

CALLING PATIENTS BY THEIR NAME IN THE WAITING ROOM OF A FAMILY DOCTOR'S PRACTICE – A VIOLATION OF GDPR?

Johannes Siegmund

University of Library Studies and Information Technologies

Abstract: Since the introduction of the GDPR on 25.05.2018, there is still disagreement in the German medical profession as to whether patients may still be called by their names in the waiting room or whether calling their names by name violates data protection regulations. In most cases, physicians fall back on the recommendations of their interest groups and professional associations or the authorities when addressing this question. However, these recommendations are inconsistent in the Federal Republic of Germany. This paper examines which data protection law recommendations are issued by medical interest groups and professional associations or government authorities.

Keywords: Naming, family doctor, patient, data protection.

Introduction

An everyday situation: Patients are in the waiting room of a family doctor's practice, waiting to be called to a free consultation room by the medical staff. In almost all medical practices, patients are still called by their name in the process. The question rightly arises as to the extent to which this common practice complies with data protection.

Family doctors in Germany do not yet have any profession-specific guidelines on how to deal with everyday data protection issues. There is also no corresponding reference work that explicitly deals with this topic. Family physicians therefore generally refer to general information brochures on the subject of data protection or to recommendations from professional associations or state authorities. Recommendations from professional associations and authorities in particular have a binding and official character for family physicians.

Using the example of the question of whether calling patients by name in the waiting room of a family doctor's practice complies with data protection law, the aim is to show and analyze which data protection law recommendations are issued by medical interest groups and professional associations or state authorities, how they may differ

from one another, and whether or how the respective recommendation is legally justified.

Research methodology

Within the framework of a discourse analysis, the following research question is investigated: Which data protection recommendations are made with regard to the question to what extent calling patients by name in the waiting room of a family doctor's practice complies with data protection law?

Only recommendations from medical interest groups and professional associations or state authorities in the Federal Republic of Germany are examined.

The recommendations are first analyzed individually and then compared with each other. In the following, an overall view will be discussed and it will be shown how the prevailing discourse has developed with regard to the question.

Results

The following recommendations have been made by medical interest groups and professional associations or government authorities:

Recommendation of the Association of Statutory Health Insurance Physicians in Saxony

The Association of Statutory Health Insurance Physicians in Saxony states the following on the question of whether calling patients by name in the practice is permissible under the GDPR: "This is not considered problematic, as the name of a person is a normal identification feature and is therefore not particularly worthy of protection. Beyond the call by name, however, it should be ensured that other patients do not receive any further information about the person called, for example, the call should not state for which treatment or illness the patient is in the practice. Distinction from authority (where numbers are drawn): There is a special relationship of trust between patient and physician, so that it would be disproportionate to impair this via the "drawing of numbers" (The patient as a mere number). There is no such relationship of trust between authority and citizen"¹.

The document provided by the Saxony Association of Statutory Health Insurance Physicians was created on June 14, 2018, and has been made available online unchanged since then.

Recommendation of the German Association of Family Doctors

The question of whether patients may still be called by name is answered by the German Association of Family Doctors as follows: “In principle, you may call out patients by name. However, if a patient objects to being called out by name, you must comply”².

The document provided by the German Association of Family Doctors was created on May 29, 2020 and has been made available online unchanged since then.

Recommendation of the Bavarian State Office for Data Protection Supervision

The Bavarian State Office for Data Protection Supervision issues the following response to the question of whether patients can still be addressed by their surname in the practice or on the telephone: “Yes, nothing has changed in this social and fundamental rights practice as a result of the enactment of the GDPR”³.

The document provided by the Bavarian State Office for Data Protection Supervision was created on August 14, 2018, and has been made available online unchanged since then.

