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# ANALYSIS OF ECHR DECISIONS ABOUT THE LEGAL REGIME OF MEDICAL PRIVACY

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In the light of the process of European integration, which is also reflected in the sphere of health care, medical privacy concept occupies an important place. The article is devoted to the analysis of decisions of the European Court of Human Rights (ECHR) and international legal norms, which establish the legal regime of health secrecy, and considers cases of lawful disclosure of doctor-patient confidentiality under the current legislation. With the help of formal-logical, comparative-legal and systemic methods the provisions on the legal regime of health secrecy were analyzed according to the decisions of the ECHR. In the result there were made the conclusion that the right to information, which is a part of health secrecy, is a right to privacy. It was also concluded that the ECHR, on the one hand, supported a regime prohibiting the disclosure of health secrecy, and, on the other, developed criteria that should be met by laws providing for the lawful disclosure of health secrecy.

***Keywords:*** *health secrecy, privacy, lawful intervention, human rights, decision of the ECHR.*

## АНАЛИЗ РЕШЕНИЙ ЕСПЧ ОТНОСИТЕЛЬНО ПРАВОВОГО РЕЖИМА МЕДИЦИНСКОЙ ТАЙНЫ

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В свете процесса евроинтеграции, которая отразилась и на сфере здравоохранения, важное место занимает понятие медицинской тайны. Статья посвящена анализу решений Европейского суда по правам человека (ЕСПЧ) и международно-правовых норм, которыми закрепляется правовой режим медицинской тайны, рассматриваются случаи правомерного разглашения врачебной тайны по действующему законодательству. С помощью формально-логического, сравнительно-правового и системного методов был осуществлен анализ положений относительно правового режима медицинской тайны согласно решений ЕСПЧ. В результате проведенного иссле-

дования было выяснено, что право на информацию, которое входит в состав медицинской тайны, относится к праву на приватность. Также было установлено, что ЕСПЧ, с одной стороны, поддерживает режим запрета разглашения медицинской тайны, а с другой – разработал критерии, которым должны отвечать законы, которые предусматривают правомерное разглашение медицинской тайны.

***Ключевые слова:*** *медицинская тайна, приватность, правомерное вмешательство, права человека, решения ЕСПЧ.*

**ANALIZA DECIZIILOR CEDO PRIVIND REGIMUL JURIDIC AL SECRETELOR MEDICALE**

În lumina procesului de integrare europeană, care a afectat și sectorul sănătății, conceptul de secret medical ocupă un loc important. Articolul este dedicat analizei deciziilor Curții Europene a Drepturilor Omului (CEDO) și a normelor juridice internaționale care asigură regimul juridic al secretelor medicale, iar cazurile de divulgare legală a secretelor medicale în conformitate cu legislația actuală sunt luate în considerare. Cu ajutorul metodelor formal-logice, comparative-juridice și sistemice, a fost efectuată o analiză a dispozițiilor privind regimul juridic al secretelor medicale în conformitate cu deciziile CEDO. În urma studiului, s-a constatat că dreptul la informație, care face parte din secretul medical, se referă la dreptul la viață privată. S-a constatat, de asemenea, că CEDO, pe de o parte, susține interzicerea divulgării secretelor medicale și, pe de altă parte, a dezvoltat criterii care trebuie îndeplinite de legile care prevăd divulgarea legală a secretelor medicale.

***Cuvinte-cheie:*** *secrete medicale, intimitate, interferență legală, drepturile omului, decizii ale CEDO.*

**Introduction.** The European integration processes that are taking place today in Ukraine are reflected in various spheres of society life. One such area is privacy, that is the ability of a person or group of persons to separate both themselves and information about themselves and then to exercise their identity selectively at their own discretion. In practice, however, questions are often raised about the need to interfere with a person's privacy, in particular in the disclosure of health secrecy. The issue of health secrecy was considered by both foreign and domestic scientists, such as: S. Bartosh, N. Korobtsov, N.A. Korotka, A.I. Matsporin, A.P. Pechenyi, I.J. Senyuta, S. Stetsenko, I.V. Shatkovsky, L. Furrow, M. Stauche, etc. However, the questions of the legal regime of health secrecy remain unexplored and there is no common view on the criteria for the legality of cases of disclosure of health secrecy.

**The purpose** of this scientific article is to determine the legal regime of information constituting health secrecy and cases of its legitimate disclosure on the basis of a systematic analysis of the decisions of the ECHR and the norms of national legislation.

**Materials and methods.** The study of the legal regime of health secrecy was carried out on the basis of decisions of the ECHR, European Conventions and national legislation on this issue. The analysis of the provisions on the legal regime of health secrecy according to the decisions of the ECHR was carried out by means of formal-logical, comparative-legal and systemic methods.

