



COVID-19 Response:

**Confidentiality and
disclosure issues for
practitioners**



Introduction

The COVID-19 pandemic has generated many practice issues for practitioners to resolve, not only in managing practicalities in our day-to-day working, but also potentially challenging issues of confidentiality and disclosures. Each case has to be decided on its own circumstances, so there cannot be a 'one size fits all' response to confidentiality and the COVID-19 pandemic related dilemmas. There are, however, some general rules and resources which are helpful in decision making. The first base for us to consider is the *Ethical Framework* (BACP 2018). The whole of the *Ethical Framework* applies to our practice, but the principles of candour, accountability and respect embodied in it are particularly important, especially Good Practice 55-59. Other useful BACP resources are listed at the end of this resource.

How to use this resource

Please note that this resource reflects the thinking of the author, and is not intended to constitute legal or professional advice in any specific case. It offers the author's thoughts on principles and policy applicable at the time of publication, and should be used in conjunction with the current BACP *Ethical Framework for the Counselling Professions* (BACP 2018), and current law and Government and professional guidance. It is not intended to be sufficient for resolving specific issues or dilemmas arising from work with clients, which are often complex, and in these situations it is recommended to consult in supervision and/or with a suitably qualified and experienced practitioner. Specific issues in practice will vary depending on clients, particular models of working, the context of the work and the kind of therapeutic intervention provided. Please be alert for legal and guidance changes that may affect your practice. References were up to date at the time of writing but there may be further changes to the law, Government departments, websites and web addresses.

A

General Guidance

It is best practice to consider any specific legal and practice issues, which may be relevant to providing counselling and psychotherapy during the COVID-19 pandemic, including matters of compliance with the current local and national law, confidentiality and disclosure. These issues can then be addressed in the client contract in accordance with the openness and transparency required of us under the *Ethical Framework* (BACP 2018) and included as appropriate in the privacy notices provided to clients in compliance with the General Data Protection Regulation (GDPR).

If these issues are carefully considered by the therapist before commencing work with a client, practice issues and matters of confidentiality and disclosure can be addressed and agreed with the client in advance of therapy work, making any subsequent decision making easier for both client and therapist.

Some specific questions are addressed in [Part C](#), but when faced with a COVID-19 related practice issue or dilemma, as a general rule, it will be helpful to:

- **Consider statutory duty v discretion to disclose information.** Certain statutes and law oblige us to disclose information, with penalties for not doing so (for example in terrorism or under court orders). Unless these apply to a situation, or the therapist is working in a service bound by specific Government regulations regarding confidentiality and disclosures, e.g. the NHS, social care, or education, the therapist must rely on their own discretion with appropriate advice to make an ethical decision, and to make a disclosure which is justifiable in the public interest – i.e. if the public interest outweighs the client's wishes. To assess the situation, and make a legal and ethical decision, see the disclosures checklists [Part C](#).
- **Check the current general law and guidance relevant for COVID-19, addressed in [Part B](#).**



- **Check the COVID-19 Government guidance and law currently applicable for your geographical area.** (At the moment, Government guidance and local rules keep developing and changing, so keep tracks of national guidance and local changes in your area). You can elect to receive regular email updates at gov.uk.email@notifications.service.gov.uk.
- **Having checked the current law and guidance for your area (see Part B), consult with your practice supervisor, or another suitably qualified and experienced legal or other advisor, and reflect on the general disclosure checklists in Part C.** These provide a way to think through a confidentiality and disclosure decisions ethically and legally.
- **Assess your workplace (home or office).** If it involves meeting others face to face (as opposed to working by phone or online), must be 'COVID secure' see services <https://assets.publishing.service.gov.uk/media/5ef2889986650c12970e9b57/working-safely-during-covid-19-close-contact-151020.pdf>. This guidance has sections that apply to our work, e.g. offices, contact centres and other indoor environments (as close as we can get to counselling), and home visits to clients.