Recommendation of the Saarland Independent Data Protection Center

The Independent Data Protection Center Saarland informs in the context of the activity report 2017/2018: “In connection with the entry into force of the General Data Protection Regulation (GDPR), the Independent Data Protection Center Saarland received numerous inquiries from physicians and patients. Especially in the healthcare sector, where particularly sensitive data is regularly processed, a great deal of uncertainty was perceived with regard to the application of the GDPR. For example, fears arose that patients would no longer be allowed to be called by name in the waiting room. In the opinion of the Data Protection Center, such an interpretation of the GDPR generally goes too far. In our view, addressing patients by name violates neither data protection regulations nor medical confidentiality; this lived practice is part of the normal interaction between doctor and patient. Nevertheless, the necessary sensitivity should also be exercised here and, if necessary, in individual cases, such as in particularly sensitive medical specialties or in the case of special spatial conditions, a call by name should be dispensed with. Any conflicting wishes of patients should also be taken into account”⁴.

The document provided by the Saarland Independent Data Protection Center was created on March 13, 2019, amended on April 3rd, 2019 and has been made available online unchanged since then.

Recommendation of the Medical Association of Lower Saxony

In its information letter on the GDPR, the Medical Association of Lower Saxony states: “From the patient’s point of view, it is common practice to be addressed and called by name by the doctor. If necessary, draw attention to this fact by posting a notice. However, if a patient wishes to be addressed impersonally, in deviation from the usual roll call, this wish must be complied with”⁵.

Recommendation of the Saxony-Anhalt State Commissioner for Data Protection

The Saxony-Anhalt State Commissioner for Data Protection “The unopposed acceptance of “conventional” calling methods does not mean that the data subject consents to this procedure. In addition, there would usually be the possibility of questioning the data subjects. Therefore, calls by name should be avoided as a matter of principle”⁶.

The recommendation of the Saxony-Anhalt State Commissioner for Data Protection is based on the activity report for the period from 01.04.2009 to 31.03.2011. The document can be found on the Saxony-Anhalt state portal in unchanged form since then.

The recommendations of the interest groups or professional associations and public authorities are mainly divided into three groups, which are presented in the following table:

Table 1. Overview of recommendations

Naming without limitation unproblematic	Naming with restriction generally possible	Naming problematic
Saxony Association of Statutory Health Insurance Physicians	German Association of Family Doctors	Saxony-Anhalt State Commissioner for Data Protection
Bavarian State Office for Data Protection Supervision	Independent Data Protection Center Saarland	
	Medical Association of Lower Saxony	

The Association of Statutory Health Insurance Physicians in Saxony has no reservations about calling patients by name in the

waiting room of a doctor's office. This is justified by the fact that the patient's name is a normal identification feature and is therefore not particularly worthy of protection. The Bavarian State Office for Data Protection Supervision also assumes that patients may still be addressed by name. This is justified by the "social and fundamental rights-adequate practice", which has not changed with the enactment of the GDPR.

The German Association of Family Doctors does not see any objections to the naming of patients' names in the waiting room, but points out, that patients have the option of objecting, which must be followed.

The Independent Data Protection Center Saarland and the Medical Association of Lower Saxony expressed similar views. Calling patients by name does not violate data protection regulations, and the practice is part of the normal interaction between doctor and patient. However, patients' wishes to the contrary must be taken into account.

Only the Saxony-Anhalt State Commissioner for Data Protection, in the context of the activity report for the period from April 1, 2009 to March 31, 2011 – i.e., well before the introduction of the GDPR – has clear data protection concerns regarding the calling of patient names by name in public authorities but also in waiting rooms at doctors' offices. The concerns are justified in particular by the fact that, in addition to state law provisions in the area of social services, social secrecy must also be maintained in accordance with § 35 of the German Social Security Code (SGB I). In the opinion of the State Commissioner for Data Protection of Saxony-Anhalt, the necessary necessity of calling a patient by name is lacking, since alternative possibilities exist, such as the use of waiting tags. The Saxony-Anhalt State Commissioner for Data Protection is of the opinion that the unopposed acceptance of the usual calling methods by the patient does not mean that the patient automatically approves of the roll call. In addition, there is usually the possibility of questioning the persons concerned. Therefore, calls by name should be avoided as a matter of principle.

Discussion

Patients with a wide variety of medical conditions present themselves at a family doctor's practice. When a patient is called by name in a family doctor's practice – in contrast to a specialist practice – it is not necessarily possible for other patients to conclude details about the state of health or the type of illness. A health data according to Art. 9 (1) GDPR with the associated increased protection

requirements will therefore not exist in a family doctor's practice as a rule.

