing would be one of the best measures to guarantee that medical confidentiality would be properly and efficiently protected in practice, as the case would be considered from the beginning to an end by person who has special expertise. This would foster an atmosphere of trustworthiness and fairness, as the public will be more confident that their secrets will be protected properly.⁸⁰

Many physicians suggested that although the law may be revised by adding measure A or B, the knowledge and understanding of Thailand’s judges about the measures should not be overlooked. There is a long-standing problem in the country that the law enforcement agencies did not really understand the principles or reasons behind the law, and this led to the inefficient law enforcement. Respondents went on to suggest that judges should study, either at home or abroad, foreign cases of medical law, as there are no experts in this area of law in Thailand right now. They also suggested that physicians and judges should work together to held seminars or training course about the protection of medical

⁷⁹ See chapter 4, 7.7.

⁸⁰ Ibid.

confidentiality, so that the judges would gain more knowledge and could exercise the discretion properly.⁸¹

Three Measures

Table 5.8 Comparison between the figures of public and physicians who chose three measures. (There were 8.63% of public and 29.72% of physicians chose two measures)

| Measures | Public (%) | Physicians (%) |
|----------|------------|----------------|
| A,B,C | 1.41% | 6.31% |
| A,B,D | 3.56% | 10.81% |
| A,C,D | 2.40% | 8.11% |
| B,C,D | 0.99% | 4.50% |
| Total | 8.63% | 29.72% |

Table 5.8 Comparison between the figures of public and physicians who chose three measures. It can be seen that 29.72% of physicians, which was significantly higher than the public, selected three measures that they thought suitable for protecting medical confidentiality in the court proceedings. 10.81% prefer measures A,B,D to other measures.

Four measures

Table 5.9 Comparison between the figures of public and physicians who chose three measures. (There were 3.15% of public and 29.72% chose two measures)

⁸¹ Ibid.

| Measures | Public (%) | Physicians (%) |
|----------|------------|----------------|
| A,B,C,D | 3.15% | 6.31% |

Table 5.11 shows the comparison between the figures of public and physicians who chose four measures. Four measures were the least preferable number of measures selected by both public and physicians. Only 3.15% of the public and 6.31% of physicians selected four measures.

Summary of the preferable measure of the public and physicians

Table 5.10 The comparison of the respondents on the preferable number of measures and the most preferable measure.

| Number of measures | Public | | Physicians | |
|--------------------|------------------|-------------------------|------------------|-------------------------|
| | % of respondents | Most preferable measure | % of respondents | Most preferable measure |
| One measure | 56.45% | B* | 23.42% | A |
| Two measures | 32.03% | A,D | 40.54% | A,D* |
| Three measures | 8.36% | A,B,D | 29.72% | A,B,D |
| Four measures | 3.15% | A,B,C,D | 6.31% | A,B,C,D |

Table 5.10 shows the comparison figures of the respondents on the preferable number of measures and the most preferable measure. It can be seen that the public preferred to use one measure as the criteria for supporting the judge to exercise the discretion about the disclosure of medical confidentiality, whereas the physicians preferred to use more than one measure to solve the problem to one measure. Two measures were the most preferable among the physicians.

For the public, 56.45% of the public preferred one measure to more than one measure. The figures is much higher than the public who chose two and three measures which were 32.03 and 8.36% respectively. This means the most preferable measure among the public who selected one measure was measure B: amend s.231 Criminal Procedure Code by adding the phase “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and the interest of justice in finding the truth on the other”.

For physicians, most physicians preferred to select more than one measure to only one measure. 40.54% of the physicians selected two measures which was much higher than other set of options. The second most preferable was three measures, as 29.72% of physicians chose it. The two most preferable measures among the physicians were measures A and D, and the most preferable three measures were measures A,B and D. It is noted that two measures, A and D, are also selected by physicians in these two groups. As a result, it can be concluded that measure A and D were the most preferable measures among the physicians.

5.2 Judges’ views of appropriate measure

With regard to the appropriate measure that should be set up for judges to exercise their discretion about the disclosure of medical confidentiality, it can be seen that many judges accepted that the criteria should be provided to enable the judge to exercise the discretion consistently. However, the judges have different views of the issue. Seven judges selected measure A; amend s.231 Criminal Procedure Code by adding the phase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case”. Moreover, some judges gave further comment that although the information is relevant and material to the case, the judge still needs to consider whether or not the disclosure would cause any damage to the person who is the subject of confidential medical information and professional obligation of the physicians before any decision would be made. It is

clear that some judges pay more attention to the issue of medical confidentiality than others.

Three judges chose measure B; amend s.231 Criminal Procedure Code by adding the phrase that the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”

Five judges gave the opinion that they would not want the law to be changed. They suggested that the court should freely exercise the discretion, as different cases contain different facts and features, so there would not be easy way to decide the case by applying the same criteria. Moreover, sometimes indirect or circumstantial evidence could be used to come to the final result of the case, so there is no need to limit disclosure only to information that is relevant or material to the case. Therefore, it would be more appropriate to leave the judge to exercise the discretion on a case-by-case basis.

Regarding measure C; appoint committee with specific knowledge to scrutinise whether or not the court should direct a person to disclose confidential information in the court proceedings, and measure D; appoint experts in the area of medical confidentiality such as physician to become the panel of judges for considering the case, no judge favoured these measures. Many judges stated that the appointment of committees or experts would burden the court proceedings, and add expense and delay. Also, the lack of legal knowledge could place a greater burden on the career judge to explain legal terms and procedure to the associate judge. The judges would rather decide cases independently rather than consider the case together with experts. However, the judge number one gave a fascinating suggestion that the judges may benefit from the knowledge of experts at the beginning, and that training courses on medical confidentiality would be necessary, but that, in the long run, the court system could be improved by sending judges to study abroad to gain more knowledge in medical law.

According to the results, it can be concluded that the most preferable measure among the public was measure B; amend Criminal Code section 231 by adding the phase “the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other”. In contrast, the physicians would prefer to see more than one measure in place to deal with the problem of the disclosure of medical confidentiality. The most preferable measures among the physicians were measure A; amend Criminal Procedure Code section 231 by adding the phase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case” and measure D; “appoint experts in the area of medical confidentiality such as physician to become panel of judges for considering the case”.

With regard to the judges’ views, the judges gave really differing opinions about exercising the discretion whether or not medical confidentiality should be disclosed under s.231 Criminal Procedure Code. Some said they would exercise the discretion by balancing the interest of maintaining medical confidentiality and interests of justice. Some would decide to disclose medical information only if the information is relevant and material to the case. Moreover, some judges accepted that the use of the discretion may vary due to personal background and knowledge. Most of the judges agreed that there should be criteria to guide the judge in exercising the discretion. Seven judges – nearly half of those interviewed – agreed with measure A; amend Criminal Procedure Code section 231 by adding the phase “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case” Three judges selected measure B; “amend Criminal Code section 231 by adding the phase the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other ” Five judges did not want the law to be revised. This means the public, physicians and the judges largely hold the same views about variation in judges’ discretion with regard to the disclosure of medical confidentiality. Therefore, s.231 Criminal

Procedure should be revised to set up criteria for the judge to apply in exercising the discretion. Measures A and B were selected most among the interested parties. As the measures can be used to support each other, it would be possible that the law can be changed by including both A and B. For example, the law can be revised by mixing both measures which is; the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the case, and also balance the interest between maintaining confidentiality and the interest of justice.

However, there were different views between physicians and judges of measure D; “appoint experts in the area of medical confidentiality such as physician to become panel of judges for considering the case”. A fair proportion of physicians also want measure D to be applied, whereas no judges agreed. The judges insisted that it would be more appropriate for the career judge to consider the case independently without an associate judge. Although an associate judge has specific knowledge in a particular issue, the lack of legal knowledge could have adverse effect on the hearing, as the associate judge could not decide the case properly. The compromise solution suggested by some judges was to give judges training, organised by experts in particular issues, such as medical confidentiality. In the longer term, judges should be sent to study abroad in the area of medical law.

Taking everything into account, the solution for solving the problem about the issue of the protection of medical confidentiality can be planned for short- and long-terms. The short term solution is to revise s.231 by mixing both measures A and B which is. This measure would be easy and acceptable to all interest parties, including the judges. However, for a long term solution, there should be more study of measure D, as the measure was selected most by the physicians together with measure A. The judges, though, strongly disagreed with measure D, as they would like to decide cases independently. Another important long term plan is to improve judicial knowledge as a whole about protection of medical confidentiality. This would require the organisation of training courses to ensure that the judges really understand the law and the reasons behind the protection of

medical confidentiality. Also, the judges should be sent to study abroad in the area of medical law, so that in the long run the disclosure of medical information in the court proceedings will be decided to an international level of acceptability.

6. Further discussion of relevant factors concerning the protection of medical confidentiality under English law

Although firm conclusions may be drawn from this survey that the public, physicians and the judges agreed that s.231 Criminal Procedure Code should be revised to set up the criteria for the judge to exercise the discretion whether or not medical confidentiality should be disclosed, it is still necessary to consider other factors lie in English laws which would be useful guide for the judges in exercising their discretion, such as the principle of necessity and proportionality. It is noted that revising the law is not the only way to solve the problem. The law enforcement system is also the key issue that will bring the just to achieve the goal of the law. This means the Thai court may need to consider the principles using by English court in deciding the case of confidential disclosure.

Necessity, proportionate, safeguards against abuse and some aspects of English laws.

As mentioned in chapter 2, English case that mentioned the principle of necessity proportionate and safeguards against abuse was found in *A Health Authority v X and others*⁸². The case was that the Health Authority wished to investigate whether Dr x and his partners whether they had complied with the health authority's terms and services. The investigation required certain documents which are copies of certain documents that were either produced to the court or were generated forensically in the course of the care proceedings and medical records of seventeen patients of Dr X. Two of the patients did not consent and Dr X said he had to comply with the duty of confidentiality owed to this patients.

⁸² [2001] EWCA 2014.

The court held that medical records were confidential between the doctor and his or her patients, and that confidentiality was underscored by the guarantee of respect for the patient's private and family life guaranteed by Art 8 of the Convention. However, having regard to all relevant factors the court held that the disclosure of the documents was necessary within the meaning of Art 8 (2) as there was a compelling public interest justifying the disclosure of List A documents to the Authority. The judgement was made by applying the principle in *Z v Finland* and *MS v Sweden* (will be discussed below) that the disclosure of the List A documents is necessary in a democratic society for the protection of health or morals. The court held :

...there is a compelling public interest justifying- indeed requiring- the disclosure of the List A documents to the Authority...that the disclosure of List A documents is, in principle, "necessary in a democratic society in the interests of ...public safety or...for the protection of health or morals, or for the protection of the rights and freedoms of others..."⁸³

The court went on to hold that the interference of patient's private life could only be justified if there were effective and adequate safeguards against abuse. The safeguards would typically be required that '(i) the maintenance of the confidentiality of the documents themselves – the documents should not be read into the public record or otherwise put in the public domain; (ii) the minimum public disclosure of any information derived from the documents; and (iii) the protection of the patient's anonymity, if not in perpetuity then at any rate for a very long time indeed.'⁸⁴

Further, the court ruled that it is in principle that every public body which transfers or authorises the transfer of medical records from a doctor to a public body or from one public body to another to ensure that the confidentiality of the records is preserved and that there were effective and adequate safeguards against

⁸³ Ibid., para 50.

⁸⁴ [2001] EWCA 2014, para 53.

abuse.⁸⁵

In *Woolgar v Chief Constable of Sussex Police*⁸⁶, the court also ruled that the disclosure of medical information was ‘necessary in a democratic society’. In the case a registered nurse sought an injunction to restrain the police from disclosing to her regulatory body, the United Kingdom Central Council for Nursing Midwifery and Health Visiting, the contents of an interview between her and the police which had taken place whilst the police were investigating the death of a patient in her care. The Court of Appeal dismissed the nurse's appeal from the refusal of the judge to grant her an injunction to restrain disclosure. It was because there was a countervailing public interest existed which entitled the police to release the material to the regulatory body as the disclosure was necessary in a democratic society in the interest of public safety or for the protection of health or morals, or for the protection of the rights and freedom of others.