**The main body.** The right to privacy and the basic principles of its protection are established by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950: "Everyone has the right to respect for his private and family life, his home and his correspondence. 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." [1, Art. 8].

The ECHR has developed a large number of rules establishing the fundamental right to privacy. Part of privacy in legal measurement is the right of the natural person for health secrecy, namely – the right to demand from the third parties nondisclosure of information, which is secret. In particular, in the case "Z. v. Finland", the ECHR indicated for the first time that... " The Court will take into account that the protection of personal data, not only health data, is essential for a person to exercise his or her right to respect for private and family life, as guaranteed by article 8 of the Convention (Art. 8). It is decisive not only to respect the patient's health secrecy, but also to ensure his confidence in the healthcare profession and health services in general" [2]. Thus, the ECHR adopted a position of protection of human rights on the secrecy of its state of health.

In accordance with Article 8 (1) of the EU Directive on Personal Data Protection [3, Art. 8] and Article 6 of the Convention on the Protection of Persons in Connection with Automated Processing of Personal Data [4, Art. 6], personal data concerning the state of health of a personal data subject are qualified as special, "sensitive" data. As a result, patient health data may be subject to a severe data processing regime than other, "insensitive" data. In "M.S. v. Sweden", the ECHR summarized that national legislation should provide appropriate safeguards to exclude any communication or disclosure of personal health data if this is not in line with the safeguards provided

by article 8 of the Convention [5].

The right to health secrecy is protected in every possible way at the national level. In particular, in the case "Avilkin and others v. Russian Federation", the ECHR once again stressed: "The protection of personal data, including health data, is fundamental to the enjoyment by a person of his or her right to respect for private and family life. It is a right guaranteed by article 8 of the Convention. Respect for the confidentiality of health information is a particularly important principle of the legal systems of all states parties to the Convention. The transmission of such information can seriously affect the private and family life of citizens, as well as their social situation and employment, as it makes them subject to abuse and possible persecution" [6].

Standards of the Point 4 of Part 2 of Article 65 of the Code of Criminal Procedure according to which health workers and other persons who in connection with performance of professional or official duties knew of a disease, health examination, survey and their results, intimate and family aspect of life of the person cannot be interrogated as witnesses act as guarantees of such protection in Ukraine. It is information constitutes doctor-patient confidentiality [7, Art. 65].

The current Code of Civil Procedure of Ukraine in the version of 2017 does not contain such a norm, made it possible to involve healthcare workers as witnesses. On this occasion, the ECHR believes that... "An order requiring the complainant's doctors to testify in court does not constitute a violation of the Convention." [2]. The European Court of Human Rights took a similar position in the case "Birjikovskiy v. Poland". Here, the court confirmed the legality of the actions of the District Court of Wrocław-Kzhiki, which released, at the request of the prosecutor, doctors who took part in childbirth from the obligation to observe professional secrets in order to obtain their testimony [8].

On the one hand, the ECHR recognizes that respect for the secrecy of health data is an essential principle of the legal systems of all parties to the Convention, since "without such protection, those in need of health care, may refrain from providing personal or intimate information necessary for proper treatment, and from seeking such assistance, thereby endangering their own health, and in the case of contagious diseases, the health of society". But, on the other hand, the ECHR "allows that the interests of the patient and the society as a whole in protecting the secrecy of health information can be inferior in importance to the interests... To ensure the transparency of proceedings if it is proved that such interests are more essential" [2]. Anyway "A critical criterion for the availability of information is the risk of adverse effects due to public access to it, especially when it comes to private space" [9].

Both European and national legislation are aware of cases of legitimate disclosure of information constituting doctor-patient confidentiality. In particular, they include the following: information constituting health secrecy may be disclosed (1) with the consent of the patient himself and (2) without the consent of the patient in cases expressly provided for by national law.

In Ukraine, the question of the legitimate disclosure of information constituting a health secrecy contained in such laws as "On Psychiatric Care" (Art. 6), "On Combating the Spread of Diseases caused by the Human Immunodeficiency Virus (HIV) and Legal and Social Protection of People living with HIV" (Art. 13), "On Preventing and Combating Domestic Violence" (Art. 12) etc.

The legislation of foreign states knows cases of lawful disclosure of health secrecy, which are not mentioned in domestic legislation. First, information constituting health secrecy can be disclosed for the purpose of preventing society from committing a crime. Such a case was analyzed by the High Court of Justice in Great Britain in Dablew v. Edgell (W v. Edgell). In the relevant case, a mentally ill patient was convicted of murder and grievous bodily harm. One condition of his early release was obtaining a psychiatrist's opinion that the patient was healthy and did not pose a danger to society. One condition of his early release was obtaining a psychiatrist's opinion that the patient was healthy and did not pose a danger to society. The prisoner's representatives requested Egell's doctor, but after a doctor's examination, it was concluded that the patient was ill and dangerous. Mr. Edgell asked lawyers to provide information on the conclusion drawn in the prisoner's case, but was refused. After that, the doctor sent a copy of his opinion to the director of the institution in which the patient was held and to the institution competent to decide on his early release. Representatives of the patient filed a claim for protection against disclosure of confidential information. The court ruled in favor of the doctor, finding that the doctor acted in accordance with the law and his actions were necessary in the interests of public safety and prevention of the crime [10].

