

Healthcare & Life Sciences - Austria

Patient data for sale: did physicians break the law?

Contributed by [Preslmayr Attorneys at Law](#)

November 20 2013

[Introduction](#)
[Legal framework](#)
[Comment](#)

Introduction

Two months ago, the Austrian media revealed that physicians in private practice, pharmacists and hospitals were providing IMS Health with patients' medication data. Such data included not only the prescription and the age and gender of the patient, but also a patient number, the diagnosis, the therapy, the laboratory findings and the social insurance institution to which the patient belonged. IMS Health was also provided with information on the drug dosage, referrals to specialists, methods of therapy, therapy changes and discontinuations of therapy with specific substantiation. This data was provided on a quarterly basis. To obtain this information, IMS Health allegedly paid €360 a year to physicians in private practice and €1,700 a year to hospitals, plus value added tax.

The revelation caused an outcry among politicians, social insurance institutions and the Medical Chamber. The chamber threatened its member physicians with disciplinary penalties, the Department for the Public Prosecution of Corruption Charges commenced investigations and privacy groups requested action.

Legal framework

Privacy law

The data provided to IMS Health by physicians, pharmacists and hospitals also included a patient number attributed to each patient by the data provider. Because of this patient number (which does not match a person's official social security number), the data provided is attributable to a specific individual (even though such person's identity is unknown to the data recipient). The data is therefore not anonymised, but only pseudonymised. Such pseudonymised data is indirectly person related in the sense of Austrian privacy law, provided that the recipient cannot identify the person concerned in the data by legal means. According to Section 9(2) of the Privacy Act, the use and transmission of pseudonymised sensitive data does not infringe the affected person's right to privacy. Furthermore, under Section 12(3)(2) of the act, such pseudonymised data may also be transferred to recipients abroad without prior approval by the Data Protection Commission.

Provided that IMS Health cannot decipher the patient number, transmission of the requested data would not infringe privacy law. However, questions still arise as to whether the collected data can be considered sufficiently pseudonymised where a long-range patient history has been recorded by an identified physician, hospital or pharmacist, in particular with regard to orphan diseases. In such case the patient could become identifiable and the data would no longer be considered pseudonymised.

Corruption and bribery

According to Section 304 of the Penal Code, public officers and arbitrators commit corruption if they request a benefit for the performance or omission of legal duties in breach of their duties. However, physicians and pharmacists are neither public officers nor arbitrators. Furthermore, under Section 309 of the code, private employees and agents of a business commit bribery if they request, in the course of business, a benefit for the performance or omission of an act in breach of their duties. Physicians in private practice are not employees of social security institutions. However, physicians and pharmacists are commissioned by social security institutions to render services to patients or to provide patients with medicines. Therefore, they can be considered as agents.

The provision of data to IMS Health in return for compensation constitutes the

Author

Rainer Herzig



performance of an act, but it is not an activity on behalf of social security institutions. The provision of pseudonymised health data is therefore not in breach of the contractual duty in respect to social security. The obligation of confidentiality under Section 54(1) of the Act on Physicians applies only in respect of patients.⁽¹⁾ In turn, patients are not a business (even if they pay for medical treatment privately). Therefore, the provision of pseudonymised data by physicians in private practice to IMS Health does not infringe Section 309 of the code either.

The situation differs with regard to physicians employed by a hospital. An employed physician could infringe Section 309 of the code if he or she provided data without the hospital's consent. However, as far as is publicly known, the hospitals provided the data on their own.

Physicians' disciplinary statute

According to Section 54(1) of the Act on Physicians, a physician and his or her ancillary staff are obliged to keep all secrets entrusted or made available to them in the performance of their profession. Infringements of this secrecy obligation are subject to an administrative fine. Furthermore, according to Section 136 of the act, physicians are guilty of a breach of discipline if they compromise the reputation of the medical profession or infringe their professional duties.

The question therefore arises as to whether the transmission of health-related data in pseudonymised form infringes the secrecy obligation. In the absence of court decisions and doctrine, this question might be answered by interpretation of the exception to the secrecy obligation under Section 54 of the act in respect of billing. This provision provides that physicians may use electronic data processing procedures for billing, but any storage of data must be effected in such a way that the relevant person cannot be identified or made identifiable. Such anonymised data may be transferred by the physician to the Medical Chamber only with the consent of the social security institutions. If the legislature considers it necessary expressly to exempt such data transfer from the general secrecy obligation, the transfer of even pseudonymised data without the patient's consent must be considered as a breach of the secrecy obligation.

Comment

Provided that IMS Health cannot identify the patients from the data provided by legal means, the transfer of such data will not infringe Austrian privacy law. However, it is uncertain whether the pseudonymisation of the data provided is sufficient, in particular with regard to orphan diseases. If it is insufficient, the data transfer will be deemed to have infringed the law. The data transfer does not infringe the corruption and bribery provisions of the Penal Code. However, physicians may infringe their secrecy obligation by such transfer if they provide IMS Health with pseudonymised patient data without the prior consent of their patients.

For further information on this topic please contact [Rainer Herzig](#) at Preslmayr Attorneys at Law by telephone (+43 1 533 16 95), fax (+43 1 535 56 86) or email (herzig@preslmayr.at). The Preslmayr Attorneys at Law website can be accessed at www.preslmayr.at.

Endnotes

(1) See also Seyfried/Zierl, "Ärzte nicht wegen Korruption strafbar", Die Presse 2013/35/03.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners

