

01/12/2016: Iron Mountain Legal Forum for law firms 1 December 2016. "Notes on the LRAR project and the records of law firms".

The Legal Records at Risk project

The Legal Records at Risk Project, based at the Institute of Advanced Legal Studies, University of London, commenced in September 2015 for an initial period of 2 years to:

- Raise the awareness of the information owners of private sector legal records as described above as to the value of their records and assist them to unlock the potential of the records for both internal business use and external research. In so doing they will raise their own external profile and demonstrate their importance in the development of the UK's legal framework.
- Identify and facilitate the rescue of legal records of potential value by developing a co-ordinated, cost-effective strategy and model (as opposed to the current ad hoc arrangements) for the transfer of records in both hard copy and digital format to appropriate repositories. This strategic work will be supported by practical advice and guidance to legal practitioners on how to lessen the cost and improve the efficiency of their information management practices, both to remove the burden of managing archival records and to reduce on-going management and storage costs for both paper and digital records.

What particular issues apply to law firms?

What are law firms doing about their records? Most seem to use external storage indefinitely. Many seem to have little idea of just what's in storage, leading to unnecessary costs due to not having destruction programmes for redundant records and no concept of potential historical value. Great emphasis on reputation and client confidentiality – client files are probably fairly well looked after. Still very paper-based.

Do law firms see their records as an asset? Our initial research suggests notⁱ. While The National Archives, Local Authority Record Offices, Higher Education and specialist repositories work tirelessly to preserve our heritage and some private sector bodies understand the value to themselves and the wider community of preserving key records and destroying redundant material, the legal sector (with some notable exceptionsⁱⁱ) simply does not seem to be aware of – or is indifferent to - the risk of losing records documenting the changes to legal services over the past century.

We understand that legal practitioners are busy people and that appraising the potential value of records is rarely a top priority when running a business. Yet managing one's business records efficiently so as to reduce costs, provide a good service to customers and reduce the need to constantly re-invent the wheel is, or should be, a high priority. Determining and saving what is of archival value, while getting rid of the dross, is simply the end of that process.

Lack of awareness in business of the value of archives and their management leads to:

- Under-utilisation of business records and history as a marketing and client relations tool and for involvement in wider corporate social responsibility projects.
- The unwitting destruction of historically important records, particularly at periods of change, such as merger, acquisition and buy-outs.
- Misinterpretation of the Data Protection Act resulting in premature destruction of records or ignoring the Act altogether by retaining personal data once it is no longer needed.
- Loss of records that could be used to provide legal protection or safeguard Intellectual Property Rights and trademarks.
- Businesses and business-related bodies not considering their heritage, the importance of good recordkeeping and the legacy of archives within the communityⁱⁱⁱ.

Are the records of law firms more at risk than those of other private sector bodies?

The Law Society (TLS), working with the Selden Society, has for many years encouraged solicitors to seek options for the preservation of their firms' historically significant legal documents. TLS's practice note [Depositing records and documents with public sector archives](#) (15 December 2010) provides advice on depositing old client documents or records documenting a firm's history with the appropriate local authority Record Office (RO). Many ROs, however, are now operating on severely reduced resources, compromising their ability to accept private sector records. The BRA, which used to act as a warehousing facility prior to arranging the transfer of records to archives offices, no longer has the capacity to provide this storage service. Solicitors' records of value are, therefore, more at risk now than in the past.^{iv}

To these records at risk we must add the millions of records of defunct law firms in the Intervention Archives, managed by Capita on behalf of the Solicitors' Regulation Authority (SRA). The SRA is, happily, appointing an archivist to help identify records of potential research value and locate relevant archive repositories willing to accept these records. LRAR and the BRA will be available to offer advice and hands-on help with this process as requested.

The records of law firms may also be at risk through auctioning to the highest bidder. TNA monitors the auctioning of documents with a UK provenance, both here and abroad and has maintained a database since the 1990s. TNA keeps an eye on all auctions and notifies the relevant RO when something comes up in which the RO might be interested^v. The RO will then bid, but only if it has sufficient funds or time to apply for a grant before the auction. TNA also advises the [Department for Business, Innovation & Skills](#) where an item is being sold overseas which by law can't leave the country without an export licence^{vi}.

