

NAVIGATING CONFIDENTIALITY, LEGAL PRIVILEGE AND GDPR TO MAINTAIN LEGAL RECORDS FOR FUTURE GENERATIONS: THE CASE FOR ARCHIVING

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Introduction to archival value

The International Council on Archives defines archives as, ‘the documentary by-product of human activity and as such an irreplaceable witness to past events, underpinning democracy, the identity of individuals and communities, and human rights’ (see www.ica.org). Archival records provide a resource to enable accountability and transparency for the actions of individuals and organisations both immediately at the point of action and through time. They facilitate the evidence for society to reflect on systems of governance and societal activity and change. As such it is key to ensure that a representative sample of legal records are retained for posterity. After all, our laws and interactions within the confines of the law demonstrate the core values of our society at a moment in time.

The value of legal records is recognized in the routine archiving of Acts of Parliament, legal policy from Government files and Court records. However, there is no systematic policy and guidance on the retention of records for solicitors and barristers. Records from such individuals have often survived by happenstance. Since 1932 the British Records Association (BRA) has been one of the key agencies whose efforts have resulted in the deposit of such records. The BRA has acted as a conduit for defunct legal companies’ records, processing and then passing these on to suitable archival repositories for permanent preservation.

Perhaps the most commonly represented legal document sets seen within local record offices are historic deeds which were retained to prove property ownership over long periods and as such reached an age which provided in most minds their status as records with archival significance. When in 2002 the Land Registration Act put in place processes for systematizing the centralization of land sales and purchases, the significance of deeds was to some extent diminished. The Society of Archivists (now the Archives and Records Association (ARA)) took steps to work with the Law Society and Land Registry to flag the significance of deeds to individuals and lawyers in order to try to preserve these important historical records. The Legal Records at Risk project (<https://lrrar.blogs.sas.ac.uk/>) represents a more holistic attempt to address wider concerns about the risks of losing legal records which document our nation’s history.

The picture of what survives in terms of a representation of the legal landscape is patchy. Many legal records are of value over the longer term and it is important to ensure that there are more strategic plans to collect and retain these. The value of archives and historical research are legislated for across the globe. This chapter considers the specific context of archiving legal records in England and considerations around access through time. These laws should be navigated in order to consider archival requirements and require the professionals who create records to consider their historical relevance, consulting with those to whom they pertain as appropriate. As we create more digital data this requires active management as digital data may not have the same qualities of endurance as paper records. In addition, it is to be noted that legislation, such as data protection laws, require us to consider how long

we need specific information and the purposes for retaining that information. Lawyers must navigate recordkeeping legislation in line with other businesses. As a pillar of society lawyers should also step up to considering the value of their information for society over the longer term. There are many examples of banks, charities, estates, hospitals, retailers and others taking this next step. This chapter outlines key legislation which archivists consider in terms of holding and providing access to information through time. In addition it draws some initial conclusions for lawyers to take steps to put in place archival frameworks which retain records and make them more widely available at certain points in time.

Data protection law

The General Data Protection Regulation (GDPR) and Data Protection Act 2018 together enshrine into UK law the principles for managing personal data. Under the terms of this legislation personal data is protected for the lifespan of the individual to whom that data, or information, relates. As such these rights do fall away when the individual is deceased. However, the legislation dictates that consideration is given to management frameworks for personal data. Organisations must build systems which build in 'privacy by design'. Under the terms of data protection legislation, data should be kept no longer than necessary but equally there is an expectation to ensure that information is retained in line with legal requirements, best practice and to a certain extent the expectations of the individual and wider society. Law firms do undertake processes to inform clients how long a file will be retained, for example in relation to a house purchase or sale. They are not always systematic in providing such detail in all cases. Under the terms of data protection law this should be reviewed and further consideration should be given to archiving.

GDPR provides a derogation for archival purposes which thus enables Member States to further legislate. Recital 158 of the GDPR sets out:

“public or private bodies that hold records of public interest should be services which, pursuant to Union or Member State law, have a legal obligation to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest. Member States should also be authorised to provide for the further processing of personal data for archiving purposes...”