Secondly, public persons may experience special interference with privacy, and information on their health may be disclosed. The issue of health disclosure of the health of a public person was analyzed in Campbell v. MGN Limited. Supermodel Naomi Campbell has repeatedly convinced society she has no drug addiction. One British publication informed its readers that the supermodel was being treated in a specialized facility for drug addicts,

about the details of such treatment, and published a photo of Naomi against the background of the establishment. In this regard, the supermodel appealed to the court for violation of her right to privacy. As a result of the court review, it was decided that information about the drug addiction of the supermodel and receipt of health care could be disclosed, as it herself misled society with its statements about a healthy lifestyle. At the same time, the publication of information about the institution in which Naomi received health care, the details of the treatment, as well as the placement of her photo against the background of a specialized institution for the treatment of drug addicts, is an improper interference with privacy [11].

It should be noted that the position of the British Court on this category of cases is ambiguous in the doctrine of law. Paragraph 7 of Resolution No. 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the Right to Privacy [12] states that public figures are persons holding public office and/or using public resources, as well as all those who play a role in public life or in politics, economy, art, social affairs, sports or any other sphere. Consequently, according to some scholars, public persons are entitled to a health secret like any other person. As I. Burmeister notes, public people usually reach certain "heights" in life due to their talent, mind, hard work and initiative, and therefore it seems unfair to limit their right to secrecy about the state of health [13, p. 19]. Others note, however, that the state of health of some public figures (for example, applicants for the post of Head of State) may affect the lives of a large number of persons, necessitates the disclosure of relevant information [14, p. 14]. After all, "public persons must realize that the special status they have in society automatically increases the level of pressure on the privacy of their lives" [12, p. 6].

The relevant question was also analyzed in Von Hannover v. Germany (No. 2), which was considered by the ECHR. In the circumstances of the case, the complainants, the eldest daughter of the Prince of Monaco, Rainier III and her husband, appealed to the European Court of Human Rights, believing that their right to respect for privacy had been violated by a number of publications. One of the publications that were the subject of the trial referred to the illness of Prince Rainier III of Monaco. The ECHR agreed with the arguments of the German Federal Court of Justice that the disease of the ruling monarch and the behavior of his family members during the illness is an event of common interest, and therefore the publication of such information is legitimate [15].

Third, it is possible to disclose doctor-patient confidentiality for the benefit of third parties, as described in Tarasoff v. Regents of University of California. The patient turned to a university psychologist and told the latter of his intention to kill his ex-girlfriend Tatiana after her return home from Brazil. The doctor informed the police of the relevant intentions. The police had a conversation with the guy and released him after promising not to kill the girl. A few months later, a guy came to his ex-girlfriend's house and killed her. Tatiana's parents filed a lawsuit with a doctor, the director of a health institution and a university. On the basis of the results of the investigation of the circumstances of the case, the court decided that when the danger posed to a third person by the patient became clear to the doctor; he was obliged to show reasonable care for such a person. A doctor may warn a third party or police of the danger or take other measures acceptable under the circumstances [16].

With regard to the last case of the ECHR in the already mentioned case "Avilkin and others v. Russian Federation", recalled that interference in privacy when... "The interest of the patient and society at large in protecting the confidentiality of health data may be outweighed by the interest in investigating and prosecuting crimes, as well as the transparency of the trial, if it is proven that these interests should be of more serious importance". Regarding the "M.S. v. Sweden" case, the ECHR noted: "... Bearing in mind the considerations set out and the discretion enjoyed by States in this area, the Court must examine, in the light of the whole case, the reasons given for the intervention were relevant and sufficient and measures proportional to the legitimate purpose".

In summary, the ECHR carefully studies cases of interference with the privacy of a person, especially when it comes to cases of disclosure of information constituting health secrecy. "Such interference may be justified only if the conditions of article 8, paragraph 2, of the Convention are met. In particular, if intervention is not to be contrary to article 8, it must be carried out "in accordance with the law", has a legitimate purpose, and be necessary in a democratic society to achieve that goal... The relevant activity is required to be based on national legislation; it also deals with the quality of the relevant legislation and requires that it be made available to the concerned person, who will also be able to predict its effects on himself. Moreover, this legislation should be consistent with the rule of law" [17].

