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A.S. Moldagaliyeva

Lectore, Chairs Custom, Finance and Ecology Law al-Farabi Kazakh National university, Kazakhstan, Almaty
e-mail: aijan86_86@mail.ru

To the issue of medical secrets In the Republic of Kazakhstan

The article analyzes the concept of confidentiality as part of privacy. It examines the issues of legal regulations to ensure patient confidentiality in the Republic of Kazakhstan, as well as reveals the problems of practical implementation.

Key words: health, personal life, patient confidentiality, access to information, privacy.

А.С. Молдағалиева

Қазақстан Республикасындағы дәрігерлік құпиясының сұрағы

Мақалада жеке өмір құпиясын құрайтын дәрігерлік құпия түсінігіне талдау жасалған. Қазақстан Республикасында дәрігерлік құпияны қамтамасыз етуді құқықтық реттеу және тәжірибеде жүзеге асырылу мәселелері қарастырылады.

Түйін сөздер: денсаулық сақтау, жеке өмір, дәрігерлік құпия, ақпаратқа қолжетімділік, құпиялылық.

А.С. Молдағалиева

К вопросу о врачебной тайне в Республике Казахстан

В статье проводится анализ понятия врачебной тайны как составляющей тайны частной жизни. Рассматриваются вопросы правового регулирования обеспечения врачебной тайны в Республике Казахстан, а также раскрываются проблемы практической реализации.

Ключевые слова: здравоохранение, частная жизнь, врачебная тайна, доступ к информации, конфиденциальность.

One of the types of information secrets and information prerogative of the personality in the information sphere is the right of private life's defense.

The constitutional fixing of the person and his rights of the supreme value dictates essentially another approach to determination his legal status. Sufficient freedom shall be provided to the person. For this purpose he should be protected from intervention of the state and from society intervention to his private life. One of the problems which arise is a problem of creation of legislative guarantees of information protect about person's private.

The private life – is a fundamental right of the personality recognized as national and international law, underlying in the theory of the natural rights of the person and the citizen. It underlies in the basic of human dignity and other human values, such as a freedom of assembly, liberty of conscience, a liberty

of choice of religious, political and different views, rights for defense of honor and advantage, family creation and so forth. During an era of general transparency and availability to information private life became one of the most significant human rights.

Art. 12 of the Universal Declaration of Human Rights establishes: “Nobody can be exposed to any intervention to his private or family life, to any infringement of immunity of his dwelling, correspondence secret or his honor and reputation. Each person has the right of the law protection against his intervention or against such encroachments”. The same regulations are consolidated by the International Covenant on Civil and Political Rights and the European Convention on human rights protection and fundamental freedoms.

Constitutions of the vast majority countries recognize and guarantee private human life. The con-

stitution of KAZSSR in 1978 fixed immunity of private life. Art. 33 of the Constitution of RK of 1993 proclaimed a line item of the new independent state, fixed that: "Private life of the citizen is inviolable. Intervention in private life of the citizen, and also infringement of his honor and advantage is forbidden. Collection, storage, use and distribution of information of personal nature without a citizen's consent are allowed only in cases and directly established by the law". The constitution of RK of 1995 expands a circle of guarantees concerning a considered complex of the rights, established that everyone has the right to immunity of private life, personal and family secret, protection of the honor and advantage, to secret of personal deposits and savings, correspondence, telephone negotiations, post, cable and other messages (the Art. 18 Constitutions of RK of 1995). These regulations are supported with action of special procedural rules. Immunity of private life is protected by the procedural legislation (the Art. of Art. 16, 235-237 of the Criminal Procedure Code of RK); the bases and an order of penetration into the dwelling for production of a search are stated in chapters 27 and 29 of the Criminal Procedure Code of RK, Art. 10 of Code of civil procedure, Art. 18 of the Code about administrative offences, Criminal Code Art. 142-145. Thereby, the Kazakhstan legislation in that field conforms to international standards of protection of the rights and freedoms of the person and the citizen.

