

# Data protection in private practice

Given that the Information Commissioner's Office admits that the Data Protection Act is 'complex, and, in places, hard to understand', it's not surprising that many therapists are confused about how clinical records should be kept and whether they are accessible to clients. And the position is even more complex for practitioners in private practice, writes **Peter Jenkins**

**T**herapy, almost by definition, is an unequal activity, with the therapist holding a degree of power, which is greater than that held by the client. This not by design, but the therapist may be more congruent and is probably less emotionally vulnerable than the client. What Aveline describes as the 'asymmetrical personal relationship...that lies at the heart of individual therapy'<sup>1</sup> possesses a number of key dimensions. It is also 'asymmetric', or markedly unequal, in terms of disclosure: the client discloses often intensely personal material; the therapist is much less likely, perhaps, to disclose equally personal material in return. Crucially, for the purposes of this discussion, the therapist often records the encounter; the client may be much less likely to do so. This recording gives the transient moment of therapy an illusory, permanent quality. The record of therapy lives on, long after the therapy itself is concluded.

Irvin Yalom writes in powerful and rather poetic terms about this aspect of therapy: 'My many-tiered file cabinets, my mounds of tape recordings, often remind me of some vast cemetery: lives pressed into clinical folders, voices trapped on electromagnetic bands mutely and eternally playing out their dramas.'<sup>2</sup> The record retains the voice of the therapist, in constructing a narrative of the client's story. The original voice of the client is filtered and reshaped in this process. Yalom's response



was to offer a therapy to one of his clients, where both parties kept and compared their records of the unfolding process, over a period of 60 hours of therapy. This then became the basis of a remarkable book, *Every Day Gets A Little Closer*. Val Wosket has also explored this fascinating territory, in a similar process of parallel recording, by both therapist and client.<sup>3</sup>

These are rare exceptions to the rule. Most therapeutic recording is done by the therapist, rather than by the client. Given the crucial importance of recording within therapy, it is surprising it is rarely taught in an explicit fashion on training courses. Most recording by therapists seems to be highly idiosyncratic, unless constrained by the requirements of a particular agency, in terms of preferred 'house style' and format.

### Professional requirements on record keeping

The issue of recording has recently been highlighted by professional organisations. The Health Professions Council (HPC) struck off a clinical psychologist from the HPC Register in 2010, on the grounds of failure 'to maintain adequate patient records', in the context of working in a multi-disciplinary team.<sup>4</sup> The BACP *Ethical Framework* has revised its earlier statement that 'Practitioners are *encouraged* to keep appropriate records'<sup>5</sup> (my emphasis added), to the stronger wording of are *advised* to keep appropriate records; with the caveat, 'unless there are good and sufficient reasons for not keeping any records' (my emphasis added).<sup>6</sup> Failure to keep adequate records figured in a recent successful complaint made against a counselling tutor.<sup>7</sup> The option for practitioners of not keeping records seems, therefore, to be narrowing.

For therapists working in organisations, there is support, and perhaps protection, when it comes to recording and data protection issues. Agencies will have at least an informal policy on recording, and very probably, formal protocols setting out requirements for keeping records. Larger employers, such as NHS Trusts or universities, will have data protection officers in post, with wider expertise and authority on data protection issues. The position can be more complex for independent practitioners. On the one hand, there is the freedom to construct one's own approach and model of recording. On the other, this can be an exposed and somewhat vulnerable position to take, should it be challenged by a client, solicitor, or by one's own professional association.

### Defining a therapy record

One initial difficulty is that, as therapists, we tend to define therapeutic recording, perhaps not unreasonably, primarily by its intended purpose.

So records may be grouped as being:

- a formal record of client sessions (key information, attendance, dates of sessions, goals, outcomes, etc)
- process notes (personal response to the client)
- notes for supervision (practice issues for reflection in supervision)
- personal journal material (personal, experiential material, related to client work).

