

## Perspective

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## Privacy of Personal Health Information(eHealth) and Covid-19 Pandemic: The Sri Lankan Experience

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**Abstract**

Privacy in relation to personal information is one of the most important facets of the concept of personal privacy as it demands that information that relates to a particular person shall remain private and secured. Covid-19 is a pandemic which affected the lives of almost all people in every corner of the world. The pandemic brought new challenges to governments, health authorities, and other private and public institutions so these authorities were compelled to introduce a number of control and preventive measures, in order to curtail the devastating impacts of the virus on public health. These measures include many preventive and control measures which have an invasive impact on the personal right to privacy. Sri Lanka also was also affected by the Covid-19 pandemic and the Sri Lankan Government imposed certain restrictions and control measures. However, the problem of whether the privacy of personal information was respected during in the context of Covid-19 is a question mark in the Sri Lankan context as there were a number of incidents where the privacy of personal information was risked. Sri Lanka does not have Constitutional protection for the Right to Privacy as a Fundamental Right under the Constitution of Sri Lanka or any Legislation on the Protection of Personal Information. In this context, this Article examines whether Sri Lanka has adequately responded to the need to assure the privacy of persons in collecting, accessing, sharing, and disclosing personal information in the context of the Covid-19 pandemic.

**Keywords:** *privacy, personal health information, public health, e-health*

**INTRODUCTION**

Privacy is a concept that is felt on a personal basis and hence has been difficult to define.<sup>1</sup> Warren and Brandeis have broadly defined privacy as 'the right to be left alone'.<sup>2</sup>

It can be identified as an interest of the human personality that protects the inviolate personality, the individual's independence, dignity, and integrity.<sup>3</sup>



In broad terms, solitude, anonymity, secrecy, and seclusion have been identified as the key components embedded in the concept of privacy.<sup>4</sup> The concept of privacy entails information privacy, bodily privacy, the privacy of communications, and territorial privacy.<sup>5</sup>

Diggelmann and Cleis point out that '[t]he right to privacy became an international human right before it was a nationally well-established fundamental right.<sup>6</sup> Privacy has been guaranteed as a human right in many international legal instruments, starting from Article 12 of the Universal Declaration of Human Rights which states 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation', every other major international human right legal instrument emphasizes privacy as a basic human right.<sup>7</sup>

Privacy in relation to personal information is one of the most important facets of the concept of personal privacy as it encompasses 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'.<sup>8</sup> Information privacy demands that an individual should be asserted that their personal information shall remain private and secured.<sup>9</sup> Accordingly, the privacy of personal information can be viewed as an aspect of the self-autonomy of a person.

The Coronavirus disease (COVID-19) is an infectious disease caused by a newly discovered coronavirus.<sup>10</sup> Covid-19 is a pandemic which affected the lives of almost all people in every corner of the world. The pandemic brought new challenges to governments, health authorities, and other private and public institutions so these authorities were compelled to introduce a number of control and preventive measures, in order to curtail the devastating impacts of the virus on public health.<sup>11</sup> These measures include many preventive and control measures which have an invasive impact on the personal right to privacy.<sup>12</sup> These health control measures require every institution to conduct temperature checks and collect personal information of persons visiting such places including names, telephone numbers, ID numbers, and addresses. Employers may be required to keep records of the status of

vaccination against Covid-19 of the employees, history of Covid-19 treatments, and details in relation to quarantine situations.

Governments use various contact-tracing apps which collect a rapid amount of personal information in relation to the infected individuals and their contacts, for the purpose of rapid identification of infected cases in order to mitigate the harmful effect of the disease.<sup>13</sup> These contact tracing apps require the devices to collect vast amounts of identifiable information about persons creating various privacy issues, as due to the lack of transparency such apps can easily become surveillance systems if designed and implemented without proper care.<sup>14</sup> Further, Governments are compelled to collect and share a vast amount of personally identifiable information including very sensitive personal health information for public health purposes and research purposes.<sup>15</sup> In these circumstances, the privacy of personal information is critical situation in the context of the Covid-19 pandemic.<sup>16</sup>

### **THE IMPORTANCE OF PROTECTING THE PRIVACY OF PERSONAL INFORMATION DURING THE COVID-19 PANDEMIC**

The disease COVID-19 involves a social stigma that has led to discriminatory behaviours against infected persons where they are labeled, stereotyped, treated separately, or experience loss of dignity due to the disclosure of their link with the disease.<sup>17</sup> This would result in people concealing the illness to avoid discrimination and social stigma and abstaining from seeking preventive care which may lead to devastating conditions aggravating the pandemic conditions.<sup>18</sup>

Further, if people are in a dilemma about assurance of their privacy, they might be reluctant to participate in health research or surveys which in turn will badly affect the new drug and treatment invention, identifying disease types and patterns, reactions as well as the decisions to be made by the health authorities in order to control the pandemic situation. Therefore, it is important to protect the privacy of the personal information of persons infected to the greatest possible extent even during a pandemic situation.

