

Covert recording of medical consultations by patients: are doctors ‘protected’?

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Non-local patient surveys showed that the prevalence of covert audio recording of medical consultations was 15% in the UK¹ and 2.7% in the United States.² Clinicians in Hong Kong may have encountered patients or their relatives placing smartphones on the table with a ‘black screen’ during a consultation. Audio recording helps patients retain medical information, given that it is very common for patients to forget or misremember information immediately after the consultation.³ However, doctors may regard such behaviour as an impolite and disrespectful intrusion on privacy. This act may also cause discomfort and stress among doctors. Are doctors protected—and should they be protected—by law against covert recording?

Infringes privacy and can be prohibited?

Although it is a matter of courtesy and respect for patients to obtain a doctor’s consent before audio recording a medical consultation, doctors have no legal right to prohibit such actions.

The constitutional rights to privacy of all Hong Kong citizens are protected under Article 30 of the Basic Law⁴ and Article 14 of the Hong Kong Bill of Rights Ordinance.⁵ The Interception of Communications and Surveillance Ordinance⁶ regulates covert interception and recording by public officers. In other general situations, the Personal Data (Privacy) Ordinance⁷ (PDPO) governs the privacy of personal data. Its Data Protection Principles regulate the collection of personal data,⁷ for example:

1. *Personal data shall be collected for a lawful purpose directly related to a function or activity of the data user.*
2. *Personal data shall be collected by means which are lawful and fair in the circumstances of the case.*
3. *When a data user collects personal data from a data subject, all practicable steps shall be taken to ensure that he is informed on or before collecting the data...and the purpose for which the data is to be used...*

Three points deserve special attention. First, the content of an audio recording of a medical consultation satisfies the definition of ‘personal data’

under the PDPO (information related to a living individual; capable of identifying that individual; existing in a form in which access to or processing of the data is practicable).⁷ Second, these Data Protection Principles are merely ‘principles’ and, in general, do not prohibit covert audio recording.⁸ Third, based on these principles, any legal determination regarding a violation of the Data Protection Principles is a discretionary exercise and is highly dependent on the actual contexts.⁹ Although covert recording may be regarded as an apparently unfair collection of personal data, in certain situations the data collector may be exempted from the Data Protection Principles. For example: “*Personal data held by an individual and concerned only with the management of his personal, family or household affairs; or so held only for recreational purposes*” (PDPO Part 8 §52).⁷ A doctor may lodge complaints to the Privacy Commissioner for Personal Data against a patient for improper collection and/or use of personal data. Upon full investigation and with sufficient grounds, the Commissioner may, as a final step, issue an enforcement notice to the patient, the violation of which constitutes an offence punishable by imprisonment. Nevertheless, such legal actions are retrospective rather than preventive. Given that patients retain certain rights to collect and/or use personal data as permitted by the PDPO, doctors generally have no grounds to proactively prohibit patients from covert recording solely on the basis of personal privacy concerns.

In the UK, patients are not required to obtain consent from doctors to record a consultation because they are only processing their own personal information. Such acts are therefore exempt from data protection principles, as stated in Section 36 of the Data Protection Act.¹⁰ In *Mustard v Flower*,¹¹ a patient covertly recorded a medical consultation, which was later included as evidence in legal proceedings for an insurance claim. Although the court considered the act reprehensible, the judge determined that the recording of medical consultations was made in the course of a purely personal activity and therefore did not amount to unlawful processing of data. In Australia, the statutory requirement for consent in patient-led recordings varies among states; in general, no consent is required when a patient

makes a recording that is reasonably necessary for the protection of their ‘own lawful interests.’¹²

Admissible as evidence in legal proceedings?

In short—yes, no matter how despicable the means by which it was obtained.

Criminal courts may consider improperly obtained evidence, such as covert recordings, not inadmissible in court hearings. In *HKSAR v Li Mantak*,¹³ law enforcement authorities conducted covert audio and video surveillance on the defendant that was not in accordance with legal regulations and infringed upon the applicant’s right to freedom and privacy. However, the trial judge stated that “...evidence obtained in breach of the right of privacy is not inadmissible per se” and refused to exclude the covert recordings as evidence, deeming their admission not unfair in the circumstances of the case.¹³ Similarly, in *HKSAR v Chan Kau-tai*,¹⁴ the court stated that any breach of constitutional rights to privacy does not automatically result in the exclusion of evidence obtained as a consequence of that breach, and the court retains discretion to admit or exclude such evidence. The final appeal case *HKSAR v Muhammad Riaz Khan*¹⁵ summarised the principles under which evidence obtained in breach of a defendant’s constitutional rights may still be admitted if:

1. The evidence is conducive to a fair trial;
2. The evidence is reconcilable with the respect due to the rights concerned; or
3. The evidence appears unlikely to encourage any future breaches of those rights.

Civil courts have widely accepted covert audio recordings as admissible evidence. In the UK case of *Singh v Singh*,¹⁶ which involved shareholder disputes, secretly recorded conversations were submitted to the court in support of the plaintiff’s claim and were admitted as evidence. The judge stated “*there can be great value in what is said in such circumstances, where the parties plainly know the truth of the matters they are discussing and are talking (at least on one side) freely about them*”.¹⁶ In *Rudin-Brown’s* case in Canada,¹⁷ concerning guardianship and power of attorney, the judge considered that the defendant—who surreptitiously recorded conversations with his mother—had likely acted in violation of Canada’s Criminal Code, which prohibits the interception of private telephone conversations without consent. However, the judge held that the manner in which the evidence was obtained should not preclude its admissibility and further set out that the court has discretion according to¹⁷:

1. The probative value versus its prejudicial effect;
2. The efficiency with which the information can be presented; or

3. The reliability of the information as balanced against its level of persuasiveness.

In the recent defamation trial *Hoi Tin Tong Co Ltd v Choy Kwok-keung* in Hong Kong,¹⁸ a covertly recorded videotape showing the improper processing of moulded turtle jelly by the plaintiff was extensively discussed in civil court, with neither judicial criticism nor disputes over its admissibility. The videotape was admitted as an important piece of evidence supporting dismissal of the libel claim. In *Hui Chi-ming v Koon Wing-ye*,¹⁹ a covertly obtained audio recording was deemed to have high probative value and was admitted straightforwardly, with little dispute.

Whose rights prevail?

When carried out by individuals in private contexts, covert recording is not prohibited. Privacy matters, but it can be overridden by considerations deemed more compelling, such as the patient’s interest or the fairness of a trial. Although such methods of recording medical consultations may warrant censure, doctors must still exercise the utmost of their knowledge, experience, and professionalism, and should regard the patient’s interest as the highest priority.

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