Data protection law tends to cut through these kinds of categories and define therapy records by a completely different set of criteria. The Data Protection Act (DPA) 1998 is directly concerned with 'personal material', ie relating to an identifiable, living individual. The sub-category of 'sensitive personal material' relates to the individual's physical, mental or sexual health, arguably covering at least some of the core ground of therapeutic work. Records are defined by their context, so that recording carried out under the auspices of health, education or social work, are covered by specific requirements as 'accessible records'. Thus, it may be the case, as an independent practitioner, that therapy is carried out under contract to an NHS Trust. The contract for the work could specify that the therapy files are deemed to be a part of the client's 'health record', and are to be returned to the Trust on completion, for archiving. (This is also the case for much private work referred via employment assistance programmes, where the contract often specifies EAP control of all therapy records).

Health, education and social work records are a specific part of the legislation contained in the DPA 1998. The Guide to Data Protection, produced by the Information Commissioner, has to admit that 'the legislation itself is complex, and, in places, hard to understand'.<sup>8</sup> For most therapists, the main area of interest will focus on how the Act affects their own day-to-day record keeping. For data protection purposes, therapy records are defined primarily by their format, ie whether they are electronic or manual (hand written) in nature.

Electronic records include records kept on a desktop computer, laptop, or memory stick, as well as audio and video recordings. Manual records are divided into those which are part of a 'relevant filing system', and those which are essentially 'unstructured' in nature.

### Transparent recording

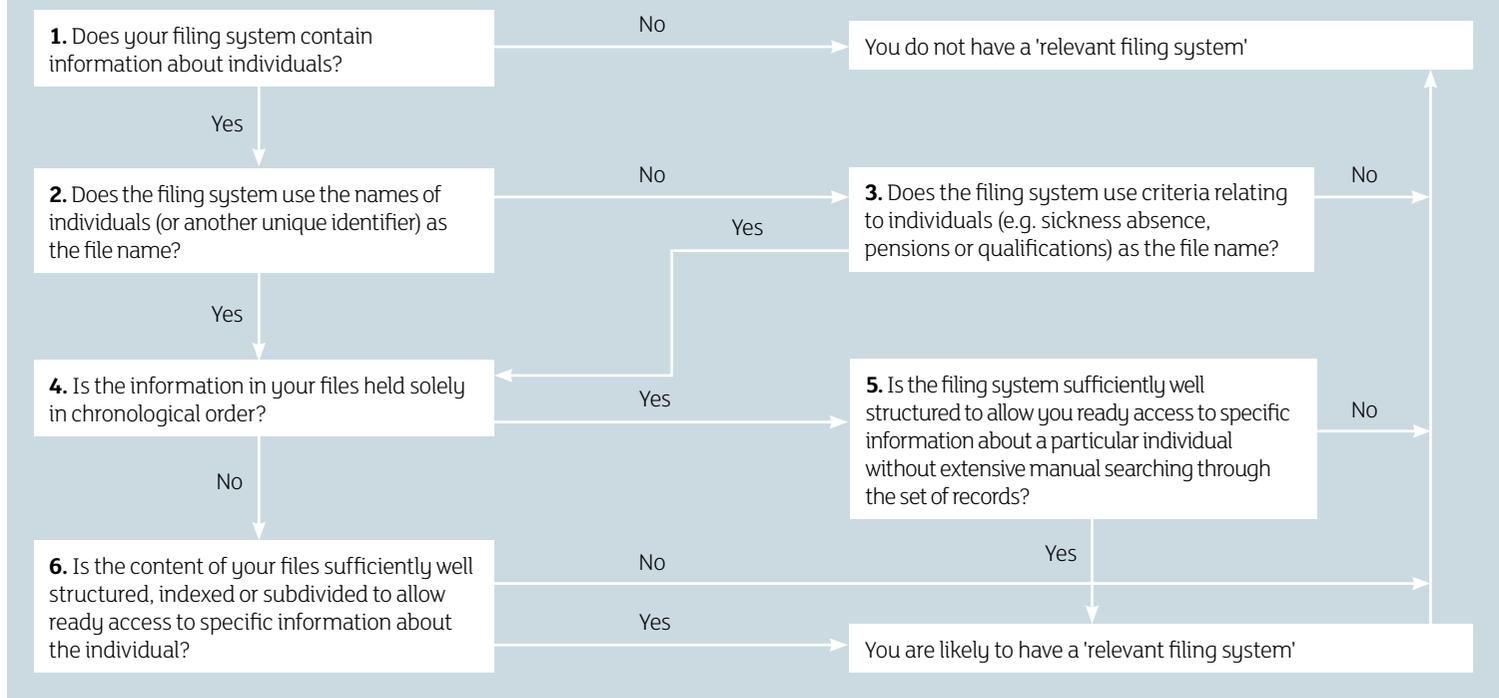
The original remit of the Act was to regulate all records kept on citizens, and to afford the right of access to most records, to ensure transparency and equity, in line with a key European Directive.<sup>9</sup> Initially, the view taken by the Information Commissioner was that most manual or handwritten records would fall within the remit of the Act, as being part of a 'relevant filing system', however random the filing system involved. However, this view was challenged and overturned by the well-known *Durant* case in 2003. Here, it was decided by the court that the correct definition of a 'relevant filing system' was a very narrow one (see box for 'Quick guide to understanding the DPA definition of 'relevant filing systems'). The effect was, at a stroke, to take most handwritten files out of the governance of the DPA 1998.

