

## Access to care records

March 2019

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### Background

This briefing is intended to be a source of information for corporate parents, particularly those responsible for the collation and management of social work records, in relation to care experienced people's access to their care records. The legislative and policy context of records access is outlined in order to clarify the duties and responsibilities of record holders, and the rights of care experienced people to access the personal data held about them. This briefing highlights experiences, views and needs of care experienced people, alongside research evidence, and discusses key issues for best practice.

This briefing is primarily concerned with ensuring best practice in procedures and supports to access records (from a historical perspective). Using this lens also provides an opportunity to ensure high quality, child-centred recording practices are in place to improve recording practice for children and young people now.

### Why records matter

Research evidence indicates that care records can have a valuable role for individuals understanding their family and identity, allowing them to answer questions about their early life, and can help them recover from the effects of trauma.<sup>1</sup> The content of care records can represent entire childhoods, they can provide a connection between the past and present, and have lifelong significance to care experienced people.<sup>2</sup> Accessing care records can be a hugely significant event in the pursuit of self-identity for care experienced people.<sup>3</sup> It can also be a difficult and intimidating process, as well as exceptionally emotionally challenging. Therefore, corporate parents should work to

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<sup>1</sup> Hoyle, V. et al (2018) "Child Social-Care Recording and the Information Rights of Care-Experienced People: A Recordkeeping Perspective" *British Journal of Social Work*. 00:1-19

<sup>2</sup> Biehal, N., Clayden, J., Stein, M. and Wade, W. (1995) *Moving On: Young People and Leaving Care Schemes*, London: HMSO

<sup>3</sup> Horrocks, C. & Goddard, J. (2006) "Adults who grew up in care: constructing the self and accessing care files." *Child and Family Social Work*, 11: 264-272.

ensure the experience of those accessing their care records as sensitive and straightforward as possible, with person centred support available wherever required.

The impact of both positive and negative experiences of accessing care records are highlighted in UK-wide research, [Listen Up](#), carried out with over 300 care experienced people, of whom over a third had accessed their records. The most common negative experiences included lengthy delays in receiving access; heavily redacted or deleted materials; having to make or send frequent and repeated phone-calls, emails and letters; and difficulties managing the emotional impact of reading records. A minority of respondents reported positive experiences, particularly in terms of the difference their records made to their understanding of their time in care and why they were placed there; the support they received from social workers/services; and discovering they had siblings they did not know about who they were then able to contact.<sup>4</sup>

## Records and rights

Following the decision in a landmark case<sup>5</sup> at the European Court of Human Rights in 1989, under Article 8 (Right to Private and Family Life) of the European Convention on Human Rights, access to records was established as an aspect of care experienced people's human rights.<sup>6</sup> Furthermore, Article 8 of the [United Nations Convention on the Rights of the Child](#) (UNCRC, 1989) recognises the rights of children to preserve their identity. This right has clear and explicit implications for children separated from their families, and any records held about them. In line with Article 8, records about children and their wider family relationships must be properly maintained, and children should have access to them.<sup>7</sup>

Despite these rights, care experienced people often lack a detailed knowledge of their past, and hold a limited understanding of the courses of events in their lives.

## Case recording in social work practice

Maintaining case records is an integral part of social work practice with children, young people and families. Records form the basis of a broad array of social work tasks, documenting the first engagement with families and assessing need; identifying strengths and challenges facing families; and recording interactions between families and services designed to support them at times of difficulty. Concerns about children's safety and welfare should be carefully recorded, and may be used as part of legal proceedings. As such, significant time and resources are spent on their creation and maintenance.

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<sup>4</sup> Duncalf, Z. (2010) *Listen up! Adult care leavers speak out: the views of 310 care leavers aged 17-78*. Manchester: The Care Leavers' Association

<sup>5</sup> GASKIN v. THE UNITED KINGDOM - <http://www.bailii.org/eu/cases/ECHR/1989/13.html> retrieved on 13/02/19

<sup>6</sup> Hoyle, V. et al (2018) "Child Social-Care Recording and the Information Rights of Care-Experienced People: A Recordkeeping Perspective" *British Journal of Social Work*. 00:1-19

<sup>7</sup> <https://archive.crin.org/en/home/rights/convention/articles/article-8-preservation-identity> retrieved on 12/02/19

Not only are records important to social work with children and young people currently using services, they are critical for care experienced people throughout their lives. However, whilst their potential is rich, the expectations and hopes of those who access their care records are not always met. Language in records may feel judgemental, stigmatising and institutional; there may be inaccuracies; anticipated information may be omitted; and narratives may be unexpected, leading to distress and causing (rather than resolving) questions over identity and belonging. Whilst some practitioners may strive to record with these considerations in mind, this is not without challenge. One of the biggest dilemmas in social work recording is that the record is written for various purposes, and for a number of different audiences.<sup>8</sup> However, the importance of ensuring high quality, understandable and accessible records for care experienced people cannot be overstated.

