

Howden Know How

Counselling and Psychotherapy Note Taking and Record Keeping



Protecting the Professionals

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This is a tricky area and needs to be approached with care and thought. Guidance and recommendations vary widely depending on the modality of your work. In some models of Psychotherapy, for example, record keeping is, in itself, seen as a breach of client confidentiality. In most therapeutic interventions however, note taking and record keeping is a recognised and valuable part of the process. Keeping records though, brings with it some onerous responsibilities, many of them codified in the Data Protection Act 1998.

The Data Protection Act 1998 replaced both the earlier Data Protection Act and the Access to Healthcare Records Act 1990 although much of the latter is subsumed into the 1998 legislation. If you keep notes and records about your clients then it is likely that you will have to register with the Information Commissioners Office (ICO). This process is referred to as Notification and currently incurs an annual fee of £35. See www.ico.gov.uk for more information.

Your clients will, almost certainly, have rights under the Data Protection Act 1998 to access the information you hold about them. We say ‘almost certainly’ because, even now, more than 10 years after the Act was drafted, legal opinion varies as to the status of hand written, manually stored records. Even the ICO themselves are currently reviewing their guidance notes as to what constitutes a Relevant Filing System following the case of *Durant v Financial Services Authority* [2003].

The previous Data Protection Act was concerned only with data (information, records, etc.) stored or processed electronically. The 1998 Act attempts, under certain circumstances, to bring manual records within the legislation giving the same degree of controls and rights of access that previously applied only to electronic data. It does this in two ways:

1. If the (manual) records are stored in, or form part of, a Relevant Filing System, or
2. If the (manual) records form part of an ‘Accessible Record’ which means (amongst other things) Health Records.

We will come back to the vexed question of whether your notes are Health Records. First let’s consider what is meant by a Relevant Filing System.

In the case of *Durant v Financial Services Authority* mentioned above the Court of Appeal was widely understood to have taken the somewhat narrow interpretation of a filing system only being a Relevant Filing System “if it is of sufficient sophistication to provide the same or similar ready access as a computerized filing system”. But how ‘sophisticated’ does it have to be to give you ready access to information about a specific client? An alphabetical system contained in a filing cabinet with John Smith’s records filed under Smith, J. would

work. As would a slightly more oblique numerical system with John's records filed under client number 132 with (even a remotely stored) index, linking John Smith and client number 132.

What the Court of Appeal in *Durant* seem to mean by the word 'sophisticated' is 'structured'. So, if you have records about individual clients in files within a structured filing system then those records are subject to the controls of the Data Protection Act 1998 and your clients have rights under the Act to access them. It confirmed, on the other hand, that if manual records are kept but in an unstructured way then the client has no right of access to them (unless they are Health Records – see below).

If, for example, all your counselling (or process) notes or records are stored in chronological order with no other referencing or indexing system then they are (or may be) unstructured. If, however, they are kept in chronological order and it is possible, by cross-referencing with, say, an appointments diary, to get directly to John Smith's record then they are (or may be) structured.

ICO recommend applying the Temp test. If you employed a temporary administrative assistant (a Temp) would they be able to find John Smith's record? You have to assume that the temp is reasonably intelligent and has had a basic induction and instruction on the workings of your filing system. If the record can be easily found, then the system is structured.

Note that it is perfectly feasible to have different filing systems (structured and unstructured) for current and former clients and even for different types of records (counselling records and process notes for example). Keep an eye on the ICO website for up-to-date guidance notes on this topic.

Health Records

All of the above and the references to Relevant Filing Systems apply only if your records are not Health Records. If they are Health records, then whether they are electronic or manual or stored in a structured or unstructured way, then they are subject to the controls of the Data Protection Act 1998 and clients have the right to access them (as specified in the Act).

The Act is very clear (if somewhat illogical) as to what it defines as Health Records. The definitions might change (or the Courts may interpret them differently) in the light of changes to the regulation of Psychological Therapies, particularly if we go down the Health Professions Council route, but presently, according to the Act, a Health Record means any record which-

- a) Consists of information relating to the physical or mental health *or condition* (my italics) of an individual, and

- b) Has been made by *or on behalf of* (again, my italics) a health professional in connection with the care of that individual.

(note the word 'and' between a) & b) so both conditions have to apply)

A 'health professional' is defined in the Act as meaning any of the following-

- a) a registered medical practitioner,
- b) a registered dentist as defined...
- c) a registered optician as defined...
- d) a registered pharmaceutical chemist as defined...
- e) a registered nurse, midwife or health visitor,
- f) a registered osteopath as defined...
- g) a registered chiropractor as defined...
- h) any person who is registered of a profession the [1960 c.66] Professions Supplementary to Medicine Act 1960 for the time being extends,
- i) a clinical psychologist (*but not a counselling psychologist?*), a child psychotherapist (*but not an adult psychotherapist or a school counsellor?*) or speech therapist,
- j) a music therapist employed by a health service body (*but not a drama, or art therapist similarly employed?*) and
- k) a scientist employed by such a body as head of department

As before, the words in italics are mine and are largely to show what I mean by illogical.

If you are, or if your records are made on behalf of anyone who is, on the list then your records are Health Records and are subject to Data Protection Act controls how-so-ever they are stored or filed. What is meant by 'on behalf of' is not specified in the Act. If you are a counsellor employed by a GP to work in the practice and your notes and records relate to a client of the practice then, in all probability your records will be Health Records. If, however, you are a self employed counsellor in private practice and you see a client as a referral from his GP then I doubt that it could be said that your records were made on behalf of the GP unless that was specifically written into the terms of the referral contract. Any report or copies of records which you might send to the GP as part of the brief will become Health Records when they are added to the GP's record keeping system.