

Use of electronic records as the professional record



Bernard Kat
reports on behalf of
the Professional
Affairs Board.

RECORDS are an important element of professional practice, whether they are written or typed on paper, audio-taped, video-taped, photographed or recorded through computerized systems. Electronic professional records have been coming into use for some years. Computer-based systems, which combine or co-ordinate existing records held on different media, are likely to emerge as a result of further development. These products of technological progress offer significant benefits to psychologists, their clients and organizations providing psychological services. Electronic systems make it easier to store, integrate, search and retrieve information. The information can also be copied or transmitted cheaply and easily to other people. Ultimately, electronic records may provide the basis for radical new developments in clinical practice.

Although the media on which records

are made and the systems for storing and retrieving them may change, the basic principles of ethical practice, including those concerning consent and the security and confidentiality of information, do not. In some circumstances, the move from paper-based or 'manual' records to electronic records may be the occasion for clarifying basic principles and assumptions about the purpose, content, ownership and control of records. The Society welcomes the benefits of electronic records, provided that they and the systems for managing them are implemented in ways which support and encourage ethical practice.

This report:

- restates the Society's current ethical standards pertaining to records, and the legislation which psychologists using electronic records must observe;
- identifies those aspects of the move from 'manual' records to electronic

Apart from the Electronic Patient Record, other projects in the NHS IM&T (Information Management & Technology) Strategy include:

The New NHS Number Programme — All the systems currently used to identify patients and clinical records are to be replaced by a single NHS number. Since last year, the Social Security Administration (Fraud) Act has allowed the Government to cross-match tax and immigration records with claims for benefits made to the Department of Social Security and local authorities' records. Some people worry that the new NHS number project could become a step towards national identity cards.

The NHS-wide network — The creation of a network capable of linking all the computer systems in the NHS. Efforts are being made to ensure that the network will be secure from unauthorized access, but the management of confidentiality revolves around who decides what may be disclosed to whom.

The Language of Health — A group of projects attempting to produce integrated coding systems, including a national thesaurus of Read coded clinical terms, diagnostic classifications (ICD10 and OPCS4), and diagnosis-related groupings.

GP systems — All GP surgeries are computerized. The aim is to implement a national scheme of the continuous collection of clinical data from these GP systems.

Contract Minimum Data Sets — The information that needs to be collected in order to fulfil the requirements of contracting and resource management.

Box 1

records which may have ethical implications;

- recommends steps in the implementation of electronic records systems which will ensure that those systems comply with ethical requirements.

It has been guided by current practice and legislation in relation to healthcare. The Electronic Patient Record is one of a number of projects which constitute the NHS Information Management and Technology Strategy (see Box 1), many of which may have implications for the maintenance of confidentiality. The ethical issues are not specific to health care; the same ethical principles apply in the other fields in which professional psychologists work.

Commentary

The extract from the Society's Code of Conduct, given in Box 2, defines the obligations of psychologists for both the *confidentiality of information* which can be identified as relating to their clients and the *security of the physical records* containing the information. The management of electronic records must acknowledge psychologists' responsibilities in relation to both of these issues.

Information given by a client to a psychologist in confidence is normally communicated to third parties (i.e. anyone else) only with the informed consent of the client. However, psychologists have clients whose competence to give informed consent is limited by their young age or reduced as a result of illness or disability. Under those circumstances, there is an obligation on psychologists to seek consent from other persons legally authorized to act on behalf of the client, and to understand and take account of the ethical and legal dilemmas to which this may give rise.

There is an ethical obligation to maintain *adequate* records, irrespective of the form in which they are held. Whether a record is adequate or not depends on the purposes for which it was made and the circumstances in which it is made. It would not be ethical to include psychometric test results in a record to which other people who would not be competent to interpret those results might have access. However, the record often contains the only enduring evidence of the psychologist's work and the client's consent and response. The quality of professional practice is enhanced by clear, complete and accurate records. Particularly in public service settings, clients may be served by a psychology department or by a succession of psychologists who need to ensure continuity of care. It is good practice to audit the quality of record-keeping from time to time and any records system, electronic or otherwise, should permit that.

With very limited exceptions, clients have *statutory rights* of access to records

Extract from the Code of Conduct

The Society can only support electronic records systems which permit psychologists to observe the intentions of the following requirements:

Confidentiality

Psychologists shall maintain adequate records, but they shall take all reasonable steps to preserve the confidentiality of information acquired through their professional practice or research and to protect the privacy of individuals or organizations about whom information is collected or held. In general, and subject to the requirements of the law, they shall take care to prevent the identity of individuals, organizations or participants in research being revealed, deliberately or inadvertently, without their expressed permission.