Some transactions are perfectly legitimate, for example the sale of personal correspondence of someone who happens to be identified by their job title; some are of solicitors' business papers which are not legally protected, though it is highly likely that an RO would accept them if offered; and some transactions recorded on TNA's database certainly show dispersal of client papers, contrary to TLS's practice note^{vii}.

The closing down or merger of a law firm with another firm also adds to the risks to records. The Legal Ombudsman has summarised this issue succinctly as follows:

“We investigated a number of cases where firms had either closed down or merged, so customers were unable to access files kept in storage. This highlights the need for firms to ensure that documents in storage are managed correctly, and to put in place clear audited systems to ensure documents can be retrieved when firms close down or merge.”^{viii}

Why are law firms reluctant to preserve their archives, yet happy to store them indefinitely in a warehouse?

The cost factor

Cost, understandably, is a major factor behind any law firm, large or small, deciding not to create and maintain an in-house archives. Yet this does not explain why law firms may be reluctant to deposit records in an archive repository such as a local authority RO. ROs do not charge for their services, though they may – and indeed should - seek a donation or fee towards ongoing expenses such as conservation or cataloguing and/or ask the law firm to pay for the cost of transporting material to the archives. These expenses are negligible compared to the year-on-year costs of storing information in 3rd party records stores pending eventual destruction, yet many law firms do not even seem to be even aware that county record offices will collect, preserve and make accessible their historic records at minimal cost, and are happy instead to pay for indefinite storage in a warehouse or basement. Why is this?

The confidentiality factor

One reason may be the undertaking firms make to their clients to keep their information confidential. There appears to be a basic misapprehension that records deposited in an archives are somehow open to all in a research free-for-all. Nothing could be further from the truth. All archives have well developed techniques for dealing with ‘sensitive’ records, including closure periods and conditions on access and use; they operate under strict confidentiality guidelines and follow TNA’s advice to close all records for at least 20 years and personal data for 100 years^{ix}. Any law firm depositing records with an archives can also stipulate its own more stringent confidentiality requirements (though the archives, equally, can refuse to accept records with an unnecessarily long closure period).

Another reason, of course, is the need to retain client records for as long as the relationship exists. Yet we see little evidence that law firms are destroying defunct client files – presumably because of the cost of sorting out the backlog of unsentenced records. It’s easier just to forget about them.

The embarrassment factor

Another, more understandable, reason is concern about embarrassment/reputational damage, even in relation to records over 20 years old. For example, a firm may be reluctant to make records available to the public, partly because some might reveal former mistakes or contain statements or notes which might seem politically incorrect by today’s standards. This seems on the face of it to be a perfectly valid argument but it is in fact a short-sighted one, since denying access to archives does not stop the stories from being there, regardless

of whether the archive allows people in or not. Archives in fact have the potential to help draw a line under a distasteful aspect of the company history. The following statement by the Barclays Group Archivist sums this up perfectly:

“In any organisation with such a long history, there will also be elements of which people may not be proud. Practices which were just a part of life 300 years ago may be frowned upon now. Decisions made 40 years ago which seemed right at the time turned out to be the wrong choice with the benefit of hindsight. And sometimes, as we all now know, people have been downright dishonest...But if we deny access to the archives, we deny access to the other side of the story too. And there is always the danger that by not letting people in, they will automatically assume the worst. The stories will always be there, regardless of whether we allow people in to the Bank’s archives or not. At least by allowing access we are demonstrating our transparency, our desire to share our history. We are enabling people to seek out the facts and draw their own conclusions.

While the archive is used only internally, there is always the risk that we will be charged with using it for propaganda, for only sharing the good bits. If we truly want to be good corporate citizens we have to share our archives. They need to be seen as a reliable and objective resource.”^x

In other words, companies – including law firms - must be encouraged to see their archives as business assets rather than liabilities. Most companies recognise that they need to be good corporate citizens and be transparent. Part of that is allowing access to their archives and the history of their business, even if it does mean revealing links to practices which are now disapproved of. ^{xi}

What about digital records?