Kennedy LJ stated :⁸⁷

“where a regulatory body such as U.K.C.C., operating in the field of public health and safety, seeks access to confidential material in the possession of the police, being material which the police are reasonably persuaded is of some relevance to the subject matter of an inquiry being conducted by the regulatory body, then a countervailing public interest is shown to exist which, as in this case, entitles the police to release the material to the regulatory body on the basis that, save in so far as it may be used by the regulatory body for the purposes of its own inquiry, the confidentiality which already attaches to the material will be maintained. ... Putting the matter in Convention terms Lord Lester submitted, and I would accept, that disclosure is “ necessary in a democratic society in the interests of ... public safety or ... for the protection of health or morals, or for the protection of the rights and freedoms of others.”

It is noted that the court went on to comment further that even if there is no request from the regulatory body, the polices who possess the confidential information, with their reasonable view, were free to pass that information

⁸⁵ Ibid., para 55-56.

⁸⁶ [2000] 1 WLR 25.

⁸⁷ Ibid., para 36.

tot the relevant regulatory body provided that the disclosure was made for the interest of public health or public safety.⁸⁸

Further, it is noted that with regard to the issue of safeguard against abuse, the court commented that if the polices were mind to disclose medical information, they may inform the person who would be affected by the disclosure of confidentiality so that that person would have a chance to seek assistance from the court. The court concluded:

“...In order to safeguard the interests of the individual, it is, in my judgment, desirable that where the police are minded to disclose, they should, as in this case, inform the person affected of what they propose to do in such time as to enable that person, if so advised, to seek assistance from the court. In some cases that may not be practicable or desirable, but in most case that seems to me to be the course that should be followed”.⁸⁹

It can be seen from the English cases that in deciding whether medical confidentiality the court exercise the discretion by determining whether the impugned measures were necessary in a democratic society and whether the measures were accompanied by effective and adequate safeguards against abuse. The judgements of the mentioned cases were made by applying the principle of the two important cases which are *Z v Finland* and *MS v Sweden*. In the cases, the discretions of information disclosure were exercised by determining whether the impugned measures were necessary in a democratic society by considering whether the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued. In order to gain more knowledge of the relevant issues, it is worth to explore the two mentioned cases.

In *Z v Finland*⁹⁰ the applicant's husband, X, was tried for various criminal

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ (1998) 25 E.H.R.R. 371.

offences in circumstances where one of the issues at his trial was the date upon which he had become aware that he was HIV positive. His wife, the applicant, declined to give evidence. At the suit of the prosecution, two of her doctors were compelled to give evidence of matters about her medical history or contained in her medical records. Subsequently her medical records were seized by the police. The relevant parts of the proceedings were held in camera, although the applicant's name and her medical condition were set out in the court's published judgment. The court ordered that the documents were to remain confidential for 10 years.

The applicant claimed that her rights under Article 8 had been breached in respect of the orders requiring her doctors to give evidence in the criminal proceedings against her husband and the seizure of her medical records and their inclusion in the investigation file.⁹¹ The European Court of Human Rights held that there had been no breach of the complaints as the impugned measures were “necessary in a democratic society”.⁹²

The Court approached the fundamental issue as follows :

In determining whether the impugned measures were “necessary in a democratic society”, the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued.⁹³

In considering the issue, the court accepted that the protection of personal data, including medical data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Art 8 of the Convention. It is noted that the court clearly stated that it is crucial that not only to respect the sense of privacy of a patient but also to preserve the confidence of

⁹¹ Ibid., para 70.

⁹² Ibid., para 94.

⁹³ Ibid., para 94.

medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing personal information as may be necessary in order to receive appropriate treatment. Therefore this will endanger their own health and the community as the diseases could be transmitted.⁹⁴

With regard to the issue of the case, the above considerations are especially important regarding the protection of confidential information about a person's HIV infection. The court ruled that disclosure of such data may dramatically affect his or her private and family life. It may also discourage persons from seeking medical treatment and undermine any preventive efforts by the community to contain the pandemic. Therefore, the disclosure of such information breached Art 8 of the Convention. However, it can be justified by an overriding interest such as the interest in investigation and prosecution of crime and in the publicity of court proceedings. The consideration of information disclosure will therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued.⁹⁵ The court stated:

“The disclosure of such data may dramatically affect his or her private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism. For this reason it may also discourage persons from seeking diagnosis or treatment and thus undermine any preventive efforts by the community to contain the pandemic. The interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued. Such interference cannot be compatible with Article 8 of the Convention unless it is justified by an overriding requirement in the public interest.”⁹⁶

In exercising the discretion of disclosure of personal data, the court stated that a margin of appreciation should be left to the competent national authorities in

⁹⁴ Ibid., para 95.

⁹⁵ Ibid, para 86-87.

⁹⁶ Ibid., para 96.

striking a fair balance between the interest of publicity of court proceedings, and the interest in maintaining confidentiality. The scope of the margin will depend on such factors as the nature and seriousness of the interests at stake and the gravity of the interference.⁹⁷ Moreover, the court stressed that any measures compelling the disclosure of medical information without patient's consent call for the most careful scrutiny on the part of the court, as do the safeguards designed to secure an effective protection.⁹⁸

Taking everything into account, the court found no violation of Art 8 in ordering applicant's doctor to give evidence concerning her without her informed consent as the order was connected with the investigation of serious crime. The hearing also took place in camera before the City Court, which had ordered in advance that its file, including transcripts of witness statements, be kept confidential. All those involved in the proceedings were under a duty to treat the information as confidential. Breach of their duty in this respect could lead to civil and/or criminal liability.⁹⁹ The interference with the applicant's private and family life was thus subject to important limitations and was accompanied by effective and adequate safeguards against abuse.¹⁰⁰ Therefore, the court came to the conclusion that the order requiring applicant's medical advisor to give evidence was not violated Art 8 as it was supported by sufficient reasons which corresponded to an overriding requirement in the interest of the legitimate aims pursued. It was also satisfied that there was a reasonably relationship of proportionality between those measures and aims.¹⁰¹

With regard to the issue concerning the seizure of applicant's medical records and their inclusion in the investigation file, the court ruled that the measure was based

⁹⁷ Ibid., para 99.

⁹⁸ Ibid., para 96.

⁹⁹ Ibid., para 103.

¹⁰⁰ Ibid.

¹⁰¹ Ibid., para 105.

on the weighty public interests which overrode the applicant's interest in maintaining confidentiality. It was because the applicant refused to give evidence against her husband as ordered by the authority which aimed to ascertain when X had become aware of his HIV infection or had reason to suspect that he was carrying the disease. Moreover, the measure was subject to similar limitations and safeguards against abuse. The material that could be seized was restricted and it was submitted in the proceedings which held *in camera*. The documents were also treated as confidential by court order.¹⁰² Therefore, the court finally ruled that the seizure of applicant's medical records found no violation of Art 8.