Specifically they shall:

- 4.1 endeavour to communicate information obtained through research or practice in ways which do not permit the identification of individuals or organizations;
- 4.2 convey personally identifiable information obtained in the course of their professional work to others, only with the expressed permission of those who would be identified (subject always to the best interests of recipients of services or participants in research and subject to the requirements of the law and agreed working practices) except that when working in a team or with collaborators, they shall endeavour to make clear to recipients of services or participants in research, the extent to which personally identifiable information may be shared between colleagues or others within a group receiving the services;
- 4.3 in exceptional circumstances, where there is sufficient evidence to raise serious concern

about the safety or interests of recipients of services, or about others who may be threatened by the recipient's behaviour, take such steps as are judged necessary to inform appropriate third parties without prior consent after first consulting an experienced and disinterested colleague, unless the delay caused by seeking this advice would involve a significant risk to life or health;

- 4.4 take all reasonable steps to ensure that records over which they have control remain personally identifiable only as long as is necessary in the interests of those to whom they refer (or exceptionally, to the general development and provision of psychological services), and to render anonymous any records under their control that no longer need to be personally identifiable for the above purposes;
- 4.5 only make audio, video, or photographic recordings of recipients of services or participants in research (with the exception of recordings of public behaviour) with the expressed agreement of those being recorded both to the recording being made and to the subsequent conditions of access to it;
- 4.6 take all reasonable steps to safeguard the security of any records they make, including those held on computer, and where they have limited control over access to records they make, exercise discretion over the information entered on records;
- 4.7 take all reasonable steps to ensure that colleagues, staff and trainees with whom they work understand and respect the need for confidentiality regarding any information obtained.

Box 2

held about them. In order to be adequate, records should be accurate and understandable by the client. Clients may also require access to records about them in the event that they have to make a complaint about a psychologist or begin a civil action for damages arising from malpractice; the records may constitute an important source of evidence. Clients are entitled to hold psychologists to account and should expect complete and accurate records. Such records may also help the psychologist to explain and justify his or her actions.

In some circumstances clients may not want the information they have given their psychologist in confidence to be available to any other person and thus may not want it recorded in any form. Such information can include even the fact that the psychologist and client have met, because of the potential implications for the client's social standing or employment prospects. Unless there is a statutory requirement to keep a record, or there are reasons of public interest which override the client's right to confidentiality, the psychologist must be

guided by the client's refusal to consent to the keeping of a record.

Where the psychologist is an employee and obliged by her or his contract of employment to observe the employer's requirements concerning record keeping, there is still an ethical obligation to obtain the client's consent to the keeping of records. In public service settings, this consent may be assumed by reference to the fact that the client has sought the service. Where there is doubt, the psychologist should explain the employer's requirements and seek the client's consent to the psychologist's observance of those requirements. In the event that the client does not consent to the psychologist observing the employer's requirements, the psychologist should advise the client that he or she is not in a position to provide the service which the client has sought.

Paragraph 4.3 of the Code acknowledges that circumstances can arise where, *in the public interest*, a psychologist may need to disclose information about a client to third parties without the client's consent. However, such circumstances are considered to be exceptional and the Code urges psychologists to consult, if possible, an experienced and disinterested colleague before making such a disclosure. It is important that electronic systems do not pre-empt that responsibility; they must deny access to the record to everyone except the psychologist.

Paragraphs 4.4 and 4.6 of the Code acknowledge that records may not be under psychologists' complete control. The instruction in paragraph 4.4 to limit the extent to which records are personally identifiable may not be implementable on many computerized systems. The instruction in the Code to exercise discretion over the information entered into records over which the psychologist does not have full control is not a solution to this problem, which is discussed later in this report in relation to control of access to records.

Legislation

Psychologists have legal as well as ethical responsibilities to keep what they have been told by their clients confidential. Their clients have legal rights of access to the information held about them and the law also offers clients a range of remedies for breach of confidence or threatened breach of confidence (Cowley, 1994).

There is a duty of confidence established in common law. In addition, the following legislation applies:

- Data Protection Act 1984;
- Data Protection (Subject Access Modification) (Health) Order 1987;
- Access to Medical Reports Act 1988;
- Access to Health Records Act 1990;
- EC Data Protection Directive 95/46/EC (which will be enacted in

British law by October 1998).

The Department of Health (1996) has provided guidance on the circumstances in which clinical psychologists as health professionals are legally permitted or obliged to disclose information about their clients or given to them by their clients. Although some elements of the underlying legislation are specific to healthcare, many are not.

A psychologist may pass on information given to them in confidence by a client:

- with the consent of the client for a purpose which the client knows and understands;
- with the consent of the client's authorized representative, where the client is not capable of giving valid consent;
- where there is implied consent on the part of the client to the transfer of information for a particular purpose, such as informing other people who 'need to know' the information in order to give the client the help she or he has sought;
- without the consent of the client where the information is required by law or a court order;
- without the consent of the client for certain other purposes, such as disclosure of documents in relation to litigation, or in the public interest.