Paper records are not the only items at risk. Digital records are (and this may come as a surprise to some) more difficult to manage correctly and dispose of appropriately than paper records, simply because they are so easy to create and store in multiple locations and their proliferation is not visible in the same way as an overflowing filing cabinet. IT professionals concentrate on facilitating the faster transaction of business, which, if prioritised over the on-going management of information, exacerbates the problem, since the emphasis is on setting up the IT system rather than managing the information stored in it; that task is usually left to the (untrained or poorly trained) individual when it is, in fact, a task for professionals.

Digital records require careful management and a proactive approach or else:

- They become inaccessible due to digital obsolescence and technological advances.
- They will be lost and a black hole will appear in the historical record.

Digital continuity (that is, the ability to be able to use digital information in the way that you need, for as long as you need) is rarely considered, yet some records, notably client records, may need to be accessible for decades. The digital preservation of records of long-term or historic value, therefore, needs to be considered and built in to IT systems at the moment of creation, not 10 or 20 years later^{xii}.

Managing digital continuity does not just preserve records of archival value; it protects the information needed to do business. This enables the business to operate accountably, legally, effectively and efficiently. It helps to protect its reputation, make informed decisions, reduce costs, and deliver better public services. If a business loses information because it hasn't managed its digital continuity properly, the consequences can be as serious as those of any other information loss^{xiii}.

Scanning: it may seem an obvious solution and certainly one that could effectively be used going forward, but it is rare that back-scanning provides any return on ROI because;

- It is highly labour-intensive (removing paper clips, straightening pages, special scanners for non-standard sizes etc).
- It makes no sense to scan material which could have been destroyed, so an exercise in reviewing records to see what has to be kept is still advisable.
- It is illegal to process (eg scan) personal data without good reason – see previous point.
- A system will be needed in which to store scanned images.
- A retention and destruction policy will still have to be created and pursued to a) act in compliance with DPA and b) ensure the system does not become overloaded.
- Resources will have to be allocated to manage the system and the records in it.
- The system will be subject to digital obsolescence. Has long-term accessibility been considered?
- If BSI 0008 standards are not followed, the paper might still have to be kept.

If the paper is destroyed, there will still be a destruction cost. Why not, therefore, destroy rather than scan if there is no business or legal reason to keep the material?

What is LRAR actually doing about all this?

The records of law firms, in all formats, are a particular focus of the LRAR project; specific actions are as follows:

- In partnership with the BRA, we are developing generic guidance for law firms wishing to deposit records with archives which will also assist them in reducing the costs of managing their current information, particularly in digital format. This includes assisting TLS in updating its current guidance on disposal of solicitors' records.
- A generic records retention and disposal schedule for law firms is in preparation.
- An agreement has been reached with a number of archives to accept those business records of law firms which are of historical value, provided they are properly listed and sensible agreements are reached as to access after a certain period.
- Discussions are underway with The London Metropolitan Archives with the possible aim of creating a Legal Archives Trust to manage the transfer of the records of law firms to archives. Such a Trust would be set up as a charity along the lines of the Pensions Archive trust and would expect donations from institutions specialised to law to carry out this function (in the same way as pensions bodies and the pensions depts of some law firms contribute towards the Pensions Archive Trust).
- A specific case study to demonstrate a records management and archiving model which could be used by all law firms is almost completed. A firm outside London with a professional archivist/records manager has agreed to be the subject of a case study

which should provide other legal practitioners with guidance on how instituting best practice in managing information gives an almost immediate ROI by reducing costs, improving efficiency and preserving its legal heritage. This case study has just been completed and should soon be published. In summary, the records manager/ archivist created a new procedure as follows, producing an almost immediate ROI:

- Going through the huge back log of files that had been stored in various basements to establish what needed to be kept and archived and what could be shredded.
- Undertaking a survey of current files in office storage and the different procedures for managing them.
- Creating an 'archives' inbox, so that all requests to retrieve items from storage were sent to a central email account, rather than to individual email addresses or written on post-it notes!
- Streamlining the archive process so that each office site now archives documents in the same way.
- Creating a standardised procedure across the firm for sending new items to be archived, returning items to storage and requesting something from storage.
- Planning a scanning procedure for live files after a certain cut-off date (in other words, back-scanning was considered and rejected due to cost).
- Creating a new records retention and disposal schedule covering all records. This will eventually be extended to digital records.