- **If you feel that a client is not abiding by the relevant current law or guidance (see Part B), if possible try to address the issues and concerns in therapy. If possible, help the client to understand the public interest needs, and where necessary and appropriate, encourage and help the client to comply with current law and guidance.**
- **If it is necessary and appropriate to safeguard the client or others from an imminent risk of serious harm (for example where the therapist has a reasonably held belief that the client is seriously unwell and is not seeking medical advice or treatment; or the client reports that they have tested positive for COVID-19 but are not self-isolating, and they are mixing widely with and/or therefore possibly endangering vulnerable others), encourage the client to self-refer to NHS 111 (or their GP) for advice and help on next steps, and/or to give consent to you as their counselling practitioner (or any other appropriate person) to make any necessary referral to to NHS 111 or their GP.**

If the practitioner has reasonable cause to believe that there is a risk of serious harm for the client or others, and it is not possible to encourage the client to self-refer to the NHS 111 service or the GP, or other appropriate service, or give consent for the practitioner or another trusted person to refer, then the counselling practitioner should consult in supervision, or with another suitably qualified and experienced legal or other advisor, and see [Part C](#) for examples of checklists. See also [Scenario 1](#).

B

COVID-19 specific law and guidance

UK general guidelines can be found at:

NI

www.nidirect.gov.uk/articles/coronavirus-covid-19-regulations

Wales

<https://gov.wales/coronavirus>

Scotland

www.gov.scot/news/route-map-for-moving-out-of-lockdown

England

Local restrictions:

www.gov.uk/government/collections/local-restrictions-areas-with-an-outbreak-of-coronavirus-covid-19

England

www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do

Legally, the Public Health (Control of Disease) Act 1984 allows a government to make regulations regarding the protection of public health. Some of these rules are designed to prevent cross-infection and contamination in the case of infectious diseases. This can include closure of premises, restrictions or requirements on people and their actions in various ways, and where absolutely necessary, the police and others can be empowered to remove people into hospital or other healthcare on a compulsory basis.

There have already been regulations made under this Act, e.g. The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020. Local authorities and the police can enforce these (and other) regulations, and prosecute for breach of them, with the imposition of fines as punishment.

In addition, there is the Coronavirus Act 2020 now in force. You can find it at www.legislation.gov.uk/ukpga/2020/7/contents/enacted

It gives the Secretary of State powers concerning the regulation of events, gatherings and premises.

C

General confidentiality and disclosures checklists for reflection

Checklist 1 and 2 are all adapted with the authors' consent from Bond and Mitchels (2015). Additional guidance can be found in [GPiA 014 Managing Confidentiality](#).

We can breach confidentiality and disclosure is justifiable when:

- 1. The client consents to and/or requires disclosure**
- 2. Law requires disclosure**
- 3. Law permits disclosure (if in public interest and ethically justifiable)**

A therapist's decision to disclose information must be ethically and legally justifiable. The decision should be based on the relevant law, professional guidance and ethical framework, agency policies and rules, and the therapist's discernment and professional judgment. They will then have to stand by their decision, and if necessary, deal with the consequences of the action, including any legal action which may be brought against them by their client. If the law regards their decision as being in the public interest, then the therapist is protected.



Decisions, disclosures and referrals checklists

Checklist 1



The information: sources, reliability, and consent issues

- Is this information founded on information from a reasonable and/or reliable source?
- What is the likelihood of serious harm in this case?
- Is this serious harm imminent?
- If I refer/disclose this information, what is likely to happen as a consequence?
- If I do not refer, would the likely consequences of non-referral include any serious harm to the client or others?
- If so, are the likely consequences of non-referral preventable? What would have to happen to prevent serious harm to my client or others?
- Is there anything I (or anyone else) can do to assist in preventing this harm to my client or others?
- What steps would need to be taken to implement such assistance?
- How could the client be helped to accept assistance/or to support the proposed action?
- Does my client have the mental capacity to give explicit informed consent (or refusal of consent) at this moment in time?
- If the client does not have mental capacity to make their own decisions, then what are my professional responsibilities to the client and in the public interest?
- If the client has mental capacity to make the decision, but does not consent to my proposed action (e.g. referral to a GP, or to the police, or to social services, etc.), does the public interest justify the intended disclosure or referral?