## Policy, guidance and legislation

The policy and legislative basis for social work case recording and accessing case records is established in a number of statutory instruments.

### Case recording

Regulations 42 and 43 of the [Looked After Children \(Scotland\) Regulations 2009](#) (the 2009 Regulations) (and associated guidance<sup>9</sup>) set out requirements in relation to case records for looked after children. These requirements apply equally to all looked after children, regardless of placement type. The 2009 Regulations require records to include:

- All information relating to the child in [Schedule 1](#) (see Appendix 1);
- A copy of the child's plan;
- Any written reports concerning the child's welfare;
- Reports for, and records of, reviews of the child's case; and
- Details of any arrangements made by the local authority in respect of the care of the child with any person, or any registered fostering service.

Guidance for the 2009 Regulations also specifies the following must be recorded:

- A chronology of significant events;
- Recording of all contacts with children and families;
- Decisions taken and reasons for these;
- Distinction between facts and opinions;
- Outcomes of interventions; and
- Details of the child's views

The guidance draws particular attention to the importance of recording links to

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<sup>8</sup> O'Rourke, L. (2010) *Recording in Social Work: Not Just an Administrative Task*. Bristol: The Policy Press

<sup>9</sup> Scottish Government (2011) [Guidance on the Looked After Children \(Scotland\) Regulations 2009 and the Adoption and Children \(Scotland\) Act 2007](#). Edinburgh: Scottish Government

information about a child's siblings, reflecting the increasing recognition and understanding of the rights of siblings, and of lifelong difficulties and issues experienced by brothers and sisters separated through care proceedings.<sup>10</sup>

The 2009 Regulations guidance is clear that the manner in which records are kept should facilitate anyone legitimately accessing them: their content must be of a quality and level of accessibility suitable for looked after children to access them in the future. The guidance specifies that local authorities should have **clear, robust and sympathetic** procedures and systems to assist people who wish to access looked after children's records, including adults who were looked after in the past, children and young people who were and are still looked after, and the parents of younger children who wish to access their children's information. Such procedures and systems should reflect relevant recommendations in the 2007 [Shaw Report](#),<sup>11</sup> a systemic review into the regulation, monitoring and inspection of residential schools and children's homes which recommended regular evaluation of record management practices, comprehensive training, and adherence to best practice codes by all organisations with responsibility for managing records relating to children's services.

Additional practice guidance [On The Record](#), published in 2010 by the former Social Work Inspection Agency, provides detailed guidance to inform and enable best recording practices. The guidance recognises the role of care records in forming a history and biography for care experienced people, and of the crucial role of partnership with the person whose record it is in drawing up high quality records.

### **Retention of records**

Regulation 43 of the 2009 Regulations requires the records for a child who has been looked after away from home (in foster, kinship or residential care) to be retained for 100 years from their date of birth (or 25 years from the date of their death if the child dies before the age of 18). The guidance explicitly reflects this is a recognition of children's potential future needs to access information about their past history as being comparable to the similar needs of adopted adults.<sup>12</sup>

For children looked after at home, records should be retained whilst there are still children or young people in the family under the age of 18, at a minimum. Guidance recommends that the records of children looked after at home are retained for a minimum period of 30 years from the child's 18<sup>th</sup> birthday.

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<sup>10</sup> For more information, please see <https://www.standupforsiblings.co.uk/>

<sup>11</sup> Shaw, T. (2007) *Historical Abuse Systemic Review: Residential Schools and Children's Homes in Scotland 1950 to 1995*. Edinburgh: Scottish Government.

<sup>12</sup> The process and support available to an adopted person who wishes to access their records, including counselling, are established by the [Adoption and Children \(Scotland\) Act 2007](#), and regulated by the [Adoption Support Services and Allowances \(Scotland\) Regulations 2009](#) and [The Adoption \(Disclosure of Information and Medical Information about Natural Parents\) \(Scotland\) Regulations 2009](#).

## Subject access requests

All individuals have rights as 'data subjects' to access information held about themselves under the [Data Protection Act 2018](#) (DPA) and the [General Data Protection Regulation](#) (GDPR). Under Section 45 of the DPA, and Article 15 of the GDPR, an individual can make a Subject Access Request (SAR) to any public authority, to access all information recorded about them. This is the legal mechanism through which a care experienced person can seek to access their care records, and indeed any data/information/records about them held by any public authority. The DPA is an enabling framework, which should not be misunderstood as a barrier preventing individuals from accessing their information.