Competence to give consent, implied consent, 'need to know' and 'the public interest' are complex issues about which it will often be wise to take advice before taking action.

Clients have statutory rights to access records made by psychologists or to which psychologists may have contributed. Certain parts of a record may be withheld from the client — generally speaking, any part of the record which would be likely to cause serious harm to the physical or mental health of a client or others, or if disclosure would reveal information about another individual or the identity of another person who has supplied information about a client.

Unlike manual records, electronic records are subject to the Data Protection Act 1984. That means that the proposed sources of the data in the records and the uses to which it may be put must be registered by the 'data user'. In the NHS, the 'data user' will normally be the Trust rather than the individual health professionals. Information from an electronic record can only be disclosed either in accordance with the disclosures which were registered under the Act by the data user, or if required as the consequence of another Act of Parliament.

A further complication arises from the ownership of records. In British law, records are the property of the employer. However, that does not give the employer ownership or control of the information in the records, which is subject to the Acts already mentioned.

Ethical implications

On a day-to-day level, psychologists use their records as an *aide-mémoire* and a means of ensuring continuity of care and communication with professional colleagues. They perceive the records as being under their control or under the control of trusted colleagues. For most psychologists, the other functions fulfilled by records, outlined above, the ownership of their records and problems about disclosures without the client's consent arise only in exceptional circumstances.

However, because the Trust is likely to be the registered data user under the Data Protection Act and because the records system may be implemented as part of a computer network, the move from 'manual' to electronic records is likely to raise questions about the aims, control and management of records, including:

- who obtains the client's expressed consent to disclosures to third parties (i.e. anyone apart from the psychologist and client);
- who has the right and responsibility to make decisions about client access and about disclosures without the client's consent;
- how access to and disclosures from team records, or records referring to couples, groups and families will be managed.

A prevailing assumption that the record is the psychologist's record, kept for the psychologist's purposes, with consent obtained from the client to the purposes and management of the record, may be exposed as false. It may appear that the record is the employer's record, kept by the psychologist on the employer's behalf, and subject to the employer's requirements. In such circumstances, the move to electronic records does not create new ethical problems, but reveals problems which already existed and had been obscured by previous practices. These problems are not resolved by focusing on the medium for holding the records (electronic or paper), but require analysis and agreement about the aims and purposes of the record system.

Electronic records systems, particularly those based on computer networks, are inherently outside of the control of the professionals using them. They do not normally permit professionals to anonymise records. Deleting records after a certain period of time may also be difficult because there may be multiple back-up copies made for security purposes. Different procedures need to be adopted in order to ensure that professionals can still fulfil their ethical obligations. The Society sees advantage in the nine principles of data security

described by Anderson (1996). For example, the principle of access control requires that computerized systems should only provide access to information to a specified list of people which, in the first instance, would be only the psychologist and the client. The principle of consent and notification requires that the client is provided with a list of those who have access, updated whenever it is changed.

Recommendations

- Systems should ensure that decisions concerning access to and disclosure of information which the client originally disclosed to the psychologist are made by that psychologist if possible, and should record and monitor other people's access to and copying of that information.
- Because of the nature of the work they do, and the phenomena and problems with which they are concerned, psychologists sometimes find themselves in situations where they can only do their job if they agree not to keep a record or agree to keep an incomplete record. Whether that is a reasonable and legitimate request can only be determined by the psychologist concerned at the time the situation arises.
- Psychologists must be given the opportunity to consider and agree the standards and procedures pertaining to a particular system before they are expected to record confidential information on it. Psychologists would not be considered to have fulfilled their ethical responsibilities if they used a system the standards and procedures of which they were unaware or ill-informed.
- The Society maintains a Register of Chartered Psychologists and investigates complaints made against those on the Register. In order to undertake that responsibility, the Society may need a complete print-out of all records concerning the complainant kept by the psychologist concerned.

This does not involve a breach of complainant's confidentiality because the complainant will have consented to disclosure of those records to the Society. Any records system must make provision for that situation.

References

- Anderson, R.** (1996). Clinical system security: Interim guidelines. *British Medical Journal*, **312**, 109-111.
- Cowley, R.** (1994). *Access to Medical Records and Reports: A Practical Guide*. Oxford: Radcliffe Medical Press.
- Department of Health** (1996). *The Protection and Use of Patient Information. Guidance from the Department of Health*. London: Department of Health.
- The Professional Affairs Board is indebted to Bernard Kat for preparing this report and to Mike Berger for his comments on an earlier draft.*
- Bernard Kat is head of Primary Care and Health Psychology, Community Health Care: North Durham NHS Trust, Durham DH1 4ST. E-mail: b.kat@dial.pipex.com*