In the theory of the right the various points of view concerning the concept "private life" are expressed. So, authors of the textbook "Human rights" understand the physical and spiritual sphere which is supervised by the individual as private life, i.e. understanding as it freedom from external impact. M.V Baglay opens this concept in details, considering that "it is the peculiar sovereignty of the personality designating immunity of his sphere of dwelling. It is presumed that the secret in this case at all doesn't cover any antisocial or unlawful activity. It reflects aspiration of each person to have own world of intimate and business interests hidden from others eyes" [162, page 181]. It means that the secret of private life is the opportunity given to the person to supervise information about the private life of intimate nature by himself.

There are various approaches to internal content of private life. So, V.G. Romanovsky allocates the following compound parties of private life:

- circle of informal communication, friends, acquaintances and so forth;
- forced communications, namely communication with a circle of people with which for certain reasons the citizen is forced to share the private information;
- actually an interior, its habits, personal experiences, house way, leisure, a hobby, sympathies, that is that emphasizes identity of the person. Disclosure of such data can cause in it a certain discomfort, complexes;
- family relations. For example, data on relationship degree, intimate relations, methods of education of children and so forth;
- religious beliefs or atheistic belief .

Krasavchikov L.O. gives other classification of manifestation of private life. Namely: intimate party, family party, improving party, leisure party, communication party, etc.

There is also other approach to classification of the data representing private life, namely:

- about the biography facts;
- about a state of health;
- about a property status of the person;
- about an occupation and perfect offenses;
- about views, estimates and belief;
- about the relations in a family or about the relations of the person with other people;
- about communications and addictions, the defects, the latent physical defects, etc.

There are various approaches in determination of a ratio of the concepts "private life" and "private life". Many scientists including what opinions were given, consider that content of these is identical to category. Whereas, in our opinion, it is necessary not to forget and about such concepts, as "family life" and "family secret", "patrimonial secret". What its place in this ratio? I.L. Petrukhin refers to secret of private life "all sphere of family life, related and friendly relations, house way, intimate and other personal relations, attachments, likes and dislikes", thereby also allocates concepts of private and family life. Anyway, the respect of private life is one of aspects of individual freedom and shall be guaranteed by the state all mechanism of its impact. That is, the right to family and personal secret is ranked as the non-physical rights, urged to protect and protect an interior, his peace of mind and protection of individual interests.

The personal secret is a component of private secret which, in turn, includes, in addition to personal secret also the family. RK Constitution adheres to

the same line item also. Its regulations share the concepts “personal secret” and “family secret”.

The personal secret concerns interests of a separate individual, irrespective of his relationship, a post, a profession and so forth. Personal secret of people protects itself including from the relatives, relatives, and this right shall be dear. Certainly, the person can have the private life hidden, including from his relatives, the relatives, that information with which he doesn't wish to share even with dearest, his secret addictions, desires, data and the facts about himself(himself). The citizen, having the personal secret, having the right of it will dispose. It is authorized to open it owing to friendly, related or other relations or not to devote in it anybody. Any information can be referred to such secret, at the discretion of the person, including data on its intimate relations, secret of political views and belief, secret of communication, secret of financial savings or financial problems (the credits and so forth) and so forth St. 144 Civil codes RK refer to secret of private life “including secrets of correspondence, telephone negotiations, diaries, notes, notes, intimate life, adoption, the birth, medical, lawyer secret, secret of bank deposits”

Immunity of private, from the point of view of administrative legal regulation, is one of types of legal regime, namely the secrets mode or, otherwise, a mode of confidential information.

In V. Dahl's dictionary “confidentiality” is determined as “frank, about the special power of attorney, not disclosed, heart-felt”, “secret” has similar concept, namely “who that doesn't know, for what the secret, all hidden, unknown, unknown” These concepts are similar on the value and in the most extended sense represent the certain circle of information protected from external intervention, disclosure and use against interests of the person or its relatives.