## **CAN PRIVACY BE AN ABSOLUTE RIGHT DURING A PANDEMIC SITUATION?**

Covid-19 has become 'a threat for every country, rich and poor' as it was introduced by the Director General of the World Health Organization and the pandemic is an exceptional circumstance which led countries worldwide to declare states of emergency.<sup>19</sup> In such a context, privacy cannot be viewed as an absolute right and should be exercised subject to certain limitations.<sup>20</sup> Extreme and full control over privacy of personal information cannot be exercised as in certain conditions such information needs to be shared for the benefit of the individual himself as well as for the public benefit at large.<sup>21</sup> This can be justified using the restricted access theory of privacy which suggests that individuals can be said to have a reasonable expectation of privacy so long as personal information about them is limited or restricted depending on each context.<sup>22</sup> According to Allen<sup>23</sup> and Gavison<sup>24</sup>, the restricted access theory of privacy states that privacy consists of the condition of having access to information about oneself limited or restricted in certain contexts. This theory seems to avoid privacy being confused with autonomy, as well as with liberty and solitude.

Accordingly, personal health information needs to be accessed and shared in cases of emergency, national interests, in the interests of national security, and public safety or 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 and for the protection of public health during pandemic situations.<sup>25</sup>

McClanahan state that 'one of the most fundamental purposes of the law is to seek a fair compromise between oppositional positions or values. Similarly, the concept of equilibrium as a goal pervades the discourse on the privacy of personal information, in which most policymakers, and scholars recognize the existence of a tradeoff of values between access to information and the protection of an individual's privacy.'<sup>26</sup>

Therefore, it is a question of where to draw the line between personal privacy and public health. To what degree when it comes to balancing measures that could help track and contain the virus and

safeguard the privacy of individuals, where is the line?

The need to exercise the right to privacy in a manner that balances with the interest of the public benefit has been highlighted in the major international instrument which recognizes the right to privacy. Article 29 of the Universal Declaration of Human Rights states in 1948 that in the exercise of the rights specified in the Declaration, 'everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.<sup>27</sup> Further, the International Covenant on Civil and Political Rights 1966 in Article 4 reiterates that state parties may take appropriate measures derogating from their obligations under the Covenant, in times of public emergency that threatens the life of the nation and the existence of which is officially proclaimed.<sup>28</sup>

## **ACCESSING EHEALTH INFORMATION FOR PUBLIC HEALTH PURPOSES**

The World Health Organization defines 'public health' as 'the art and science of preventing disease, prolonging life and promoting health through the organized efforts of society'.<sup>29</sup> Easy and fast eHealth information can be utilized to track down diseases and injuries a particular population has and to plan targeted preventive programmes which can reduce the threat to public health effectively.<sup>30</sup> Such planned preventive programmes contain a long-term effect on individual health which is more cost-effective than utilizing resources of a country to enhance personal medical services.<sup>31</sup> The state may be compelled to require persons entering a country to undergo mandatory health screening at airports to prevent such diseases from entering the country, though it might violate the privacy of such persons.<sup>32</sup> Additionally, health statistics are vital for the purpose of policy planning in relation to the healthcare sector. Accordingly, the state needs to access health-related information of patients for statistical purposes.<sup>33</sup>

Accordingly, States may be compelled to access personal health information without the consent of the patients by the state or the government

during a pandemic situation such as the Covid-19 pandemic in order to curtail and control such diseases and to organize quarantine arrangements.<sup>34</sup> As Gostin points out that privacy laws will be impractical and redundant if the policymakers fail to identify the weight to be given to the need to access personal information to a permitted degree in order to improve public health and safety purposes.<sup>35</sup> The reason is that as same as individuals have concerns about their personal autonomy and privacy, they also have an inherent willingness to live healthily within society. Accordingly, individual privacy can be compromised for communal benefit in which the same individuals are also members.