The Information Commissioner's Office (ICO) provide a detailed Subject Access Code of Practice, explaining the rights of individuals to access their personal data, and the responsibilities and duties of data controllers (including local authorities and any other public bodies or organisations holding information about a care experienced person). Adherence to this ensures subject access is provided in accordance with the law and best practice. Following the enactment of the DPA in 2018 (which replaced the previous Data Protection Act 1998 in light of the GDPR), the Subject Access Code of Practice is in the process of being updated, with publication expected soon. In the meantime, detailed information for organisations about SARs is available on the [ICO website](#), and key issues are summarised below.

Issue	Key information
<b>Personal data, confidentiality and redaction</b>	<p>Individuals have a right to obtain a copy of all of their personal data held by an organisation, and supplementary information including information about the source of the data.</p> <p>Individuals are only entitled to access their own personal data. Whilst case records principally relate to the individual, by their nature they also contain personal information relating to other people in the individual's life, such as parents, siblings, carers and friends. The DPA and GDPR also protect the privacy of these 'data subjects', meaning their information cannot be disclosed without their consent, unless it could be determined as reasonable to do so. Considerations in determining such reasonableness include:</p> <ul style="list-style-type: none"><li>• the type of information that would be disclosed;</li><li>• duties of confidentiality to the other individual;</li><li>• steps taken to seek consent; and</li><li>• the capability of the other individual to give consent.</li></ul> <p>Decisions involve balancing the data subject's right of access against</p>

	<p>the other individual's rights. If the other person consents, then it would be unreasonable not to disclose their information. However, if there is no consent, an active decision must be made about whether to disclose the information anyway.</p> <p>It is not lawful to refuse to provide access to personal data which has been <i>obtained from</i> a third party, although the personal data of the third party may require consent to disclose.</p> <p>While matters of confidentiality persist beyond death, data protection rights only apply to living individuals. This should be remembered when making redaction decisions concerning deceased third parties.</p> <p>In practice, each case requires its own review, and consequently approaches to releasing information may be inconsistent. Research suggests decisions about how much third-party information to redact are one of the main areas of difficulty for those providing access to care records, as well as those receiving access.<sup>13</sup></p>
<b>Timescales</b>	<p>Data controllers have one calendar month to comply with a SAR, and should act on SARs without undue delay. If a request is complex, the time to respond may be extended by a further two months.</p>
<b>Making a request</b>	<p>An individual can make a SAR verbally or in writing (or via social media), to any part of an organisation. No specific format or form of words is required for an individual to make a valid SAR, it simply has to be clear that the individual is asking for their personal data. The onus is on the organisation, rather than the individual making the request, to ensure that any SARs are identified and properly handled.</p> <p>Providing a form through which an individual can make a SAR is good practice, but SARs made by other means must still be processed within the specified time scales.</p> <p>An individual can also make a SAR via a third party. This includes third parties such as solicitors, as well as less formal arrangements such as via friends or family, where an individual does not feel comfortable making the SAR themselves for any reason. The third party must provide evidence that they are entitled to act on behalf of the individual, for example through a written authority.</p>

<sup>13</sup> Goddard, J., Feast, J. and Kirton, D. (2008) "A childhood on paper: Managing access to child care files by post-care adults", *Adoption & Fostering*, 32(2): 50-62.

<b>Fees</b>	A fee cannot be charged to deal with a SAR in most circumstances. Where there are justifiable reasons, and where a request is considered manifestly unfounded or excessive, a 'reasonable fee', based on the administrative costs of complying with the request, can be charged.
<b>Requests from children</b>	<p>Children have their own subject access rights, as opposed to parents or guardians having these rights. A SAR made by a child who is considered to have sufficient age and maturity to understand their rights should be responded to as any other SAR. In Scotland, children aged 12 and over are presumed to have such capacity, unless it can be shown otherwise. Children under the age of 12 may still have such capacity, and this should be assessed carefully.</p> <p>If a child is too young to understand their rights, a person with parental responsibilities and rights may exercise the child's rights on their behalf, if the child wishes this, or if it is evident that this is in the child's best interests. The consequences of allowing those with parental responsibility to access a child's information must be taken into account, particularly in situations where there may have been abuse or ill-treatment.</p>
<b>Quality of information</b>	Information must be provided in a concise, transparent, intelligible and easily accessible form. Whilst there is no specific requirement to ensure the particular individual understands the information provided, it should be in a format that 'the average' person (or child) is capable of understanding.