Fixing in the Constitution of the Republic of Kazakhstan of the right of immunity of private life, in its complete amount means that Kazakhstan follows the road, already well-known to many foreign countries where there is a branched system of the legislation directed on ensuring interests of the personality and her right actively to protect itself from illegal attempts to collect information, to store the file, i.e. to do the person by the potential victim (for example, prosecutions, blackmail) special state bodies, criminal groups, other citizens and their communities. Collection, storage, use and distribution

of information on private life of the person without its consent aren't allowed.

As the subject of protection the state, with all the regulatory and forced device, and also the person, as a rule, acts, whose rights and freedoms are acknowledged or are considered as it inviolable. Legal regulation, legal fixing of immunity allows to consider the double nature of this institute, namely its expression as “rights” and as “prohibition”. Any infringement of private life and the related information which the person refers to secret, to secrets or other private information, is punished by the law. Infringement of private life of the personality is understood as any “illegal collecting or distribution of data on private life of the person, being its personal or family secret, without its consent if these acts harmed the rights and legitimate interests of the victim”

The right of defense of data, on the one hand, assumes not only possibilities of the citizen, but also an obligation of relevant organs and persons. For example, there are secrets of post and cable messages, medical, adoption and some other acts of civil status, the will and other notarial actions, pretrial investigation and legal proceedings, judicial protection (lawyer secret), a confession, a trade secret. Everything who has to them the relation, are obliged not to disclose similar information. Certain persons and bodies have the right not to disclose data, not to give evidences, to hold closed meetings if it is connected with protection of interests of the personality (for example, restriction of publicity of legal proceeding; refusal of the investigating officer to report to the press the investigations of criminal case this about a course, a surname of suspects: refusal of the priest to give evidences on the circumstances which have become to it known on confession).

On the other hand, proceeding from immunity of the private life, each citizen can protect himself and address in the relevant instances with statements, claims. Informatization process also is under construction on the principles of immunity of private life of citizens, strict observance of constitutional laws and freedoms of citizens and safety of the personality, society and the state during the using of electronic information resources and application of information technologies. The citizen as the owner or the owner of electronic information resources, including the resources containing data, being data on his private life having the right freely to use and extend them taking into account restrictions, es-

tablished by laws of the Republic of Kazakhstan. Respectively, the Law RK “About Informatization” of January 11, 2007. also assigns an obligation to protect the private interests, personal and family secret on citizens any permitted and provided laws by methods. Forming, storage and use of electronic information resources of limited access, I governed protection and access to them are determined and provided with their owner or the owner in an order established by the legislation of the Republic of Kazakhstan.

Citizens and the officials who have caused damage to interests of the person, are attracted to disciplinary, administrative, criminal liability. The bodies determined in the law bear also a liability for the damage caused by their workers to citizens.

V. N. Lopatin allocates two main types of modes of the secrets underlying ensuring immunity of private human life [5]:

– mode of professional secrecy – if it is received by them only owing to execution of the professional obligations which haven’t been connected with the public or municipal service. Also it is necessary to refer secret of the lawyer, secret of the notary, a bank secrecy, secret of priests, medical secret to professional secrecy, etc.

– mode of official secret – if it is received by representatives of state bodies or local government bodies owing to execution of the service duties and in an order established by the law. The official secret is provided by such types, as secret of adoption (adoption), secret of the data which have become known to law enforcement officers in connection with execution by them of the service duties, including in a penal system.

However this line item is somewhat already obsolete. Today to speak about a net type of secrets rather difficult.

One of the directions of ensuring confidentiality of private life of the person is the medical secret which observance doctors swear the medical oath.

According to the Code of RK “About Health of the People and Health Care System” of September 18, 2009 the medical secret is understood “As information on the fact of the request for medical care, a state of health of the citizen, the diagnosis of its disease and other data received in case of its inspection and (or) treatment, are medical secret”. According to this Code disclosure of the data being medical secret, isn’t allowed by persons to which they became known during the training, execution of profession-

al, service and other duties. With the consent of the citizen or his legal representative transfer of the data being medical secret, to other citizens in interests of inspection and treatment of the patient, for carrying out scientific researches, use of these data in educational process and in other purposes is allowed.