In *MS v Sweden*¹⁰³ the issue before the Court arose as a result of the communication, without the patient's knowledge or consent, of her medical records to the Social Insurance Office for the purpose of enabling the Office to consider her claim for a disability pension. The court accepted that the disclosure of medical data entailed an interference with the applicant's right to respect for private life as guaranteed by paragraph 1 of Art 8. However, in order to determine whether the interference was justified, the court examined whether the reasons adduced to justify the interference were relevant and sufficient and whether the measure was proportionate to the legitimate aim pursued. The court held;

“... the protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.

Bearing in mind the above considerations and the margin of appreciation enjoyed by the State in this area, the Court will examine whether, in the light of the case as a whole, the reasons adduced to

¹⁰² Ibid., para 92-93.

¹⁰³ (1997) E.C.H.R. 49.

justify the interference were relevant and sufficient and whether the measure was proportionate to the legitimate aim pursued.”¹⁰⁴

Having regard to all relevant facts, the court found that the law provides the condition for imparting medical data required by the insurance office as the information was importance to consider whether the applicant entitled to receive the compensation under the Insurance Act. The insurance office was also under the duty to treat the data as confidential subject to similar rules and safeguards as the clinic. Therefore, the court finally ruled that there were relevant and sufficient reasons for the communication of the applicant’s medical records by the clinic to the insurance office. The measure was proportionate to the legitimate aim pursued and was accompanied by effective and adequate safeguards against abuse. Accordingly, there has been no violation of applicant’s right to respect private life as guaranteed by Art 8 of the Convention.¹⁰⁵

All in all it can be seen that the mentioned cases will be the useful guide for Thai court to apply in deciding whether or not medical confidentiality should be disclosed. It is clear that only revising the content of S.231 Criminal Procedure Code by adding the phrase “The court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the case, and also balance the interest between maintaining confidentiality and the interest of justice” may not enough to solve the problem immediately. It is also necessary to consider all relevant mentioned factors such as the principle of human rights, necessity, proportionality and safeguard against abuse. It is noted that the protection of right to privacy is clearly provided in Thai Constitution but it seems that Thai court rarely decides the case to give the effect of the right. Therefore, considering both English and Thai law concerning the issue of human right, it is necessary for Thai court to take into account to decide the case to give the effect of human right, as the

¹⁰⁴ Ibid., para 41.

¹⁰⁵ Ibid., para 43-44.

principle has been interpreted as one of the reasons lies in the protection of medical confidentiality.

Another issue in English law that need to be considered is the principle under Data Protection Act. The first data principle under the Data Protection Act requires that personal data must be processed “fairly and lawfully”. The term “lawfully” imports all relevant laws concerning the protection of confidentiality such as the common law duty and the HRA. Therefore, the disclosure of confidentiality that does not comply with the laws will be regarded as the information that has not been processed or disclosed lawfully. Although Thailand does not have Data Protection Act, the principle under the act could be very useful for Thailand to learn. For example, the state agencies that have the duty of information disclosure under OIA can learn that they should process, provide and disclose personal information by considering all the relevant laws concerning confidentiality such as the Constitution and criminal law. Although, at present, the OIA does not contain the same principle as English law, it is worth to explore the principle lies the Data Protection Act and find the possibility of revising the OIA in line with the principle.

Also, the court should apply the same principle in deciding whether or not medical confidentiality should be disclosed. This means in considering the case of confidentiality, the court should take into account of all relevant law concerning the protection of confidentiality such as the Constitution to give the effect of human right, criminal law, civil law and OIA.

7 Other issues that need to be considered for Thailand

In order to ensure that the court discretion will be exercised in accordance with international standard mentioned above, certain education is also needed to provide for the judges in order to gain more knowledge and

understanding about English laws and cases. In doing so, the judge should be sent aboard to study medical laws or short course training or seminar should be held and legal experts in the area of medical laws from UK. should be invited to give the knowledge of how the information disclosure is made under English law and what are the criteria that English courts apply in exercising their discretion. The knowledge will enable the judge to give clear legal reasoning in the judgement of disclosure of confidentiality.

However, the researcher suggests that the training course should not be limited to only the judges. To create a good understanding between the important stakeholders, both judges and physicians should be invited to join the training course. In order to receive the cooperation from both judges and physicians at the first stage, the amount of the participant can be limited to only the judges and physicians who are interested in the area of medical confidentiality, such as five-ten judges and physicians. It is hoped that the trained judges and physicians could work well together and expand their knowledge later as they would really understand legal reasoning behind the balancing exercise under English law. In general, it is very hard to get all judges agree with the new principles that we would like to introduce into the legal system as different judges hold different views of the protection of medical confidentiality and may want the law to provide the broad discretion to individual judge. Therefore, the new system should be started by the small group of judges and physicians and the trained judges and physicians could expand their knowledge to the others in the future and the standardization of the judgements concerning the disclosure of medical confidentiality would be existed.

Another suggestion is that Thai General Medical Council would be the organisation that can work together with the judiciary system as they have their own professional obligation that can be developed for providing the new law or guideline for considering the case. Therefore, consulting or meeting between General Medical Council and the court could enable the

judges to exercise the discretion properly and gain more knowledge about what would be considered as sensitive patient's information that need to be concerned of information disclosure.

Further, with regard to the possibility of appointing the physicians to the panel of judges or for consulting the case, the researcher would like to suggest that there are several physicians who hold the knowledge of both medical sciences and law. These physicians can be the key persons to start training and learning all the law reform process and expand their knowledge to the others, or become the panel of judges.

8 Conclusion

It can be concluded from the survey result that the public still lack of the knowledge of laws concerning medical confidentiality, particularly the protection of right to privacy under the Constitution and OIA. Therefore, more education should be provided to ensure that people will know their right under the laws and state agencies really understand about their task of information disclosure as well as the protection of right to privacy. Moreover, the court should interpret ordinary law, such as criminal law to give effect of Constitutional right to privacy, in order to ensure that Thai legal system protects medical confidentiality in accordance with international standard.

