Record keeping and the law

However, in many settings, recording usually plays a secondary role. Records provide a paper trail of service, provision and accountability for the organisation, above and beyond the contribution of any individual practitioners. Paper records are increasingly less personalised within agency settings. They are often more standardised in tone, allowing easier communication between therapists, and carers. Absence of illness can be evident to private staff who will expect comprehensive assessment and monitoring of any patient's condition.
A recent survey suggests that electronic record keeping is still an uncharted aspect of practice for many private practitioners.
Process notes are not exempt from access by, or disclosure to, the client simply because the therapist doesn’t want to disclose them.

holds identifiable client personal data in electronic form, ie the client’s landline or mobile number, for work or professional purposes. In professional and ethical terms, he may also be in breach of the BACP Ethical Framework, section 14 (f), which requires him to keep up to date with the law and regulations. In therapeutic terms, he may well feel the need to process his countertransference towards the client. However, it may be that the very detailed kind of narrative process records he appears to be keeping are ‘excessive’ in DPA terms. He could, for example, still process his own emotional responses to the client, without necessarily writing in such detail. At the very least, he could make brief ‘post-it’ notes, to be destroyed after use in supervision, rather than to be retained, potentially as part of the permanent client record.

Matias seems ill informed about his obligations under the DPA 1998. In all probability, his storing of personal client data, in electronic format on his phone, means that he should register with the ICO, whether or not he also keeps manual records of therapy and manual process notes. If he is in any doubt, there is a very simple checklist, available on the ICO website, which should quickly resolve any uncertainty on this issue (ico.org.uk/for-organisations/register/).

Client access to process notes

Assuming that Matias does need to register with the ICO, the client has a general right of ‘data subject’ access to his own files. The Guide to Data Protection gives a straightforward example of a client having access to their counselling notes, without making any distinction as to whether this was in a statutory or private setting. This would, therefore, tend to confirm that private practitioners are not exempt from client (or data subject) access requests. The Guide states very clearly that ‘The right of subject access is central to data protection law’. While, in practice, it is not an absolute right, there are only very limited restrictions on this broad, general principle.

There is another more technical issue here about whether the client can access Matias’s handwritten client and process notes. Process notes are effectively just the therapist’s opinions about the client. However, process notes are not exempt from access by, or disclosure to, the client simply because the therapist doesn’t want to disclose them. Research suggests that professional practice in counselling has shifted broadly to only record factual data about clients, and not keep process notes at all. Another practical option would be to keep only short-term process notes, as ‘post-it’ notes, to be shredded after use in supervision. (I provide an example of this kind of recording, using post-it notes for short-term recording of issues to take to supervision, in my book).5

Ultimately, client access to Matias’s handwritten process notes would depend on yet another technical issue, ie on whether these process notes are filed in a highly systematic way, consistent with what is defined as a ‘relevant filing system’ (see Private Practice, Winter 2012, for the criteria for such a system).6

By not keeping up to date with standard data protection requirements, Matias risks a fine from the ICO of several hundred pounds, a professional complaint by his client to BACP and the need to respond to the aggrieved client under the ‘duty of candour’, as required by the Ethical Framework.

References

About the author

Peter Jenkins is the author of Professional Practice in Counselling and Psychotherapy: ethics and the law (Sage, 2017).