However, according to Art. 4 Nr. 1 GDPR, the name of a patient is a personal data. The transfer of personal data generally requires the existence of a legal basis or a declaration of consent. The processing of a patient's name by the family doctor is in principle to be regarded as lawful according to Art. 6 (1) lit. b) GDPR.

According to Art. 5 (1) lit. c) GDPR, a personal data must be adequate and relevant to the purpose and limited to what is necessary for the purposes of the processing. This is the so-called "data minimization". According to Art. 32 GDPR, it is also necessary to protect personal data, and thus also the name of a patient, in terms of data protection law by means of appropriate technical and organizational measures.

Insofar as the Association of Statutory Health Insurance Physicians in Saxony is of the opinion that the patient's name is a normal identification feature and thus not worthy of special protection, this opinion cannot be followed. As a personal data, the name of a patient is to be protected in a suitable manner. Moreover, the demand of the Saxony Association of Statutory Health Insurance Physicians that it must be ensured that other patients do not receive any further information about the person called up beyond the call by name is not always feasible, since some clinical pictures can already be clearly assigned visually by everyone.

The Bavarian State Office for Data Protection Supervision is just as unconvincing with its sweeping justification that naming patients by name is a "practice in line with social and fundamental rights" as the Independent Data Protection Center Saarland or the Medical Association of Lower Saxony, which refer to the "lived practice" to date, which is part of the normal interaction between doctor and patient. The fact that the naming of patients' names in the waiting room of a medical practice was not discussed before the introduction of the GDPR does not automatically mean, that the practice lived until today is in accordance with data protection regulations. Even in a family doctor's practice with a large diversity of clinical pictures, the calling of the patient's name in connection with an obvious clinical picture of a patient can make it apparent to third parties which disease the patient, who is now known by name, is suffering from.

Insofar as the German Association of Family Doctors additionally points out that the patient has the option to object, which must be complied with, it should be noted that in the event of an option to object, the patient would have to have given prior consent to the naming of the

patient. If the German Association of Family Doctors therefore assumes that the patient has an opportunity to object, it must also be assumed that the family doctor has obtained the relevant consent from each patient in advance. As a rule, family doctors do not obtain written consent regarding the calling of patients by name in the waiting room. If one correctly does not consider the mere name of a patient without communication of further personal data to be a health record within the meaning of Art. 4 Nr. 15 GDPR, however, then the GDPR also does not contain any specifications with regard to the form of consent. According to § 4a (1) S.3 BDSG (old version), consent was subject to a written form requirement. Apart from the Federal Republic of Germany, no other EU member state required consent to be in writing⁷. The GDPR now only requires an explicit declaration, which can also be made informally or by conclusive behavior [1]. Therefore, there is the possibility of an implied consent of the patient by accepting the previous practice of calling by name. As already correctly stated by v. Lewinski/Rüpke/Eckhardt, there is the possibility, in accordance with the judgment of the LAG Frankfurt am Main of 27.08.1981, Ref.: 9 Sa Ga 360/81, that a declaration of consent can lie in an unrepentant acceptance of data processing over a longer period of time⁸. Correctly, however, the family doctor would then also have to point out before entering the waiting room, in accordance with Art. 7 (3) GDPR, that the patient has the option of revoking consent at any time.

The recommendation of the Saxony-Anhalt State Commissioner for Data Protection is comprehensible and consistent in light of existing data protection regulations. The recommendation correctly points out that there are other call-up options (for example, the use of waiting marks) which do not involve any encroachment on the right of personality, which is why calls by name should generally be avoided. The use of corresponding alternative call-up options is not objectionable from a data protection perspective.

“The General Data Protection Regulation regulates the rights of data subjects very extensively and in detail. On the one hand, it strengthens the previous provisions of the Data Protection Directive and the Federal Data Protection Act and expands them in some areas” [2].

“The General Data Protection Regulation (GDPR) became directly applicable law at the end of the transition period on 25.5.2018, it is directly effective in every EU member state and takes precedence over national law” [3]. The GDPR is therefore equally applicable throughout the territory of the Federal Republic of Germany. Therefore, in the recommendations shown, which are based on the legal foundation of

the GDPR, there should actually be no deviations between the individual federal states.