With regard to the judge discretion about the disclosure of medical confidentiality, the survey results reflect publics' concern of the discretion, therefore the criteria was requested to the limitation of such discretion. The interview of the judges' opinions also supported this view, as the judges really give different views about exercising the discretion of confidential disclosure.

The measures to support the judge in exercising the discretion selected by stakeholders are different. The most preferable measure among the public was measure B, where as the physicians would prefer to see more than one measure in

place to deal with the issue, and the most preferable are measure A and D. Seven judges selected measure A., and all judges strongly disagreed with measure D. Taking everything into account, the compromised solution would be the combination of measure A and B, as the measures were accepted by all stakeholders. The possibility of forming measure D would need more study in the future.

Although, firm conclusion may be drawn from the survey that the law need to be revised, it is still necessary for Thai judiciary system to consider other relevant factors lie in English laws which would be very useful to enable the judges to give clear legal reasoning in their judgement, such as necessity, proportionate and safeguards against abuse. Other factors like education and training course are also required to reach the goal.

Chapter 6 Conclusion

In England, the main discussion of the protection of medical confidentiality takes place in the context of the common law duty to respect confidences. And the reason behind the protection of medical confidentiality lies in the public interest in maintaining confidentiality. As the effect of the HRA 1998, the court needs to interpret the common law duty of confidentiality in the light of the Convention. And it was held that the common law cause of action should now be regarded as an extension of an individual's right to "private life" under Art.8. Moreover, the Data Protection Act 1998 also contains further safeguards for confidential medical information with regard to the specific situation of processing of such information. Art.1 of the Directive on which the Act based also states that the Directive seeks to protect the fundamental rights and freedoms of individuals, in particular the right to privacy. From this, it can be concluded that the HRA 1998 could bring the common law duty of confidence and the 1998 Act close together, as the laws the law need to be interpreted to give effect of the Conventional rights.

With regard to the disclosure of medical confidentiality in the court proceedings, English law does not provide privilege for the physician to refuse to give testimony. This means a physicians who is called upon to testify in the judicial proceedings has no right to refuse to give testimony. Although the duty to keep confidential medical information lies in the public interest, the interest of justice will always prevail at the end. In deciding whether or not medical confidentiality should be disclosed, the court will usually conduct balancing exercise to make the discretion whether or not to exclude medical evidence. Under current case-law the courts will exercise any discretion to exclude medical evidence where it is neither relevant nor material to the case. And where the medical evidence is necessary for the trail, the court will exercise the discretion in favour of disclosure which is mainly based on the consideration that the interests of justice override the interest in maintaining confidentiality. With regard to the anonymised information, the court recently held

that there is no obligation of confidence owed to such information. However, almost every premise in the reasoning given by the court is subject to challenge.¹

In Thailand, medical confidentiality is protected as part of the constitutional right to privacy. However, ordinary law, such as criminal law plays an important role in protecting medical confidentiality, as it provides the breach of duty to confidence constitutes criminal offence. From both legal systems, it seems that the scope of protection of medical confidentiality does not differ significantly, regardless of whether the protection awarded by the constitution, by criminal law or by private law. The existence of a fundamental right to privacy is also recognised in both legal systems. However, though Thai law recognises the protection of medical confidentiality as the constitutional right to privacy, Thai court still has less experience in dealing with the issue concerning medical confidentiality and privacy. Therefore, the study of English law and the court judgements, which have long experience towards the issue of the protection of medical confidentiality and privacy would be very useful for Thailand.

With regard to the issue concerning the disclosure of medical confidentiality in court proceedings, while English court has performed balancing exercise between the interest in maintaining confidentiality and the interest of justice, Thai law provide broad discretion for the judge in exercising the discretion whether or not medical confidentiality should be disclosed. No criteria or guideline have been placed by the law to support the judge in exercising the discretion whether or not medical information should be disclosed in judicial proceedings. Therefore, the judge discretion in disclosure of medical information may vary, as different judges hold different views towards the protection of medical confidentiality. And the study from the cases clearly shows that the discretions of the judges are really difference. Therefore, the balancing exercise conducted by English court is the measure that could be adapted as guideline for Thai court which has little experience in confidentiality to consider in exercising the discretion of confidential disclosure.

¹ See Beyleveld and Histed 2000.

The empirical study shows that the public and physicians satisfied with the protection of medical confidentiality under the laws, which are the constitution, civil law and criminal law. However, the public and physicians have different views about criminal law which provides that the breach of medical confidentiality constitutes criminal offence. The public agree and want more consequence to be placed on those who breach the duty of confidence where as physicians state that the breach of confidentiality should not constitute criminal offence, as compensation is already available in civil law. It is noted that in Thailand, although medical confidentiality is guaranteed as constitutional right, the protection of medical confidentiality via criminal law nevertheless plays an important role. The consequence under criminal law has attracted public attention, as the law may cause more direct effect toward people act rather than the general principle under the constitution. And the consequence under criminal law would be the efficient measures in prohibiting health care members to disclose patients' secret. However, the protection via criminal law may cause more burdens of proof on the plaintiff rather than private law. Therefore, the compensation available under civil law will be alternative way for seeking remedies. However, according to the survey results, nearly half of the public do not have the knowledge of their right in asking for compensation under tort law. Thus, it is necessary to build up public knowledge and awareness of their right in complaining the compensation from the health care members.

Another interesting issue from the survey results is public knowledge concerning Official Information Act 1997. It is noted that both physicians and public do not have much knowledge about the Act which contained the protection of personal data. Although the Act has been enforce for ten years, the principles under the Act still new to both the state agencies and public. Therefore Thai society needs to learn and practice more about the law. State officials have to learn and understand more of the substance and procedures of the law, so that they can know how to provide information services and disclose the information to meet public requests as well as how to provide appropriate security system for personal information. Also, more education should be provided to the public to ensure that the public recognise their own rights and know how their personal information would be well kept to prevent improper use.

With regard to the disclosure of medical confidentiality in judicial proceedings, the survey results show that 96.76 percent of the public and 90.98 percent of the physicians agreed that some criteria should be provided to support the judge to exercise the discretion. However, the judges gave different opinions in exercising the discretion whether or not medical confidentiality should be disclosed. Some said they would exercise the discretion by balancing the interest of maintaining medical confidentiality and interest of justice. Some would decide to disclose medical information only the information is relevant and material to the case. Some accepted that the judge's discretion may vary in exercising the discretion, as due to personal background and knowledge. However, most of the judges agreed that there should be the criteria for the judge to apply in exercising the discretion whether or not medical confidentiality should be disclosed.