The code establishes a certain circle of the bases of provision of the data being medical secret, without a consent of the citizen or his legal representative it is allowed in the following cases:

1) for the purpose of inspection and treatment of the citizen not capable because of the condition to express the will;

2) in case of threat of distribution of the diseases constituting danger to people around;

3) at the request of bodies of inquiry and pre-trial investigation, the prosecutor, the lawyer and (or) court in connection with carrying out investigation or legal proceeding;

4) when rendering medical care to the minor or incapacitated person for informing of his legal representatives;

5) in the presence of the bases to believe that harm to health of the citizen is done as a result of illegal acts.

Created in a result of reform in the health care sphere the single medical information system obliges all medical institutions to bring in an electronic database all data on all patients, on everyone their visits, a condition of their health and so forth. Such process aimed at the development of information and communication infrastructure of an industry of health care in a framework of “the electronic government”, providing physical persons and legal entities with medico-statistical information, and also provision of other electronic services.

This innovation has both positive, and negative sides. So, for example, in questions of determination of a technique of treatment, when carrying out office investigation of actions of medical staff, in cases of identification of the personality, in case of treatment of the patient, necessary data, and also any changes in a database “are highlighted” in a network. Thus, the legislator accurately establishes that the electronic information resources of health care containing personal data about physical persons (patients), belong to category of confidential electronic information resources, obtaining, handling and which use are limited to the purposes for which they gather (Art. 28 of the Code of RK). Medical institutions are obliged to provide updating

of necessary data and safety of this information.

At the same time, the new question – ensuring protection of this information network from unauthorized access is put. The legislator establishes that owners or the owners of the information systems who have received electronic information resources, containing personal medical data, are obliged to take measures for their protection against disclosure, thus, such obligation arises from the moment of receipt of the electronic information resources containing personal medical data, and before their destruction or a depersonalization or before receipt of a consent to their disclosure from the face to which these data concern.

At the same time, the question of practical implementation of confidentiality is problematic because this system has a huge “exits” and “entrances” in spite of the fact that connection of the automated databases having personified nature, to the networks connecting them with other databases, without the permission of patients isn’t allowed when using information of the personified nature concerning them to private life.

In most cases, the reason of information leakage is the negligence of medical staff, and also simple computer illiteracy. Thus, there are databases of patients, including former patients with socially dangerous diseases disclosure of information about which can do essential harm to career and private life of the person, for example a database about patients with tuberculosis, AIDS, venereal diseases, mentally and sincerely sick, sick with alcoholism, drug addiction and toxicomania and so forth.

Thus it is necessary to pay attention that the Criminal Code of the Republic of Kazakhstan to Art. 144. Disclosure of medical secret refers only disclosure by the medical worker without professional or office need of data on a disease or results of physical examination of the patient, expressed in the message of data on availability at the person HIV/AIDS (Criminal Code of the Republic of Kazakhstan Art. 144) whereas distribution of other information on patients with other types of diseases aren’t punishable. That also not for benefit of ensuring medical secret which is provided, by and large, with regulations of office and professional ethics, instead of a law letter.

Ministry of Health of RK approved special “Rules of provision of information about the patient” of September 24, 2012 No. 15-5/6177/I), at the same time, this state body doesn’t assume an obligation of control of safety and updating of medical information, transferring weight of obligations to owners or owners of information systems whereas the public medical institutions (hospitals and polyclinics) those aren’t. Thus the informatization Ministry also not fully can supervise safety of bases of such data as they fall under the principle of jurisdiction.

Respectively, transition of society to new level of information exchange, universal implementation of computer technologies, development of corporate information systems, demand new approach to development of legal and technological guarantees of information security, including being medical secret, from unauthorized access.