



Your Archive Needs
YOU!

Navigating confidentiality, legal
privilege and GDPR to maintain legal
records for future generations

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Private Management

- Held by the creator for business benefit
Information is a recognized asset with far greater potential and risks in a digital age – ‘toxic assets’
- In line with key responsibilities and public expectations
- Managed to enable access through time

Private Management

- ❑ Accountability is changing – it may no longer be acceptable to inform clients that their data will be destroyed after a certain period.
- ❑ GDPR will shift expectations in terms of retention and the 'right to be forgotten'. Archival derogations are key to moving this forward.
- ❑ Ideally have fair processing notices and informed consent

Private Management

- Solicitors and barristers must manage their records properly to provide a better service to clients and efficiently manage business resources more efficiently.
- Larger practices encouraged to employ or contract records management services
- In addition, archival considerations should be managed from the outset.

Public Authority – historic picture

Archivists: historically the gatekeepers of the past dictating access

- ❑ Mainly paper acquisition
- ❑ Access regimes agreed with depositor
- ❑ 'Loan', 'Permanent loan' or 'Gift'
- ❑ Copyright
- ❑ Few laws dictating the retention of information for historical purposes
- ❑ Lawyers records often deposited on mass in times of crisis without catalogues etc.

Public Authority – current picture

Archivists: Currently mediators of the past & present navigating legislation:

- ❑ Subject to FOIA/EIRS and DP/GDPR etc
- ❑ Special terms for archives under some legislation
- ❑ Gift (loan is now very rare)
- ❑ Minimal closure but respecting considerations around confidentiality/privacy commercial and personal
- ❑ Accepting records in all formats
- ❑ Contract must be drawn up at point of deposit
- ❑ Sadly records still being deposited with archives ad hoc

Access: Freedom of Information (FOIA) Environmental Information Regulations (EIRs)

- Deposit in a public authority alters control
- The contract and terms of deposit are key to manage the records in line with the depositors expectations.
- It is to be noted that exceptions to access under EIRs weigh very heavily in favour of release.
- Cases around exceptions/exemptions impacting on the law more generally are being decided by the ICO and in First and Second Tier Tribunals. ICO distills these in guidance.

Legal professional privilege - s.42 FOIA

Qualified exemption

- Advice privilege applies to confidential communications between client and professional legal adviser provided the advice has a legal function
- Litigation privilege can apply to communications with third parties
- Waiver

Legal professional privilege - s.42 FOIA

Bellamy v Information Commissioner & Secretary of State for Trade & Industry (EA/2005/0023)

Calland v Information Commissioner & the Financial Services Authority (EA/2007/0136)

Mersey Tunnel Users Association v Information Commissioner & Merseytravel (EA/2007/0052)

Three Rivers District Council and others v Governor and Company of the Bank of England [2004] UKHL 48

Confidentiality - s.41 FOIA

s.41(1) Information provided in confidence – absolute

- Whether the information has the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence;
- Whether an unauthorised use of the information would result in detriment to the confider.

Confidentiality - s.41 FOIA

s.41(1) Information provided in confidence cont.

- If the requested information is commercial in nature the disclosure will only constitute a breach of confidence if it would have a detrimental impact on the confider.
- The law of confidence recognises that a breach of confidence may not be actionable when there is an overriding public interest in disclosure.

Commercial interests – s.43 FOIA

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- Trade secrets
- Prejudice to commercial interests.

Health and safety – s.38 FOIA

s.38 Health and safety

- Physical or mental health
- Safety of an individual

Human Rights/ Data Protection/ GDPR

Article 8 Right to Privacy

s.40 Freedom of Information/Data Protection/GDPR

- Client consents
- Reviews of legacy records
- Transparent retention/destruction processes

In conclusion there needs to be ...

- A responsible approach agreed between lawyers and archivists which acknowledges complexities and challenges.
- A sample retention schedule which provides transparency about different record sets and allows a debate around the future of these records
- Agreed client consent processes which are transparent about destruction and/or archival deposit.
- A templated deposit contract if possible agreed with ICO, SRA, ARA and BRA. This needs to agree legal costs for dealing with access disputes.