The most preferable measure selected by the public is measure B; amend Criminal Code section 231 by adding the phrase "the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other". In contrast, the physicians chosen more than one measures to deal with the problem of confidential disclosure, which are measure A; amend criminal Procedure Code section 231 by adding the phrase "the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the issue of the case" and measure D; "appoint experts in the area of medical confidentiality such as physician to become panel of judges for considering the case" There were nearly half of the judges agreed with measure A, which is the most preferable measures selected by the public.

Therefore, it can be concluded that the public, physicians and judges had the same views that the judges' discretion may vary with regard to the disclosure of medical confidentiality in the court room. Therefore, s.231 Criminal Procedure should be revised to set up the criteria for the judge to apply in exercising the discretion. And measure A and B were found to be the most preferable measures among the interest parties. As measure A and B can be used to support each other, it would be possible that the law can be changed by considering these measures mix together, which should be "the court should direct the person to disclose confidential information

only in the circumstance that the information is relevant and material to the case, and also balance the interest between maintaining confidentiality and the interest of justice”.

Finally there were different views between physicians and judges of measure D; “appoint experts in the area of medical confidentiality such as physician to become panel of judges for considering the case”. While the physicians want this measure to be applied, all the judges strongly disagreed with it. The judges insisted that it would be more appropriate for career judge to consider the case independently without associate judge. The compromise solution suggested by some judges was to give the judge the training course organised by the expert in particular issue such as medical confidentiality. And in the long term, the judge should be sent to study abroad in the area of medical law.

All in all, the recommendations for this thesis could be found for short term and long term plan. For short term plan, s.231 Criminal Code should be revised by mixing measure A and B, which is; “the court should direct the person to disclose confidential information only in the circumstance that the information is relevant and material to the case, and also balance the interest between maintaining confidentiality and the interest of justice”. This measure would be the easiest measure that can be accepted by all interest parties.

Although, firm conclusion may be drawn from the survey that the law need to be revised, it is still necessary for Thai judiciary system to consider other relevant factors lie in English laws which would be very useful to enable the judges to give clear legal reasoning in their judgement, such as necessity, proportionate and safeguards against abuse.

For long term plan, there should be more study and discussion about the possibility of appointing the expert in the area of medical confidentiality to become associated judge, as this measure was selected most by the physicians together with measure A. But the judges strongly disagreed. This can be performed by organising workshop between the interest parties in order to gain more useful reasons and opinions that could help to develop more appropriate measure. Another important plan is that to

develop the judiciary system by organising the training course related to the issues of medical confidentiality. The judges should also be sent to study abroad in the area of medical law and foreign cases that can be apply in Thailand.

Appendix

**Questionnaires for public
(Translated Version)**

(For public)

Code.....

Questionnaire for Thesis
The protection and disclosure of medical confidentiality in the court proceedings in Thailand.

Introduction and purpose

My name is Boonyarat Chokebandanchai, Assistant Professor of Law, Naresuan University and have received a scholarship from Naresuan University to study Ph.D. at Department of Law, Durham University. My thesis topic is **The protection and disclosure of medical confidentiality in court proceedings in Thailand**. This questionnaire is part of my thesis. It aims to examine the public views towards the protection of confidential medical information, particularly, in the court proceedings in Thailand. I would like to encourage you to fill out this questionnaire. There are no right or wrong answers. You can answer the questionnaires freely. Your help is greatly appreciated. The questionnaire will take about 20-30 minutes to complete.

Procedure

You will be asked to fill out a questionnaire that asks for :

1. Demographic information (e.g. gender, age, etc.).
2. Your general knowledge towards the laws concerning medical confidentiality.
3. Your personal views towards the protection of medical confidentiality in the court proceedings.

Confidentiality

The questionnaire does not ask for your name. I wish to emphasise that all information given will remain confidential and used for the purpose of my research only.

Contact for questions.

If you have any additional questions about the questionnaire, you may contact Assistant Professor Boonyarat Chokebandanchai at ;
Faculty of Law, Naresuan University, Phitsanulok , 65000. Ph. 055-261000 ext.2150. Or by email at boonyartch@hotmail.com

Consent to participate

Your participation in this research is voluntary. By participating in the questionnaire, you are giving permission for the researcher to use your information for research purpose.

Thank you very much for your favour in advance.

Please tick the appropriate answer or write in space provided.

1. Are you male or female?
 - a. male
 - b. female

2. In which age group are you?
 - a. 20 or under
 - b. 21-25
 - c. 26-30
 - d. 31-35
 - e. 36-40
 - f. 41-45
 - g. 46-50
 - h. 51-55
 - i. 56-60
 - j. 60 plus

4. What is your qualification?
 - a. Bachelor degree
 - b. Master degree
 - c. Ph.D.
 - d. Other - please specify.....

5. Are you aware of the protection of medical information?
 - a. Yes
 - b. No
 - c. Other-please specify.....

6. Do you know that there are several laws such as Constitution, private law, criminal law and Official Information Act concerning the protection of medical confidentiality?
 - a. Yes
 - b. No
 - c. Other-please specify.....

7. Do you have the knowledge towards the following laws with regards to the protection of medical confidentiality?

| Laws | Know | Don't know | Not sure |
|--|------|------------|----------|
| S.35 Constitution (right to privacy) | | | |
| S.420 Civil and Commercial Code (right to ask for compensation) | | | |
| S.323 Criminal Code (criminal offence to the physician who disclose medical information) | | | |
| S.231 Criminal Procedure Code (medical privilege and the interest of justice) | | | |
| S.15 Official Information Act (the protection of personal data) | | | |

*** Please note that S.35 Constitution 2007 contains the same principles of “right to privacy” as S.34 Constitution 1997. Therefore, when mention S.35 Constitution 2007, you can answer from your knowledge of S.34 Constitution 1997.

Please read s.35 the Constitution, and answer question 8-

S.35; *A person’s family rights, dignity, reputation or the right of privacy shall be protected.*

The assertion or circulation of a statement or picture in any manner whatsoever to the public, which violates or affects a person’s family rights, dignity, reputation or the right of privacy, shall not be made except for the case which is beneficial to the public.