The court's decision raises an important ethical issue for therapists. If an independent therapist keeps records, even partly, on a computer, then



## Quick guide to understanding the DPA definition of 'relevant filing system'

Source: Adapted from ICO (2011)



these are covered by the Act. If the records kept are solely in manual form, then these are essentially outside the remit of the Act, although they should still comply with the data protection principles (see Box: Principles of data processing). This raises the possibility, for some therapists at least, of keeping only manual unstructured therapy records, precisely in order to retain greater control over their own recording. For example, clients do not have the right of access to unstructured, manual records, unless these are kept by a 'public authority', such as by a university or college counselling service. An independent practitioner might opt, therefore, to keep unstructured manual records, partly in order to avoid clients accessing their records.

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Principles of data processing: Data Protection Act 1998

Personal data is to be:

- processed fairly and lawfully
- obtained only for one or more specified lawful purposes
- adequate, relevant and not excessive for their purpose
- accurate and kept up to date
- not kept longer than is necessary
- processed in accordance with the rights of data subjects
- protected against unauthorised use or loss
- not transferred outside the European Economic Area unless subject to similar levels of data protection.

While this might be in accordance with the letter of the law, it clearly runs counter to the spirit of data protection law, however clumsily worded the latter might well be. Prior to the Data Protection Act 1998, most therapeutic recording was accessible only to the professional involved. Indeed, clients might be largely unaware that any records were being kept, unless informed by the therapist (as required by the earlier BAC *Code of Ethics*). The law has introduced a distinct shift in the way that records are now perceived by therapists, in terms of their being more accountable and, in principle at least, accessible to their clients. Research in university and college counselling services indicates that therapy recording has become

much more factual and less speculative in nature, but perhaps losing some of its richness in the process.<sup>10</sup>

### Practical implications for independent practitioners

There are a number of practical implications of data protection requirements for independent practitioners. The first involves a choice as to whether to keep records at all. While this option remains available in theory, under the revised 2010 version of the BACP *Ethical Framework*, it seems clear that this is an increasingly risky professional position to take. Records may be useful in rebutting a complaint by a current or former client, or in responding to a legal complaint for breach of contract. Some professional indemnity insurers will insist on 'adequate records' being kept, as a condition of their insurance cover. This is in the expectation that many complaints will fail, if the therapist can dispute them effectively with documentary evidence, in the form of systematic records of therapy.