Checklist 2

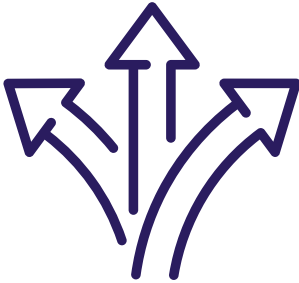


Legal and ethical issues in making a good disclosure

Am I acting within the law?

- Am I acting within the guidelines of my Code of Ethics (e.g. BACP's current *Ethical Framework*)? What would be my professional situation if I go ahead and make the referral without client consent?
- Is this information regulated by the Data Protection Acts or the GDPR; (for example, do the records comprise client-identifiable sensitive personal data?)
- Were the counselling records/notes made by a professional working for a public body in health, education or social care?
- What are the relevant rights of the person concerned under the Human Rights Act 1998?
- If working in the health community, is disclosure compliant with the Caldicott principles and guidance? (List of principles can be found in [GPiA 014 Managing Confidentiality](#))
- Is there a legitimate requirement to share this information: e.g. statutory duty or a court order
- What is the purpose of sharing the information that may be disclosed? (See [Checklist 1](#))
- If the information concerns a child, young person, or vulnerable adult, is sharing it in their best interests?
- Is the information confidential? If so, do you have consent to share it?
- If consent is refused, or there are good reasons not to seek consent, does the public interest necessitate sharing the information?
- Is the decision and rationale for sharing the information recorded? (See recording disclosures guidance on the [next page](#)).
- What is the most appropriate way to share this information? (See making a good disclosure guidance on the [next page](#)).

Guidance in making a good disclosure



1. Inform the client, **except** in circumstances where telling the client:
 - is illegal or
 - will cause or increase any risk of harm to the client or others or
 - may prejudice a police or inter-agency investigation of a serious crime.
2. Limit the information disclosed to the minimum necessary in order to avert the risk.
3. Select the recipient(s) of the information: disclosure should only be made to a person or agency that is capable of minimising or preventing the harm.
4. Mark written or emailed communication 'Confidential' or 'In confidence.' Oral communications should be preceded by a clear statement that what is being disclosed is confidential.
5. If the therapist is unfamiliar with the practice of the person or agency receiving the information, it is reasonable to ask how the information will be protected or treated in advance of disclosing it.

Guidance in recording disclosures



6. If sharing the information is necessary and appropriate, make a note as soon as possible of the following:
 - the date of providing the information
 - to whom the information is given
 - the content of the information shared
 - the method of disclosure or referral
 - whether consent was given (and by whom)
 - if the disclosure is made without consent, record the reasons why this decision was made.

D

Specific dilemmas

Scenario 1

My client tells me they have been 'notified' by their mobile app to inform that they have been in close contact with a person who has COVID-19, or that they have been in a venue where such exposure may have occurred, but my client has neither requested nor had a COVID-19 test, and they have not told their GP or anyone else. They say that they 'feel fine' and so are not obeying the Government guidelines and 'not bothering with social distancing.' What should I do?

Are you working with the client remotely or face to face? Consider the issues discussed in [Part A General guidance](#), then [Part B COVID-19 specific law and guidance](#), and [Part C Disclosure checklists](#). How reliable is the client's information? Assess the reliability of the facts stated - is this a realistic statement of what the client has been told and what the client is doing?

Is there any evidence in the therapy session that the client is really unwell (e.g. the client cannot easily breathe or talk, and/or shows other recognised symptoms of COVID-19 infection/distress) and clearly in need of urgent medical help? Or, if you or others can persuade them to stay at home, self isolate and abide by the Government guidance, might the client be safe to wait to see whether or how any illness develops?

If the practitioner has reasonable cause to believe that the information given by the client is based on fact, try to find out why the client is not wanting to comply with the guidance, and address this in the therapy session. If possible, try to persuade the client to self-refer to NHS 111 (or their GP) for advice and help on next steps, and to comply with the self-isolation guidance to safeguard others, and/or if the client is showing symptoms of developing the illness, to give consent to the counselling practitioner to make the necessary referral.

