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## **Retention of client records of member organisations and individual members when delivery of counselling and psychotherapy ceases**

### **COSCA Guideline**

#### **Introduction**

This guideline on the retention of client records when a counselling service ceases complements 2 other COSCA guidelines on record keeping published on the COSCA website:

- Record Keeping – COSCA Guideline
- Electronic Record Keeping: Points for COSCA Member Organisations and Individual Members to Consider.

#### **Data protection principles**

There is no clear rule or law on retention of client records when a counselling service ceases. From a data protection perspective, the 'storage limitation' principle under GDPR and the Data Protection Act 2018 states that personal information should not be kept longer than is necessary for the purposes for which the personal data are processed. This places the obligation on the 'controller' of the personal data to decide when personal data are no longer necessary, and this is linked to the processing purpose e.g. why the personal data was collected and what it is to be used for.

In relation to member organisations which have separate corporate legal responsibility, once the organisation is dissolved, there will be no controller of the personal data. However, for those who operate as sole traders or for some types of partnerships, the individuals behind these businesses will continue to be the controller once the business ceases to trade.

Client records will generally be maintained for the purposes of providing the counsellor's services to the client, for maintaining records and for managing the client relationship. These are the primary reasons for holding these records and therefore if the counsellor ceases to trade and ceases to provide these services there will be no need to retain the records.

There are other reasons the counsellors may want to hold on to records for a longer period – see below.

### **Other reasons for retention**

Some counsellors may work with NHS Scotland and under NHS Scotland contracts. NHS Scotland has provided Guidance in relation to retention periods. The Guidance explains that counselling records should be kept for 30 years as they may have research or historical value. Within the Guidance, it is recommended that each organisation has its own retention policy and agreed retention period to follow its internal requirements. Those working under NHS contracts need to consider whether they are obliged to comply with these Guidelines. If so, they then need to think about who will hold the records after the relevant organisation /individual ceases trading – see more on this point below.

Where an individual counsellor ceases trading (whether as an individual or as part of a company/partnership) they still exist as an individual and a client may still attempt to bring a claim (e.g. for negligence or breach of contract) against the relevant individual. In most cases where an organisation has been a limited company or LLP, there would be a question around legal personality and “who” a client could actually bring a claim against. For example, if the client has a right of action against the dissolved organisation, that claim may still be covered by the organisation’s insurance policy from that time. Of course standard complaints procedures, including that of COSCA, will continue to apply and a client may still raise a complaint against an individual regardless of whether they were engaged as a corporate body.

For this reason, individual counsellors may wish to retain records of their own clients or arrange for those records to be securely retained so those records are available as evidence in defence of claims which could be brought against them by clients. In this context, although they do not need to retain the records, counsellors would be justified in retaining them (with adequate security in place) for a set period. Retaining records indefinitely on this basis would not be justified.

In this context, retention periods could align with prescription/limitation periods for bringing negligence claims e.g. in Scotland there is a 5 - year limitation period while in England and Wales it is 6 years. However, these limitation periods relate to the date when damage/loss becomes evident which could be any time during/after a particular client session or course of sessions. Therefore, it is not as simple as saying that records should be retained for the 6 - year period following the end of a client relationship, although that is certainly a sensible starting point as advised above.

Insurers may also have their own requirements and COSCA recommends that counsellors should review their insurance obligations to assess whether they are required to retain any relevant documentation for a set period.

## **Who should retain the documents?**

If a receiver is appointed, the receiver would usually have control of the documents. If no receiver is appointed, counsellors themselves need to retain the documents for the appropriate time period or arrange for the same to be stored.

It is extremely important that robust security measures are put in place to retain the documents and that reasonable steps are taken to ensure that this happens. COSCA is aware that some members retain client records in their homes (e.g. in home offices or in attics, etc.). These security arrangements are not always appropriate, particularly given the sensitive nature of some of the records held.

The use of shared storage facilities with clear lines of access and authorisation agreed and the use of locked/robust filing cabinets could be considered. Electronic storage of the documents could also be considered provided the access was encrypted or password protected. Security on homes where records are stored need to be kept under review to ensure safe and secure storage of the records.

COSCA recommends that all members review their security options and implement the COSCA guidance on this aspect as outlined above.

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