If records are to be kept, then any electronic recording will require registration with the Information Commissioner's Office. This is accessible online, with a very straightforward nine-point web questionnaire to determine whether or not registration is required. Registration itself costs £35, as an annual fee. Within the terminology of the Act, 'data controller' usually refers to an organisation, although an independent



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practitioner, who is involved in managing (primarily electronic) client personal data, will also be a 'data controller' for the purposes of the law. There are three areas which are particularly relevant to therapists who are governed by the Act, including provision for client access; time limits for keeping records; and maintaining security of records.

Clients have a general right of access to electronic records, records kept in 'relevant filing systems' and unstructured manual records which are kept by a public authority, such as a university or other publicly-funded body. The principle of client access under sections 7 and 8 of the Data Protection Act 1998 requires that the information made available to the client is presented in 'intelligible form'. The ICO Guide suggests that 'it would be good practice for you to help them understand the information you hold about them'.<sup>8</sup> This might take the form of meeting the client to go through the counselling record and clarify its meaning, if required. For some therapists, this may appear to add yet another level of complexity to the therapeutic relationship – is this a postscript to therapy or a renewal of therapy in another form? Research suggests that the process of facilitating client access to records, often for purposes of litigation which is external to the therapy, can be experienced as deeply troubling for the therapist involved.<sup>11</sup>

### Time limits for keeping records

Most therapists seem unclear about the time limits governing the keeping of therapy records. The advice given is often conflicting. Many organisations operate a rule of thumb, whereby records are kept for six or seven years, corresponding to the time limits applying to legal action for breach of contract. Therapy records may

be valuable in responding to a professional complaint. BACP professional conduct procedures refer to a time limit of three years for a complaint to be brought. However, this may be extended to within three years of the complainant becoming aware of the alleged professional misconduct, or 'within a reasonable time'. This suggests a degree of flexibility about the relevant time frame for a complaint to be made, and, therefore, for records to be retained. Professional indemnity insurers have suggested that records be kept 'almost indefinitely', for defensive legal purposes; one solicitor has suggested, anecdotally, keeping records for up to 30 years.

The Data Protection Act brings a fresh and rather welcome perspective to this key debate. According to the data protection principles, records should be kept 'no longer than is necessary'. This implies that independent therapists can set their own policy regarding keeping notes, while bearing some of the provisos mentioned above in mind. This could also entail determining what the permanent or longer-term therapy record would consist of. Ephemeral recording, such as notes of issues for supervision, could therefore be shredded immediately after use, having served their purpose. The data protection principle offers a definite challenge to the view that records should be kept 'as much as possible, for as long as possible'. Practitioners need to weigh up the advantages and disadvantages of both approaches, before deciding on a course of action.

Finally, independent therapists need to consider security issues relating to their recording. The news media often carry stories of the loss or theft of sensitive personal, medical, or health data by employees of large organisations. What receives less publicity, except on the more specialist data protection industry websites, are the substantial fines, levied by the ICO on these same organisations. While independent therapists may not be at risk of these substantial fines, it is still essential to follow basic guidelines on data security, for example, by encrypting data kept on computers and memory sticks, or by locking filing cabinets. And when client data is finally destroyed, this needs to be done under secure conditions, to avoid unintended third party access to confidential material.

### Conclusion

Data protection law offers particular challenges to the independent practitioner, who may be less sheltered and protected by an employing organisation. Conversely, the law also provides for greater choice and autonomy for independent practitioners, in devising their own policy and approach to record keeping, while remaining within the law. There are conflicting pressures about keeping client records, either to keep them long term for defensive purposes, or to opt for minimal, short-term recording. Meanwhile, Yalom

laments 'the abandoned warehouses of unread clinical notes and unheard electromagnetic tapes'.<sup>2</sup> Perhaps he might yet find some solace in the data protection principles? ■

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### Legal case

*Durant v Financial Services Authority* [2003] EWCA Civ 1746.

### Find out more

Peter Jenkins is currently leading a participative workshop on Counselling confidentiality, data protection and access to records as part of the second series of BACP Professional Development Days running until March 2013. Forthcoming dates include 25 January in Birmingham and 2 February in London. For further information visit [www.bacp.co.uk/pdd](http://www.bacp.co.uk/pdd) or call 01455 883300.