Furthermore, the right to health is an internationally accepted basic human right. International Covenant on Social, Economic and Cultural Rights 1966 declares that every person has a right to the enjoyment of the highest attainable standard of physical and mental health and that such right includes the prevention, treatment, and control of epidemic, endemic, occupational and other diseases. Accordingly, access to personal information restricting the right to privacy of persons can be permitted in order to uphold the right to health of persons in a pandemic situation.<sup>36</sup>

In addition, people's right to access information is of vital importance in during pandemic outbreaks in order to control the disease and raise public awareness. The right to information is a well-recognized human right in a number of international human rights instruments.<sup>37</sup> Therefore a fair balance should be maintained between the privacy of personal information and the right of the persons to receive information during a serious pandemic outbreak like Covid 19.<sup>38</sup>

### **SRI LANKAN EXPERIENCE**

A 14-year-old girl presented with excessive worry Sri Lanka also was also affected by the Covid-19 pandemic and the Sri Lankan Government imposed certain restrictions and control measures including imposing a quarantine curfew to restrict the movement of persons, introducing requirements to collect information about persons

visiting public institutions and places, and contact tracing to prevent widespread community transmission of the disease. Sri Lanka initiated time and commendable control and preventive measures with the participation of health workers, armed forces, and many other stakeholders, and an immense role was played by the media in order to raise public awareness and to transmit accurate information in relation to the pandemic.<sup>39</sup>

However, the problem of whether the privacy of personal information was respected during the context of Covid-19 is a question mark in the Sri Lankan context as there was a number of incidents where the privacy of personal information was risked. Certain media publicized identifiable personal information about Covid-19 infected persons and the scene of tracing the Covid-19 infected persons by the health officials and imposing quarantine measures on such persons was filmed and telecasted.<sup>40</sup> The Identity of such persons were blatantly disclosed in these media coverages and the details of their family members were disclosed and their homes and living conditions were filmed and telecasted. Further, the ethnicity of the infected persons and persons who died from the disease was disclosed creating stigmatization and discrimination.<sup>41</sup> In this context a request was made by the Ministry of Defence from the 'print and electronic media to respect the privacy of coronavirus infected patients and refrain from shooting their places of living and the scenes when the health authorities check their houses."<sup>42</sup> Additionally, almost all the places that the public is visited collect a large amount of personally identifiable information on a daily basis in order to facilitate the contact tracing of covid infected persons. However, the manner in which such information needs to be protected and shared is not regularized.

In order to ensure the privacy of personal health information in the context of Covid 19 outbreak, Sri Lanka does not have a Constitutional Protection for the Right to Privacy as a Fundamental Right under the Constitution of Sri Lanka or any Legislation on the Protection of Personal Information. Sri Lanka does not have a data protection law or any other legislation which has specific reference to the right to privacy at present though an initiative was taken by the Government of Sri Lanka to introduce a draft Data Protection Bill

which has not yet become an Act passed by Parliament.<sup>43</sup>

However, some protection can be traced through the common law action of *actio injuriarum* where the invasion of privacy is considered as an aspect of impairment of *dignitatis*.<sup>44</sup> Further Privacy as an individual's right has been considered and recognized directly and indirectly before the courts of Sri Lanka in a few Sri Lankan cases in different contexts such as servitudes, criminal trespass, divorce, and defamation in relation to an unlawful arrest.<sup>45</sup> Some protection also can be traced through the law of contract but there need to be express contract terms on protecting the privacy of personal information between the parties unless it is difficult to enforce such a contract.<sup>46</sup> The Computer Crime Act, No. 24 of 2007 under section 3 makes it an offence to gain access to any computer or any information held in any computer by a person knowing or having reason to believe that he has no lawful authority to secure such access.<sup>47</sup> However, the Act focus of the Act is to impose penal sanctions following an unauthorized access or disclosure of information contained in the electronic record stored in a computer but protection of the privacy of personal information extends beyond penalizing and needs to cover the processing of personal information through legal means in a manner that ensures personal privacy. The Right to Information Act is a piece of Sri Lankan legislation that has the reference privacy of individuals specifically where it states access to information can be permitted to the extent that the disclosure of such information would cause an unwarranted invasion of the privacy of the individual unless the larger public interest justifies.<sup>48</sup>

## CONCLUSION AND RECOMMENDATIONS

In light of the discussion in here it is evident that ensuring the privacy of personal information is an important aspect during a pandemic situation like Covid-19 as it would promote the general public to come forward and disclose information relating to the disease to facilitate contact tracing. It would also encourage persons to seek medical treatment and vaccination in time and to participate in public health research activities especially statistical to identify the patterns of the disease spread, the

areas in which movements need to be restricted, and for statistical purposes. This is evident from the formal statement made by the European Data Protection Board (EDPB) on March 16<sup>th</sup> which states that in the context of the COVID-19 outbreak, the concept of data protection does not form a barrier to public health.<sup>49</sup> It further states that the rules and regulations in relation to the Protection of personal data including the privacy of such data should not hinder measures taken in the fight against the coronavirus pandemic.<sup>50</sup> However, most importantly the EDPB emphasizes that even in these exceptional times, the data controller and processor must ensure the protection of the personal data of the data subjects. Therefore, a number of considerations should be considered to guarantee the lawful processing of personal data and in all cases, it should be recalled that any measure taken in this context must respect the general principles of law and must not be irreversible.