This latter sentence establishes the basis for specific localised approaches to archiving to be considered at a national level. In a UK context 'archiving in the public interest' is further set out in the Data Protection Act 2018 which enshrines the GDPR. In addition, it is underpinned by The National Archives (TNA) guidance on archiving in the public interest. This guidance illustrates the wide and rich landscape of archives in a UK context including public authority archives, private archives (such as law firms) and community archives (TNA, 2018). Organisations keeping records for permanent preservation in the public interest may claim the right to processing under the archiving terms. It is to be noted that in certain instances organisations may not be able to claim that they are archiving in the public interest. The 'public interest' needs to be defined. An example would be that there is some intention of some potential future public access to the records in some form or public provision of information from the records. If the records are kept solely to support the primary business then a public interest case is hard to make. However, other data protection purposes interrelate with the archiving purpose in the public interest and may be applicable either instead or in addition to this purpose. A key example is the

application of processing for historical research purposes, which also provides a basis for retention over the longer term. Key to highlight, in this regard, is that where records are kept for archiving purposes or historical research then the specific consent for this purpose is not required. Nevertheless, archival processing should be provided for in privacy notices and other relevant documentation wherever possible. Farrer & Co LLP's privacy notice states standard retention periods but in addition that:

“Longer retention periods may be appropriate where, for example, specific legal or public interest archival reasons apply.” Available at <https://www.farrer.co.uk/footerlinks/legal-regulatory/privacy-policy/> (Accessed 31 July 2018).

Many other law firms have not provided for this purpose in their privacy notices and it is to be hoped that this will be considered and addressed by lawyers more generally. Further guidance on archival processing under the terms of data protection legislation has been published by The National Archives (TNA, 2018) and the Archives and Records Association (<http://www.archives.org.uk/>).

Records with personal data are carefully managed in archival contexts and normally kept closed from public access during the lifetime of the data subject. Under data protection laws, archivists assume that a personal data subject may likely live no longer than 100 years (unless it can be easily confirmed whether the person is alive or deceased at this time). Assuming that a person was an 'adult' when the records were first created, a record with personal data will be retained closed for 84 years taking the working assumption that the person was 16 years in age or older. If the record relates to a child then depending on the context, the age of the child may be assumed to be less than one years old.

There are some instances under which personal data may be released. In reviewing opening a record this will depend on considerations around its sensitivity and the potential to cause damage or distress to an individual were it to be released. The case in favour of the release would be a key determinant. One person's data might be released were it to have a bearing on another individual's circumstances that were deemed to outweigh the other party. Aligned to this consideration are laws around confidentiality.

Confidentiality and legal professional privilege

In considering archiving client records, lawyers will no doubt wish to consider their contractual and professional obligations. It is normally an expectation that all matters discussed with clients are undertaken under a duty of confidence. Confidentiality law applies in many contexts but is further legislated for in terms of the professional duty of lawyers under section 1(3)(e) of the Legal Services Act 2007 which stipulates “that the affairs of clients should be kept confidential.”

Similar confidentiality expectations exist with the provision of other professional services, for example in respect of doctor patient consultations. Significant work on the archival considerations for medical and health records has been undertaken as it is well understood that there is a value in keeping and using these records for long periods of time. In addition, National Health Service Trust records are designated as public records under the Public Records Act 1958 and therefore those deemed worthy of permanent preservation must be transferred to The National Archives. The frameworks in this domain have potential readover to legal contexts and inform an understanding of confidentiality law. Within this context it has become clear that confidentiality laws can be navigated for archival purposes and do not

preclude the deposit of records within an archive repository nor their potential to be accessed by researchers and the wider public over time.

It has been the presumption of archivists that confidentiality diminishes through time and this has been confirmed in legal disputes. As such it has become common practice amongst archivists to keep closed information provided under a duty of confidence for 100 years after the date of the actual record rather than any calculation based on a data subject's age. This normally does somewhat extend the closure period of the records beyond those usually applied under data protection law.

Keeping records closed under confidentiality requirements is assessed on the basis:

- i. whether the information has the necessary quality of confidence;
- ii. whether the information was imparted in circumstances importing an obligation of confidence;
- iii. whether an unauthorised use of the information would result in detriment to the confider.
- iv. whether the disclosure would constitute a breach of confidence actionable by the person who supplied the information or any other person;
- v. whether a breach of confidence may not be actionable when there is an overriding public interest in disclosure.