In cases of unlawful collection and/or disclosure of information constituting doctor-patient confidentiality, the ECHR always refers to the interpretation of the phrase "by law" provided to them. Thus, in the case "L. H. v. Latvia", the ECHR indicated that... "The con-

tested criterion had some basis in national legislation that was compatible with the rule of law, which in turn meant that national legislation should contain precise language and allow adequate protection against arbitrariness. Accordingly, national legislation should determine with high accuracy the scope of rights granted to competent authorities and the manner in which they are applied" [6]. That is, it is the "quality of the law", which allows the collection, processing and dissemination of information constituting health secrecy. The European Court of Human Rights states that such a law should be seen to be accurate in regulating the conditions and procedure for storing and using relevant information, while it is important to have clear detailed rules relating to borders and the application of such measures, as well as to minimum guarantees [18].

An example of a "qualitative law" may be the provisions of Part 6 of Article 163 of the Code of Criminal Procedure of Ukraine, which establishes the basis for temporary access to health documentation. It should be a decision of an investigative judge (not law enforcement agencies) within the framework of a pre-trial investigation or a court decision within the framework of the relevant criminal case.

As we can see, when the ECHR examines the legality of interference by the authorities in human rights, it assesses in detail not only whether such interference was carried out in accordance with the law on quality and pursued its legitimate purpose, but also whether it was necessary in a democratic society and proportional.

National personal data laws establish a general rules for information that contains health secrecy: 1) personal data are processed for healthcare and preventive purposes, in order to establish a medical diagnosis, rendering health and health-social services; 2) processing of personal data is carried out by persons which are professionally engaged in healthcare activities and are obliged to keep health secrecy in accordance with the provisions of national legislation; 3) storage of information on the state of health of citizens should be in isolation in order to realize their right to health protection and health care.

In the context of the question under consideration, cases of disclosure of information constituting health secrecy against deceased patients deserve special attention.

In view of the fact that "personal information concerning the patient is undoubtedly related to his private life" [2] and guarantees of the protection of the honor and dignity of the deceased and good memory of him cannot be excluded from the sphere of general (public) interest in the State, where the person, her rights and freedoms are the highest value health secrecy are also intended to protect the information about the deceased.

It should be noted that in Ukraine the regime of confidentiality of information about a person is not preserved after his death and practical confirmation of the lifting of the legal ban on health secrecy is a certificate, which is issued after death. In relation to the deceased, a certificate of cause of death is issued stating the cause of death and the illness that led to it, which is directly related to the disclosure of health secrecy. This document is issued to the wife/husband, a close relative, other relatives or a legal representative of the deceased, and may also be issued to another person who has assumed the obligation to bury the deceased (this list is not established at the legislative). Thus, any natural person can practically become the recipient of the data which is health secrecy concerning the dead, and the law did not establish legal responsibility for its disclosure.

Healthcare documentation collected in accordance with the procedure established by law in the provision of health care, after the death of the patient, continues to be a medium of information. The health institution while maintaining the healthcare documentation, then acts as the owner of the information and can dispose of it.

The conclusions reached by the ECHR in "E. M. et al. v. Romania" were relevant. The Court, citing its own jurisprudence, explained that... "If the violation of the right to life or security of person is not committed intentionally, the positive obligation imposed by article 2 to establish an effective judicial system does not necessarily require the conditions of criminal protection in each case. In the specific area of medical negligence, obligations may, for example, also be remanded if the legal system provides victims with protection in a civil court, both independently and together with protection in a criminal court, making it possible to establish any liability on the part of doctors and obtain civil redress, such as a claim for compensation for damages and publication of the decision. Disciplinary sanctions may also be imposed" [19].

As stated above, the ECHR considers it in principle permissible to disclose information constituting doctor-patient confidentiality to third parties, provided that the reasons justifying such interference in privacy are convincing and sufficient and the measures taken are proportional to the legitimate purpose [2, 5].

**Conclusions.** Having analyzed the main legal positions of the ECHR and the norms of national legislation on the right to non-disclosure of information constituting health secrecy, we will draw conclusions.

First, information which is a part of health secrecy confidential with the strengthened protection mode

and the right on such information belong to the right for private life, fixed and guaranteed Article 8 of the Convention on protection of human rights and fundamental freedoms.

Secondly, the European Court of Human Rights, given the discretion of national legislation to regulate the legal regime of health secrecy, on the one hand supports the regime of prohibition of disclosure of health secrecy, and on the other hand, has developed criteria that must be met by laws providing for the lawful disclosure of health secrecy. Such laws must be of good quality, and interference with privacy (disclosure of information constituting health secrecy) must be in accordance with national law, have a legitimate purpose, and be necessary in a democratic society and proportional.

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