In situations where the practitioner has *reasonable cause to believe a client is unwell with an infectious illness and that the information is based on fact, and that there is clear evidence of a real and imminent risk of serious harm to the client and others*, but the client is unwilling to refer to medical advice and/or comply with the guidance, the next step is to consult your practice supervisor or another suitably qualified and experienced advisor quickly and consider the issues in [Part A General guidance](#), then [Part B COVID-19 specific law and guidance](#), and [Part C Disclosure checklists](#).

If the practitioner has reasonable cause to believe there is a *real and imminent risk of serious harm to the client and/or others*, then under the current law and regulations (Coronavirus Act 2020 and Public Health (Control of Disease) Act 1984 and Regs) it may be justifiable in the public interest for the counselling practitioner to breach confidentiality and refer the client's situation to the client's GP. The police have the power under the Coronavirus Act 2020 and the Public Health (Control of Disease) Act 1984 to implement regulations for public safety and stop others being infected, including requiring a person who may pose a serious risk to others' health to attend an appropriate place for testing and treatment.

Scenario 2

My client is working in a shop. He tells me he thinks that he has symptoms which may be of COVID-19, but he has neither requested nor had a COVID-19 test, and he has not told his GP or anyone else. He is not receiving treatment and says that he is 'just a bit under the weather' and so not obeying the Government guidelines. My client says he is still working in the shop, serving customers, and 'not bothering with social distancing,' What should I do?

The client '...thinks he has symptoms of COVID-19.' Is the client right in his assumption? Is the client putting others at risk of infection? Who should be the judge of these issues? First the counsellor needs to consider whether either the client or they as a counselling practitioner are in a position to make a reasoned judgment of the reported or observed symptoms, and whether there is a valid and reasonable cause to believe there is a *real and imminent risk* to the client and/or others.

Are you working with the client remotely or face to face? Consider the issues discussed in [Part A General guidance](#), then [Part B COVID-19 specific law and guidance](#), and [Part C Disclosure checklists](#). How reliable is the client's information? Assess the reliability of the facts stated – is this a realistic statement of what the client is experiencing and what the client is doing? Consider whether the client is in touch with reality, or might this information arise from possible fantasy, hallucination, psychosis, an expression of unfulfilled need, etc.? Is there any evidence in the therapy session that the client is really unwell (e.g. the client cannot easily breathe or talk, and/or shows other recognised symptoms of COVID-19 infection/distress) and clearly in need of urgent medical help? Or, if you or others can persuade them to stay at home and abide by the Government guidance, might the client be safe to wait to see whether and how any illness develops? Is the counselling practitioner a healthcare practitioner qualified to make such a diagnosis? If not, this is a matter for the appropriate health professionals to decide.

If the practitioner has reasonable cause to believe that the information given by the client is based on fact, try to find out why the client is not wanting to comply with the guidance, and address this in the therapy session. If possible, try to persuade the client to self-refer to NHS 111 (or their GP) for advice and help on next steps, and to comply with the self-isolation guidance to safeguard others, and/or to give consent to the counselling practitioner to make a referral to the client's GP.

What if the client had stated in the therapy session that they have recently tested positive for COVID-19, but are not self-isolating and are still at work, serving the public face to face?

Please refer to the responses to [Scenario 1](#) and the first part of [Scenario 2](#). If the practitioner has *reasonable cause to believe that the information is based on fact, and that there is clear evidence of a real and imminent risk of serious harm to the client and others*, but the client is unwilling to refer to medical advice and/or comply with the guidance, the next step is to consult your practice supervisor or another suitably qualified and experienced advisor quickly and consider the issues above in [Part A General guidance](#), then [Part B COVID-19 specific law and guidance](#), and [Part C Disclosure checklists](#).

If the practitioner has reasonable cause to believe there is a *real and imminent risk of serious harm to the client and/or others*, then under the current law and regulations (Coronavirus Act 2020 and Public Health (Control of Disease) Act 1984 and Regs) it may be justifiable in the public interest for the counselling practitioner to breach confidentiality and refer the client's situation to the client's GP. The police have the power under the Coronavirus Act 2020 and the Public Health (Control of Disease) Act 1984 to to implement regulations for public safety and stop others being infected, including requiring a person who may pose a serious risk to others' health to attend an appropriate place for testing and treatment.

Scenario 3

My client says that they have no symptoms of COVID-19, but also says that they are not obeying the Government rules ... what should I do?