A 'detriment test' establishes the impact on the confider were the information to be released. Whilst personal data considerations under data protection law relate to living individuals to whom that data relates, under the duty of confidence a wider circle of actors may be captured within the considerations surrounding whether or not to release information. For example, were a person to be an informant then this information is given under a duty of confidence. As such the information will be kept closed whilst that person is alive but also beyond that person's lifetime where there is any potential readover to surviving family members which may include children and grandchildren. This decision is in the public interest as it works to society's benefit to provide enabling mechanisms for informants to feel that the information they provide is closed potentially beyond their own lifetime to protect their families and contacts. In some circumstances it is possible that a decision will be made to retain records closed over very long periods of time.

In the context of confidentiality rights, it is important to understand that commercial exchanges are deemed to have a differing status than a personal duty of confidence although none the less the impact of a release of information would require evaluation and does have legal protection. In The National Archives context, 40 years is often seen as a standard maximum closure period for commercial confidentiality but this is not fixed and longer terms may be applied particularly when a company is still in existence and depending on the 'quality of confidence' residing within that information. In all cases, consideration will be given to what the information reveals and under what circumstances and understandings/assurances it was imparted.

In addition, in legal contexts underpinning the duty of confidentiality are additional protections relating to legal privilege. In this regard legal privilege protects communications between a lawyer and their client for the purpose of seeking or giving advice. Litigation privilege protects the information or documentation which may be generated in order to deal with litigation. There is a long-standing understanding that this information is protected from disclosure. Nevertheless, as with confidentiality law, archives would deem this protection to diminish through time considering the case and position of the actors to whom it relates.

Human Rights legislation

Related to personal data and confidentiality considerations are certain information rights provided under the terms of human rights legislation. Within the UK, the Human Rights Act 1998 enshrined the European Convention on Human Rights. Key within this legislation are Article 10, which established the right of freedom of expression into UK law, and Article 8, which protects the respect of a right to a private family life. In this context family has been interpreted broadly when applied. The legislation covers lifestyle and information considerations including surveillance and third-party scrutiny. Some exemptions do apply, for example national security considerations can override privacy considerations. There have been a number of high profile cases under the terms of these Articles. The press claim their rights under Article 10 for printing stories but those who feel they have had their privacy invaded will often then cite Article 8. Where an individual becomes aware of a story then a privacy injunction may be sought. The application of Human Rights law has a bearing in archival contexts. It will be weighed when considering whether or not papers can be made available in any form.

Access to archival information through Freedom of Information and Environmental Information legislation

Laws on access to information through time have been tested in public authority archival contexts. Under the terms of the UK Freedom of Information Act 2000 individuals may request access to closed information in archives when they are held by organisations which are public authorities. The exemptions from release in these circumstances would most normally relate to considerations as to whether the information is personal data (s.40), whether it is held in circumstances where a case for breach of confidentiality remains possible and depending on the quality of confidence in the material (s.41(1)), whether the information is deemed to be exchanges between a lawyer and a client in which case legal privilege exemptions may apply (s.42), commercial confidentiality (s.43), health and safety exemptions (s.38) in terms of the damage or distress to a party which might be caused by its release and s.44 which relates to the application of other relevant legislation such as the Human Rights Act. Whilst some of these exemptions are seemingly absolute when they have been tested through the related complaints and legal system the legal outcomes have revealed the complexity of the application of the law in practice.

Key cases in regards to each exemptions are summarized in the guidance which is provided by the Information Commissioner's Office (ICO) available at <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/> (Accessed 31 July 2018). Some exemptions must be applied through a risk-based approach which:

- identifies the applicable interests within the relevant exemption.
- identifies the nature of the prejudice that would occur if the information was released and shows that the prejudice claimed is real, actual and/or of substance.
- shows that there is a causal link between the disclosure and the prejudice claimed.
- decides on the likelihood of the prejudice occurring.

