

## 24 Release from Obligation to Secrecy

*What happens if the current consent form does not provide for an explicit release from the duty of confidentiality according to § 203 StGB?*

*Which test criteria can be used to determine algorithmically whether a release from the duty of confidentiality is required in a project?*

Data protection law and secrecy obligations are instruments to be applied in parallel which represent a kind of double wall of protection (the so-called two-barrier principle). In accordance with Section 1 para. 2 sentence 2 BDSG the secrecy obligations remain unaffected by the BDSG. For the purpose of clarification, an identical provision has also been included now for social data protection law in § 35 Para. 2a SGB I.

The data protection law regulates the processing of personal data comprehensively according to the broad term of the processing in article 4 No. 2 GDPR and gives the data subject far-reaching powers of disposal over the data concerning it. The obligation to secrecy however regulates only the unauthorised disclosure of information in which a person could have a secrecy interest. Doctors are bound to secrecy as a result of the exercise of their profession. One can therefore refer to it as professional secrecy. Professional secrecy is regulated by the professional code of conduct of the physicians of the chamber district applicable to the respective physician, which is modelled following the requirements of the model professional code of conduct of physicians (MBO-Ä).



On the other hand, there is a criminal law form of confidentiality for some professions, which also include physicians in Section 203 StGB.

One way in which a secret may nevertheless be disclosed is if the person concerned declares his or her approval and therefore abandons the special protection of confidentiality. It would be wrong to say that a release from confidentiality is absolutely identical to consent under data protection law.<sup>77</sup> However, consent under data protection law to the transmission of personal data can at the same time legitimise the disclosure of secrets that are subject to a duty of confidentiality. If the data subject consents to the use of personal data (concerning health) for the purpose of scientific research and understands that data will not only be processed by a treating physician but also transferred to other scientists or for example a TTP, no further release from medical secrecy is mandatory. However, in order to take into account the principle of transparency and to allow informed consent, it is recommended that a consent text should include an indication that the consent also includes a limited disclosure of secrets. It may be important to note that the recipient of the data may no longer be protected against seizure.

A release from confidentiality will always be necessary if data are to be collected by a doctor or a hospital or transmitted by this without only anonymous data being affected.

In special constellations, it may not be necessary to release a physician from his duty of confidentiality with regard to a TTP if research is as an exception part of the physician's professional activity. As a general rule, this could be assumed in university hospitals. Then TTP employees could be legally involved in the secret as so-called "other persons involved". According to Section 203 para. 3 S. 2 StGB, physicians may disclose foreign secrets to other persons who are involved in their professional or business activities to the extent that this is necessary for the use of the activities of the other persons involved; the same applies to other persons involved if they make use of other persons who are involved in the professional or business activities of the aforementioned persons.

The doctors must then have ensured that any other person involved who discloses without authorisation a secret which has come to his knowledge in the course of or on the occasion of his duties has been obliged to maintain secrecy. Otherwise they are liable to prosecution.

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<sup>77</sup> Nevertheless with a dissenting view: Bieresborn, *JM* 2019, 41 (42).