Thus, in the absence of a proper legal framework to protect the privacy of personal information or any specific rule or guideline issued in relation to the collection, accessing, and handling of personal information during the Covid-19 pandemic, it is important to issue guidelines on collecting, accessing and handling personal information for the purpose of controlling and preventing Covid-19 pandemic. It should be specific that the collection of information must be relevant for the purpose of controlling the pandemic and shall not be misused or permitted for unauthorized access. The guidelines should specify what kind of information can be collected. Such information needs to be adequate, relevant, and not excessive for the purpose of collection. Personal information so collected should not be kept for longer than is necessary for the purpose which it is collected. The information collection institutions must be required to ensure appropriate technical and institutional safeguards are maintained in respect of such information.

However, since Covid-19 is a pandemic that requires an urgent response, by the public health authorities, the need to rely on the consent of the owner of personal information can be accepted. Furthermore, appropriate measures such as anonymization of personal information can be followed in order to prevent the persons from

being personally identified by such information. Additionally, appropriate guidelines need to be issued to all types of media in broadcasting and telecasting news in relation to Covid-19 and should require them to respect the privacy of personal information of persons. This would be a part of policy statements of respective institutions and hence appear as a recommendation in both policy work and legal implementations. Based on the recommendations made in here it is recommended to draft a new legislation framework for the implementation of discussed points in this paper. The recently introduced Personal Data Protection Act No, 09 of 2022 would be a sufficient help in this regard.

#### Author declaration

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#### Author contribution

Dr. Upeksha M. Sapukotana conducted the data collection, analysis and drafted the manuscript. Dr. Thusitha B. Abeysekera was involved in the planning of the study and edited the manuscript, and further editions on received reviews.

#### Conflict of interest

As both authors are independent researches, there is no such conflict of interest in any means.

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#### Ethical clearance

Statement on ethical clearance obtained and method/s of consent for participation in all studies dealing with human subjects/ material (onsent for participation only in Case reports)  
As a legal Doctrinal research, not applicable.

#### Statement of Data availability

Data will be available from corresponding author on request.

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  46. Mahanamahewa P., ‘Data Protection Law an E-Business and E-Government Perception’ (2003), <[www.icter.org/conference/sites/default/files/icter/IITC-2003p16.pdf](http://www.icter.org/conference/sites/default/files/icter/IITC-2003p16.pdf)> accessed on 28 March 2021, p4; T. B. Abeysekara., *A Proposal for the Protection of Digital Databases in Sri Lanka* (PhD Thesis, University of Exeter 2013)p1.
  47. However, the Act focus of the Act is to impose penal sanctions following an unauthorised access or disclosure of information contained in the electronic record stored in a computer but protection of privacy of personal information extends beyond penalizing and needs to cover processing of personal information through legal means in a manner that ensure personal privacy; generally read T.B. Abeysekara, Computer Crimes: Endless Race of Road Runners, *JSA Law Journal* (2015) 3, 127.
  48. Right to Information Act, No. 12 of 2016 – Section 5.
  49. European Data Protection Board (EDPB), ‘Statement by the EDPB Chair on the processing of personal data in the context of the COVID-19 outbreak’ <[https://edpb.europa.eu/news/news/2020/statement-edpb-chair-processing-personal-data-context-covid-19-outbreak\\_en](https://edpb.europa.eu/news/news/2020/statement-edpb-chair-processing-personal-data-context-covid-19-outbreak_en)> accessed 27 March 2021. See also the Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak Adopted on 21 April 2020 <[https://edpb.europa.eu/news/news/2020/european-data-protection-board-twenty-third-plenary-session-edpb-adopts-further-covid\\_en](https://edpb.europa.eu/news/news/2020/european-data-protection-board-twenty-third-plenary-session-edpb-adopts-further-covid_en)> accessed 30 March 2021.
  50. The General Data Protection Regulation under Article 9 2(i) also allows the processing of health data when the ‘processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health.