Within some exemptions the components of the exemption have a different status, section 43(2) of the commercial confidentiality exemption is prejudice based but the first part section 43(1) is absolute. In regards to what is actually 'absolute' this has been tested in legal cases. The ICO guides review current cases where decisions have been made to release information or retain it closed under the Freedom of Information law. It is under the cases played out in practice that we see that seemingly absolute exemptions from release may not always hold. For example guidance on s.41 which relates to confidentiality law demonstrates how confidentiality may diminish through time (see <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf> (Accessed 31 July 2018)). Likewise, the legal privilege exemption has also been seen not always to hold or apply as widely as once assumed. In the cases of *Calland v Information Commissioner & the Financial Services Authority* (EA/2007/0136) and *Bellamy v Information Commissioner & Secretary of State for Trade & Industry* (EA/2005/0023) what is covered by legal privilege was discussed in detail within both cases. In addition, within the latter case the point was made that, "clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential." This makes the point that legal privilege may not always be upheld. In the case of *Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48, discussions across the Bank of England were not deemed to be covered by the legal privilege exemption only discussions within a small centralised team set up to deal with the specific dispute. Further information is available within the ICOs guidance on legal privilege at https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf (Accessed 31 July 2018).

Where lawyers are dealing with environmental information the requests for release may extend beyond the remit of a public authority, as understood under the more terms of Freedom of Information legislation, to those undertaking environmental public functions as understood under the terms of the Environmental Information Regulations 2004. Under the terms of these Regulations the public interest in release is given greater weight under the law and the exceptions from release are more limited.

Maintaining records for archival purposes

Where archives are placed with public archival repositories, contracts can put in place as part of the terms of deposit which determine the closure and access terms for the records and as such underpin the confidentiality expectations. These should be agreed ahead of the deposit and would then be weighed were a Freedom of Information request be made to access the closed records. Where records are retained in-house, by for example chambers or a solicitors, then they are not subject to the same rights of access, as whilst data protection rights apply clearly Freedom of Information legislation is not relevant.

Lawyers should consider whether the records of historical/archival value they create are best maintained within in-house archives or stored by a third party archive. Many organisations will gain value from using their records through time and evidencing their long-term values and stability. This is a factor for consideration in determining whether an in-house archive is a valid option and can be resources properly. However, for many an alternative option will be to make arrangements for a local archival repository to store records. It is to be noted that most public archives will expect records to be

gifted rather than loaned given the public resources will then be invested in their care. Either route is valid but, in both instances, properly considered processes should be put in place. Guidance on managing business archives is available at <https://managingbusinessarchives.co.uk/>.

Lawyers should have a responsible agreed approach to archiving which includes:

- Retention/disposal and archiving strategies for all records.
- Formats, storage and digital management procedures.
- Information on archiving policies for legal clients and other parties where possible. In some instances, it is perfectly possible to discuss archiving records with a client. Where appropriate there should be agreed client consent processes which are transparent about destruction and/or archival deposit. In other instances, this may not be practical but central documentation and privacy notices can set out archiving policies and procedures.

At a higher level it would be possible to produce:

- sample policies and procedures for a range of legal contexts.
- a sample retention and access schedule which provides transparency about different record sets value through time. At present retention and disposition periods may be set but there are few public facing schedules detailing records of permanent value and the timeframes from which access can be reviewed. Much can be learnt from wider work which has been undertaken by the business archives community and the medical profession.
- sample client consent processes which are transparent about destruction and/or archival deposit.
- a templated deposit contract for deposits with archival repositories. This needs to agree ownership, access/confidentiality expectations and legal costs, e.g. for dealing with access disputes if the status of records as closed need to be defended.

Where possible the above can be agreed with key parties, examples may include ICO, Law Society/SRA, Bar Standards Board, ARA and BRA.

Conclusions

In conclusion, information rights laws are placing an expectation on organisations and individuals to better manage the information they hold. These laws specifically legislate for archiving records thus recognizing the significance of historical information to inform society. This chapter is not a substitute for legal guidance as who better to set out archiving guidance than lawyers!

References

The National Archives. (2018) *Guide to archiving personal data*. London: OPSI. This legislation is currently in draft at <http://www.nationalarchives.gov.uk/documents/information-management/guide-for-public-comment.pdf> (accessed 31 July 2018) but is in the process of being finalised.