ⁱ Of 43 institutions specialised to law (including 11 law firms) personally contacted to date we have had: 4 positive responses (ie a willingness to assist the project), 4 tentative responses (ie a willingness to allow further contact/provide some information), 3 negative responses (ie flat refusal to be involved) and 32 non-responses. General requests for information on specialist law listservs or via articles in legal publications have produced no response. By contrast, generic appeals to archives and research organisations listservs have produced overwhelmingly positive responses (ie offers of information/publicity/practical help).

ⁱⁱ Such as the Archives of the Inns of Court, the Law Society and the Records of Legal Education Archives plus a small number of law firms which maintain in-house archives for material of historic value. These are not to be confused with the almost universal practice of depositing non-current records en masse in a warehouse for indefinite storage.

ⁱⁱⁱ The British Records Association's **Report on Records at Risk**, 2012 (p.26) listed some examples of records being lost or destroyed as follows:

- unreadable digital media
- records found in empty properties unrelated to Estate, if no issuing organisation can be traced
- local historian's papers thrown away at her desk
- 80,000 glass plate negatives 1870-1970 destroyed by school because not their provenance
- own building records, because of lack of space
- branch records not transferred to archive and now lost
- local solicitor's collection broken up and sold on market stalls; items at auction are often beyond the financial resources of the repository
- personal papers destroyed because "not important"
- company records lost after being surveyed
- memoirs and memorabilia of alumni which are outside collecting remit
- business records and photographs thrown away
- video tapes affected by mould whilst in commercial storage before deposit
- deceased person's archive split between friends.

^{iv} This is a resource issue; in the past law firms have, quite frankly, exploited the willingness of the BRA and local record offices to rescue records free of charge; however it is no longer appropriate in the current economic climate to expect the taxpayer to cover the cost of solicitors' unwillingness to take some responsibility for their own historic records.

^v Auction information gathered during a meeting with personnel from TNA's Manuscript Sales Monitoring Service, 17/11/15

^{vi} Any document which is not the property of the exporter and is over 50 years old must have an export licence.

^{vii} **TLS' Practice Note S.3.1 Client documents specifies that "Documents such as wills, deeds, property transactions and agreements do not belong to the firm as they remain the property of the client for whom they were drawn up or his successor in title. These documents should not be sold or destroyed."**

^{viii} Legal Ombudsman, [Learning from complaints: case study publication](#), March 2016. P.3

^{ix} TNA [Code of practice for archivists and records managers under Section 51\(4\) of the Data Protection Act, 2007](#)

^x Maria Sienkiewicz (Group Archivist, Barclays Group Archives): ['Take the 109 bus and bring a packed lunch': Confidentiality, reputation and logistics – the challenges and opportunities of opening up business archives.](#) Presentation at the BAC conference 2014

^{xi} This point is made in more detail in the BAC [Access Guidance Note](#): ‘Let the right one in? Challenging perceptions of access to business archives’ 2015

^{xii} According to the Information Governance Initiative White Paper (p.4): **The Governance of Long-Term Digital Information: IGI 2016 Benchmark** “97 percent of our survey respondents told us that they are “aware that technology (hardware and software) obsolescence could mean that long-term digital records and information are at risk of not being readable or useable in the future.” This is great news—awareness is very high. The bad news? The number one solution to this problem currently being undertaken by our industry: “we are currently considering our approach.” (44 percent) The second most common approach? “We have no comprehensive strategy.” (31 percent). Only 16% are actually transferring this critical long-term information to a standards-based digital preservation system.” For the full report see <http://preservica.com/resource/long-term-records-preservation-2/>

^{xiii} TNA has a great deal of advice on digital continuity <http://www.nationalarchives.gov.uk/information-management/manage-information/policy-process/digital-continuity/>, as do private organisations such as AIIM (Association for Information and Image Management) <http://www.aiim.org/Resource-Centers/Electronic-Records-Management> and 3rd party records storage facilities such as iron Mountain <http://www.ironmountain.com/Services.aspx>