A person shall have the right to be accorded protection against undue exploitation of person data related to his or her individuality, as provided by law.

8. Do you understand this section when you read it?

- a. Yes b. No c. Other, please specify.....

9. Do you agree with this section?

- a. Yes b. No c. Other, please specify.....

Please read s.420 Civil and Commercial Code, and answer question 10-11.

S.420; *A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any rights of another person, is said to commit a wrongful act and is bound to make compensation therefore.*

- 10. Do you understand this section when you read it?
 - a. Yes
 - b. No
 - c. Other, please specify.....

- 11. Do you agree with this section?
 - a. Yes
 - b. No
 - c. Other, please specify.....

Please read s.15 Official Information Act, and answer question 12-13.

S.15; A State agency or State official may issue an order prohibiting the disclosure of official information falling under any of the following descriptions, having regard to the performance of duties of the State agency under the law, public interests and the interests of the private individuals concerned ;

.....

(5) a medical report or personal information the disclosure of which will unreasonably encroach upon the right of privacy.'

- 12. Do you understand this section when you read it?
 - a. Yes
 - b. No
 - c. Other, please specify.....

- 13. Do you agree with this section?
 - a. Yes
 - b. No
 - c. Other, please specify.....

Please read s.323 Criminal Code, and answer question 14-15.

S.323; Whoever knows or acquires a private secret of another person by reason of his functions as a competent official or his profession as a medical practitioner, pharmacist, druggist, midwife, nursing attendant, priest advocate, lawyer or auditor, or by reason of being as assistant in such profession, and then discloses such private secret in a manner likely to cause injury to and person, shall be punished with imprisonment not exceeding six months or fine not exceeding one thousand baht, or both.

A person undergoing training and instruction in the profession mentioned in the first paragraph has known or acquired the private secret of another person in the training and instruction in such profession, and discloses such private secret in a manner likely to cause injury to any person, shall be liable to the same punishment.

- 14. Do you understand this section when you read it?
 - a. Yes
 - b. No
 - c. Other, please specify.....

- 15. Do you agree with this section?
 - a. Yes
 - b. No
 - c. Other, please specify.....

Please read s. 231 Criminal Procedure Code and answer question 16-19

Section 231; *Where any party or person is to give or produce any kind of the following evidence:*

- (1) *any document or fact which is still an official secret :*
- (2) *any confidential document or fact which has been acquired by or make know to him by virtue of his profession or duty :*
- (3) *any process, design or other any process, design or other work protected from publicity by law;*

the said party or person is entitled to refuse to give or produce such evidence unless he has obtained the permission from the authority or the person concerned with such secret.

Where any party or person refuses to give or produce the evidence as aforesaid, the Court has the power to summon the authority with such secret to appear and give explanation in order that the Court may decide whether or not there is any ground to support such refusal. Where the court if of opinion that refusal is groundless, it shall order such party or person to give or produce such evidence.

16. Do you understand this section when you read it?

- a. Yes b. No c. Other, please specify.....

17. Do you agree with this section paragraph one?

- a. Yes b. No c. Other, please specify.....

18. Do you agree with this section paragraph two?

- a. Yes b. No c. Other, please specify.....

19. Do you think that some criteria should be set up for the judge to apply in exercising the discretion whether or not to direct a physician to disclose confidential medical information in the court proceedings?

- a. Yes b. No (go to question 13) c. Other, please specify.....

20. In your opinion, what would be an appropriate measure for the judge to apply in exercising the discretion whether or not to direct a physician to disclose confidential medical information in the court proceeding? (Can select more than one choice.)

a. Amend s.231 Criminal Procedure Code by adding the phrase that “*the court should direct the person to disclose confidential medical information only in the circumstance that the information is relevant and material for the investigation in court proceeding.*”

b. Amend s.231 Criminal Procedure Code by adding the phrase that “*the court should direct the person to disclose confidential information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other.*”

- c. Appoint committee to scrutinise whether or not the court should direct a person to disclose confidential information in the court proceedings.
- d. Appoint expertise in the area of medical confidentiality become panel of judges for considering the case concerning the protection of confidential information.
- e. Do not need to change anything.
- f. Other, please specify.....

21. Other comments.

.....
.....
.....
.....

Thank you very much for completing this questionnaire.

Please return it to.....
by.....

**Questionnaires for physicians
(Translated Version)**

(For physicians)

Code.....

Questionnaire for Thesis
The protection and disclosure of medical confidentiality in the court proceedings in Thailand.

Introduction and purpose

My name is Boonyarat Chokebandanchai, Assistant Professor of Law, Naresuan University and have received a scholarship from Naresuan University to study Ph.D. at Department of Law, Durham University. My thesis topic is **The protection and disclosure of medical confidentiality in court proceedings in Thailand.** This questionnaire is part of my thesis. It aims to examine the public views towards the protection of confidential medical information, particularly, in the court proceedings in Thailand. I would like to encourage you to fill out this questionnaire. There are no right or wrong answers. You can answer the questionnaire freely. Your help is greatly appreciated. The questionnaire will take about 20-30 minutes to complete.

Procedure

You will be asked to fill out a questionnaire that asks for :

1. Demographic information (e.g. gender, age, etc.).
2. Your general knowledge towards the laws concerning medical confidentiality.
3. Your personal views towards the protection of medical confidentiality in the court proceedings.

Confidentiality

The questionnaire does not ask for your name. I wish to emphasise that all information given will remain confidential and used for the purpose of my research only.

Contact for questions.

If you have any additional questions about the questionnaire, you may contact Assistant Professor Boonyarat Chokebandanchai at ;
Faculty of Law, Naresuan University, Phitsanulok , 65000. Ph. 055-261000 ext.2150. Or by email at boonyartch@hotmail.com

Consent to participate

Your participation in this research is voluntary. By participating in the questionnaire, you are giving permission for the researcher to use your information for research purpose.

Thank you very much for your favour in advance.

Please tick the appropriate answer or write in space provided.

1. Are you male or female?
 - a. male
 - b. female

2. In which age group are you?
 - a. 20 or under
 - b. 21-25
 - c. 26-30
 - d. 31-35
 - e. 36-40
 - f. 41-45
 - g. 46-50
 - h. 51-55
 - i. 56-60
 - j. 60 plus

3. Do you know that there are several laws such as Constitution, private law, criminal law and Official Information Act concerning the protection of medical confidentiality?
 - a. Yes
 - b. No
 - c. Other-please specify.....