## Principles of good practice in accessing records

Corporate parenting refers to the collective responsibility of all agencies of the state to uphold the rights and safeguard the wellbeing of care experienced children and young people. It is about asking "would this be good enough for my own child?", and if not, taking actions to improve. In Scotland, [Part 9 of the Children and Young People \(Scotland\) Act 2014](#) establishes the duties and responsibilities of corporate parents, including the need to work collaboratively with one another; to promote the interests of care experienced children and young people; and to take action to support care experienced children and young people to make use of services and access supports. When viewed through a corporate parenting lens, the impetus to improve care experienced people's access to their records is clear.

In England and Wales, the principles of good practice in accessing records are outlined in the [Children Act 1989 guidance and regulations – Volume 3: Planning transition to adulthood for care leavers](#). Practice in accordance with these principles should be expected by any care experienced person requesting access to their records, regardless of their age. The guidance summarises consistent messages from care leavers about what makes a positive difference when accessing their records, including:

- Good quality record keeping;
- Clear, publicly available guidance about how to access their records;
- Timely responses to access requests, and to be told without delay if records are missing or do not exist;
- Sensitivity and support during the access process, including an understanding by front line staff of the importance of the content of records to the individual seeking access; and
- Ensuring crucial family information and childhood experiences are not redacted; and any redaction necessary is clearly explained.<sup>14</sup>

In Scotland, corporate parents will wish to use insights such as these, and others gained by continuing to listen to care experienced individuals, in order to improve services and supports. Many corporate parents are already endeavouring to develop processes to consistently ensure individuals' access to their records is facilitated in a person centred, supportive, sensitive, responsive way, cognisant of the very real potential that trauma may be confronted as a result. However, evidence from care experienced people is clear that this is often not the experience. Alongside complying with the legislative requirements discussed above, in pursuing best practice, corporate parents will wish to consider matters such as:

- Effective ways to collaborate with other corporate parents. In a variety of circumstances, corporate parents will need to work together to ensure an individual is fully supported to access *all* of their records. Examples include:
  - Where a range of agencies (or different departments within one agency) may hold relevant records (for example: social work, mental health services, educational psychology, housing)
  - Where an individual requests access to records that were created by an administrative area which no longer exists (such as Central, Grampian, Tayside or Strathclyde)
  - Where other organisations such as inpatient health settings or residential establishments (including the voluntary organisations) hold additional records
- Ensuring the availability (where required/requested) of person centred, trauma-informed support to understand and process care records. No one approach will

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<sup>14</sup> Department for Education (2015) *The Children Act 1989 guidance and regulations - Volume 3: planning transition to adulthood for care leavers*. London: DfE



suit all individuals, but for some, the practice of receiving (often disorganised) care records through the post with no support to comprehend them is at best unhelpful and at worst traumatising.

- Ensuring care experienced people are listened to, and included and involved in improvement activities and the design of new systems.
- Taking an enabling and proactive approach to redaction. Taking a considered approach to assessing which information can be disclosed without consent, and seeking consent where it is required, can help ensure redaction is kept to an absolute minimum and enables care experienced people comprehensive access to their personal histories. Care should be taken to ensure consistency in decisions about redaction throughout an individual's record.

## Conclusion

The importance of access to records in order to understand their life history is an issue uniquely felt by those with care experience. Ensuring a sensitive, responsive system for care experienced people to access their records is an important responsibility. The rights of care experienced people to access their information are clearly established and legally enshrined. By listening to the experiences of, and issues that matter to, those with lived experience, and through the continuous pursuit of improvement and implementation of best practice, corporate parents can not only meet their legal duties, but support care experienced people at every step of understanding their past.

## Appendix 1: Schedule 1 – Information relating to the child

Schedule 1 of the 2009 Regulations sets out information which must be included in the case records of a looked after child as follows:

1. Name, sex, date and place of birth and present address of the child, their parents and any relevant person.
2. Nationality, race, religion and language.
3. Physical description.
4. Present legal status of the child, including any statutory responsibility the local authority have for the child.
5. Why consideration is to be given to the child being looked after by the local authority.
6. Previous history of involvement of the child with any local authority or other relevant organisation.
7. Details of any brothers and sisters, including their dates of birth, addresses and any details in respect of their being looked after by a local authority.
8. The extent of contact with members of the child's family and any other significant person who does not live in the same household as the child.
9. The child's health history, current state of health and development and existing arrangements for their medical and dental care.
10. The child's education history and current arrangements for provision of education.
11. Personality and social development.
12. Interests and recreational activities

Our goal is simple. We want to make a difference. We are totally committed to making positive and lasting improvements in the experiences, life chances and outcomes for Scotland's looked after children and young people. Taking a multi-agency, collaborative approach towards making lasting change thinking and ways of working, with everyone whose work touches the lives of looked after children.

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