In this situation, a counselling professional would probably want to address in the therapy session why the client is unwilling to comply with the guidance, and to address any fears or anxieties the client may have.

Where possible, the counselling practitioner should consult in supervision, or with another suitably qualified and experienced legal or other advisor. Client confidentiality may only be breached without the consent of the client either in obedience of statute or a court order, or in the public interest, if there is reasonable cause to believe that there is a real and imminent risk of harm to the client or others.

Statute does not impose a duty on a therapist to disclose this information, and so the therapist must rely on their discretion to make an ethical decision, if this is in the public interest, [Part A](#) and the answers to [Scenario 1](#). Disclosure is only justifiable in the public interest where there is reasonable cause to believe that there is a real and imminent risk of serious harm to the client or others, so here, it is questionable whether a court would feel that a disclosure by the therapist in the public interest would be justifiable. Try to address these issues in the therapy and persuade the client to comply with the current guidance to safeguard others.

But... what if this client then goes on to say that they are about to hold a large indoor house party with many people dancing together?

In this case the potential risk to others may be increased, and the therapist would need to consider what the current law and Government guidance requires in their geographical area. Try to address these issues in the therapy and persuade the client to comply with the current guidance to safeguard others.

Certain statutes and law oblige us to disclose information, with penalties for not doing so (for example in terrorism or under court orders). Unless these apply to a situation, or the therapist is working in a service bound by specific Government regulations regarding confidentiality and disclosures, e.g. the NHS, social care, or education, the therapist must rely on their own discretion with appropriate advice to make an ethical decision, and to make a disclosure which is justifiable in the public interest – i.e. if the public interest outweighs the client's wishes. To assess the situation, and make a legal and ethical decision, please see [Part A General guidance](#), then [Part B COVID-19 specific law and guidance](#), and [Part C Disclosure checklists](#), and the responses to [Scenario 1](#). The public interest will only outweigh client wishes, justifying disclosure without client consent, in circumstances where there is reasonable cause to believe that there is a real and imminent risk of serious harm to the client or others. In that situation, if the therapist decides to make a disclosure, careful consideration should be given to how and to whom disclosure should be made, and a record kept. See the Checklist [Part C](#).

Useful Resources



British Association for Counselling and Psychotherapy (BACP) (2018) *Ethical Framework for the Counselling Professions*. Lutterworth: BACP.

BACP (2019) GPiA 105 Legal Resource: *The General Data Protection Regulation (GDPR) and the legal principles and practice notes for the counselling professions* (Content Ed. Mitchels, B.). Lutterworth: BACP.

BACP GPiA 014 Legal Resource: *Managing confidentiality in the counselling professions* (Content Ed. Mitchels, B.), Lutterworth: BACP.

Reeves, A. (2015) *Working with Risk in Counselling and Psychotherapy*. London: Sage.

Scottish Executive (2003) *Sharing information about children at risk: a guide to good practice*. Edinburgh: Scottish Executive.

UKCP *Code of Ethics and Professional Practice* (available at www.psychotherapy.org.uk/registers-standards/standards-guidance-and-policies/#standards)

About the author

Dr Barbara Mitchels, PhD, LLB, BACP Registered (Snr Accred), is a practising psychotherapist and Fellow of BACP. A retired solicitor, Barbara also provides ethics, law and therapy related consultancy, resources and CPD workshops, see www.therapylaw.co.uk.

Copyright information:

COVID-19 Pandemic: Confidentiality and disclosure issues for practitioners is published by the British Association for Counselling and Psychotherapy, BACP House, 15 St John's Business Park, Lutterworth, Leicestershire, LE17 4HB.

T: 01455 883300 **F:** 01455 550243
E: bacp@bacp.co.uk **www.bacp.co.uk**

BACP is the largest professional organisation for counselling and psychotherapy in the UK, is a company

limited by guarantee 2175320 in England and Wales, and a registered charity, 298361.

Copyright © 2020 British Association for Counselling and Psychotherapy.

Permission is granted to reproduce for personal and educational use only. Commercial copying, hiring and lending are prohibited.

Design by Steers McGillan Eves.