4. Do you have the knowledge towards the following laws with regards to the protection of medical confidentiality?

| Laws | Know | Don't know | Not sure |
|--|-------------|-------------------|-----------------|
| S.35 Constitution (right to privacy) | | | |
| S.420 Civil and Commercial Code (right to ask for compensation) | | | |
| S.323 Criminal Code (criminal offence to the physician who disclose medical information) | | | |
| S.231 Criminal Procedure Code (medical privilege and the interest of justice) | | | |
| S.15 Official Information Act (the protection of personal data) | | | |

*** Please note that S.35 Constitution 2007 contains the same principles of “right to privacy” as S.34 Constitution 1997. Therefore, when mention S.35 Constitution 2007, you can answer from your knowledge of S.34 Constitution 1997.

Please read s.35 the Constitution, and answer question 5-6.

S.35; *A person’s family rights, dignity, reputation or the right of privacy shall be protected.*

The assertion or circulation of a statement or picture in any manner whatsoever to the public, which violates or affects a person’s family rights, dignity, reputation or the right of privacy, shall not be made except for the case which is beneficial to the public.

A person shall have the right to be accorded protection against undue exploitation of person data related to his or her individuality, as provided by law.’

- 5. Do you understand this section when you read it?
 - a. Yes
 - b. No
 - c. Other, please specify.....

- 6. Do you agree with this section?
 - a. Yes
 - b. No
 - c. Other, please specify.....

Please read s.420 Civil and Commercial Code, and answer question 7-8.

S.420; *A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any rights of another person, is said to commit a wrongful act and is bound to make compensation therefore.*

- 7. Do you understand this section when you read it?
 - a. Yes
 - b. No
 - c. Other, please specify.....

- 8. Do you agree with this section?
 - a. Yes
 - b. No
 - c. Other, please specify.....

Please read s.15 Official Information Act, and answer question 9-10.

S.15 *A State agency or State official may issue an order prohibiting the disclosure of official information falling under any of the following descriptions, having regard to the performance of duties of the State agency under the law, public interests and the interests of the private individuals concerned;*

.....
(5) a medical report or personal information the disclosure of which will unreasonably encroach upon the right of privacy.

- 9. Do you understand this section when you read it?
 - a. Yes
 - b. No
 - c. Other, please specify.....

- 10. Do you agree with this section?
 - a. Yes
 - b. No
 - c. Other, please specify.....

Please read s.323 of the Criminal Code, and answer question 11-12

S.323; *Whoever knows or acquires a private secret of another person by reason of his functions as a competent official or his profession as a medical practitioner, pharmacist, druggist, midwife, nursing attendant, priest advocate, lawyer or auditor, or by reason of being as assistant in such profession, and then discloses such private secret in a manner likely to cause injury to and person, shall be punished with imprisonment not exceeding six months or fine not exceeding one thousand baht, or both.*

A person undergoing training and instruction in the profession mentioned in the first paragraph has known or acquired the private secret of another person in the training and instruction in such profession, and discloses such private secret in a manner likely to cause injury to any person, shall be liable to the same punishment.

11. Do you understand this section when you read it?
 a. Yes b. No c. Other, please specify.....
12. Do you agree with this section?
 a. Yes b. No c. Other, please specify.....

Please read s. 231 of the Criminal Procedure Code, and answer question 13-16

S.231; *Where any party or person is to give or produce any kind of the following evidence :*

- (1) any document or fact which is still an official secret :*
- (2) any confidential document or fact which has been acquired by or make know to him by virtue of his profession or duty :*
- (3) any process, design or other any process, design or other work protected from publicity by law;*

the said party or person is entitled to refuse to give or produce such evidence unless he has obtained the permission from the authority or the person concerned with such secret.

Where any party or person refuses to give or produce the evidence as aforesaid, the Court has the power to summon the authority with such secret to appear and give explanation in order that the Court may decide whether or not there is any ground to support such refusal. Where the court if of opinion that refusal is groundless, it shall order such party or person to give or produce such evidence’.

13. Do you understand this section when you read it?
 a. Yes b. No c. Other, please specify.....
14. Do you agree with this section paragraph one?
 a. Yes b. No c. Other, please specify.....

15. Do you agree with this section paragraph two?
a. Yes b. No c. Other, please specify.....

16. Do you think that certain criteria should be set up for the judge to apply in exercising the discretion whether or not to direct a physician to disclose confidential medical information in the court proceedings?
a. Yes b. No c. Other, please specify.....

17. In your opinion, what would be an appropriate measure for the judge to apply in exercising the discretion whether or not to direct a physician to disclose confidential medical information in the court proceedings? (Can select more than one measure.)

a. Amend s.231 Criminal Procedure Code by adding the phrase that *“the court should direct the person to disclose confidential medical information only in the circumstance that the information is relevant and material for the investigation in court proceeding.”*

b. Amend s.231 Criminal Procedure Code by adding the phrase that *“the court should direct the person to disclose confidential medical information by balancing between the interest in maintaining confidentiality on the one hand and interest of justice in finding the truth on the other.”*

c. Appoint committee to scrutinise whether or not the court should direct a person to disclose confidential medical information in the court proceedings.

d. Appoint experts in the area of medical confidentiality such as physician to become panel of judges for considering the case concerning the protection of confidential information.

e. Do not need to change anything.

f. Other, please specify.....

18. Other comments.
.....
.....
.....

Thank you very much for completing this questionnaire.

Please return it to.....
by.....

Interview's Questions. (For judges)

In your opinion.....

1. In practice, according to s.231 Criminal Procedure Code, what are the criteria the judge has used to decide whether or not to direct the physician to disclose confidential medical information?
2. Do you think it is possible that the judges' discretion may vary with regard to the disclosure of medical confidentiality under s.231?
3. Do you think section 231 should be revised or some criteria should be provided for the judge to apply in exercising the discretion with regard to the disclosure of medical confidentiality?
4. According to the survey for public and physicians, some criteria that the researcher thought could be used to solve the problem under s.231 were provided for the public and physicians to select. In your opinion, what should be the appropriate measure for the judge to apply in exercising the discretion about the disclosure of medical confidentiality?
5. Do you have any other suggestions about the measures that should be put in place to ensure that confidential medical information would be protected properly in court proceeding?

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