

Client confidentiality and record-keeping



Record-keeping

Every **client should be told** that there is a strong obligation on the counsellor and the organization to keep the client's information confidential. But clients should also be told that the law imposes certain limits on client confidentiality and, in some circumstances, the counsellor may be compelled to breach confidentiality. The client's confidential information could thus end up being used in legal proceedings, including in **a criminal investigation or prosecution**. Clients should also be given information about the note-taking and record-keeping practices and policies of the counsellor and the organization.

- Organizations may want to consider what information gets recorded in client counselling files in the context of the criminalization of HIV non-disclosure. **Some community-based agencies have decided to reduce note-taking to a minimum in order to limit the potential for client notes being used as incriminating evidence against the client.** For example, some rape crisis and sexual assault centres have taken this step to protect clients who may become witnesses in criminal prosecutions. In these agencies, counsellors record only general feelings expressed by the client and avoid recording facts (called non-fact-based reporting). Some health educators have recommended this procedure be adopted with files of HIV-positive clients as well. In practice, that could mean, for instance, recording service providers' actions rather than client's factual history (i.e., service providers would record "client counselled regarding condom use," rather than "client engages in unprotected sex.").
- **However, organizations should be aware that reducing note-taking to a minimum (or not taking any notes at all) may involve difficult trade-offs.** It could unnecessarily undermine the counselling relationship and could have the unintended effect of compromising the agency's legal position in a case involving the client. Agencies may need to demonstrate that they have advised a client thoroughly and accurately regarding transmission and other issues related to HIV. In the case of someone living with HIV who continues to engage in unsafe behaviour, the agency might need to show that it had taken reasonable steps to encourage the client to practise safer behaviour. And if the organization decides to breach confidentiality in such circumstances, it might need to show that its decision was reasonable in the circumstances. A minimal note-taking policy could undermine the agency's ability to do this. Detailed counselling notes may also provide better continuity in client counselling, particularly when a client has more than one counsellor.

- Given the uncertainty about when disclosing HIV-positive status to a sexual partner may be required in order to avoid the risk of criminal prosecution, **it may also be difficult for an organization to determine what recorded information may benefit — or harm — a client in the context of criminal investigations.**
- **Moreover, counsellors who are members of regulated professions are required by law to keep records of their professional practice, in accordance with the generally accepted standards of practice of their profession.** Laws and professional standards often set out the minimum information that must be recorded, as well as rules about access, disclosure, storage and destruction of client records. Where a regulated professional fails to keep a record, or handles a record in a way that is prohibited, he or she may be guilty of professional misconduct.
- **Record-keeping requires balancing possible conflicting interests. It is therefore important that organizations evaluate their recording practices based on these (non-exhaustive) considerations and develop (or adapt) record-keeping policies to guide their staff and volunteers.**

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