How can it be explained that renowned interest groups or professional associations and authorities of different federal states make such different recommendations?

The opinion that calling out patients' names in the waiting room of a family doctor's office is unproblematic from a data protection point of view is based, among other things, on the argument that this has been the practice up to now and the fear that the patient would feel treated as a "mere number". Both approaches do not appear to be particularly valid from a legal point of view. The practice followed to date does not constitute a justification for violations of data protection law. The patient also does not necessarily feel like a mere number if, after being called using a waiting badge, a digital patient call system or similar, he or she is subsequently personally cared for and treated well by the medical staff.

It is striking that almost all recommendations are to be classified chronologically before or around the introduction of the GDPR, but have not been updated to date. During the period of the introduction of the GDPR, there was, as is well-known, a great deal of uncertainty as to how the daily routine in a family doctor's practice could best be managed in terms of data protection law. Efforts were made to implement data protection requirements of the GDPR without losing touch with the patients. The GDPR should be implemented in the best possible way but at the same time not lead to an inappropriate anonymization in the doctor-patient relationship. Against this background, it seems conceivable, that a large part of the interest groups and professional associations or data protection authorities of individual federal states wanted to recommend a middle way, which would justify the calling of the patient's name by the usual and previously lived practice and also grant the patient a right of withdrawal. The assumption of implied patient consent by acceptance of the call by name is justifiable, provided the patient not only has a right of revocation, but was also informed of this in advance.

With the exception of the Saxony-Anhalt Data Protection Officer, the legal reasons for the respective recommendations are not sufficiently elaborated or explained. The justifications are limited to a few sentences or sometimes even to individual keywords. The fact that recommendations additionally diverge from one another makes decision-making more difficult for the family doctor.

Conclusion

The recommendations of medical interest groups and professional associations or state authorities differ greatly in some cases. The recommendations are dated before or around the introduction of the GDPR and have obviously not been questioned or updated since then. In addition, the legal reasons for the respective recommendations are generally not explained or at least not sufficiently explained.

The evaluation of the recommendations reveals a clearly prevailing discourse. Of six recommendations from interest groups or professional associations and public authorities, two bodies consider the naming of patients' names in the waiting room to be unproblematic without restriction. Three other bodies also see no data protection concerns, only with the restriction that the opposing wish of the patient – i.e. the wish to be called without a name – must be taken into account or the patient's right to object must be followed. Only one body has data protection concerns and therefore recommends avoiding calls by name as a matter of principle.

The view that calling up patient names by name in the waiting room of a doctor's practice is unrestrictedly unobjectionable or fundamentally unproblematic is difficult to reconcile with current data protection regulations. The patient name is a personal data according to Art. 4 Nr. 1 GDPR, which has to be protected in terms of data protection law by appropriate technical and organizational measures. The transfer of personal data generally requires the existence of a legal basis or a declaration of consent.

The prevailing recommendation that calling patients by name is possible if the patient does not object, i.e., the assumption of implied consent by merely accepting the call by name, is justifiable if the patient not only has a right of revocation but, in the best case, has also been informed of this in advance. An overarching pattern of the prevailing recommendations can be seen in the fact that a feared anonymization of the doctor-patient relationship is countered and at the same time the patient is given the opportunity to cooperate under data protection law (possibility of objection). The prevailing recommendations should be supplemented to the extent that patients should be informed of their revocation option before giving (implied) consent in accordance with Art. 7 (3) GDPR.

Notes

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⁷ **Sydow, G.,** Europäische Datenschutzgrundverordnung, 2018, Baden-Baden, Nomos Verlagsgesellschaft, p. 453.

⁸ **v. Lewinski, K., Rüpke, G., Eckhardt, J.,** Datenschutzrecht, 2022, München, C.H. Beck, pp. 188–189.

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About the Author

Johannes Sigmund is a lawyer and certified data protection officer of the TÜV SÜD Academy. As an external data protection officer, he has been advising several family doctor's practices on all data protection issues for many years.

To contact the Author: sigmund@gmx.de