



## FILE CLOSURE, RETENTION AND DESTRUCTION

Guidance Note  
Legal Compliance Services

The  
Strategic  
Partner

Essential Risk & Business Insight for Law Firms

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**Our partners at Legal Compliance Services outline the considerations for Law Firms in developing an effective policy for the closure, storage and destruction of client files.**

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The issue of how long firms should keep closed client files is complex. There are no hard and fast rules and it is impossible to apply a one-size-fits-all approach. The SRA Handbook does not deal with the issue specifically, and the Law Society's guidance is limited to trust and will files. With this lack of certainty, and the risk of possible claims or complaints against the firm if documents are wrongly destroyed, it is easy to see why many firms simply archive all their closed files, often indefinitely. However, the Information Commissioner has said that retaining personal data on a 'just in case' basis - or without taking into account the circumstances and context - would not be compliant with the Data Protection Act. The SRA is also pressing firms to deal with historic archiving issues, having incurred huge costs in archiving and storing the files of firms it has intervened in.

Firms need to tackle this issue head-on rather than accumulate problems (and costs) for the future. The starting point is having an effective policy for the closure, storage and destruction of client files.

This should include:

## Closure

- checking that all work has been completed, there are no undertakings outstanding and no money is owed to or by the client;
- ensuring the file is well organised, with any unnecessary or duplicate documents removed. (These might include duplicates of originals that



have not been annotated, drafts of letters, memoranda, reports, informal notes that do not represent significant steps or decisions in the preparation of an official record and printed materials obtained from external sources and retained primarily for reference purposes). This will be important if a claim or complaint is later made against the firm.

- removing or highlighting any important original documents which should not be destroyed;
- informing the client:
  - ◆ that their file has been closed;
  - ◆ that they can have the file returned to them if they wish;
  - ◆ what will happen to the file if it is not returned to the client;
  - ◆ how the file can be retrieved;
  - ◆ whether any charges will apply; and
  - ◆ that it may be destroyed after a specified period;
- provision for copies to be retained in order to protect the firm's position if the file is returned to the client;

It is important to remember, when closing files, that the file may not comprise just the paper file but also include information held in other forms, for example: audio and video recordings, electronic files, emails, handwritten notes in note books, magnetic tape, test samples, voicemails, memory in mobile phones and other mobile devices and even online postings, such as on social media sites. For electronic files and emails it is important that all fee earners understand how the firm's electronic data is stored and preserved, how back-ups are created and maintained and how long emails are retained.

## Storage

- specifying the firm's standard minimum periods of retention for the various categories of files, with an indication of the factors that may make it necessary to extend this period;
- recording a proposed destruction date for every file, which should be

reviewed before the file is destroyed – this should ideally be done by the main fee earner with reference to the firm's policy;

- keeping a central record of:
  - ◆ the files stored;
  - ◆ the date they were sent to storage and the date of any recall / return if appropriate;
  - ◆ details of the provisional destruction / review date;
  - ◆ the date of destruction.

The firm will need to give careful consideration to how and where files are to be stored (e.g. on-site, an off-site storage facility or using a third-party storage company) and the risks associated with the various options such as theft, fire, flood or rodent damage or the third party storage company going into liquidation. It is no good having an excellent storage policy if the files are then kept in a damp basement prone to flooding and vermin.

## Destruction

- procedures for authorising destruction, ideally by a senior member of the firm/head of department. Destruction should not be automatic when the proposed destruction date is reached; the file should be checked by someone who appreciates the importance of the task – this is not simply an administrative task and consideration should be given to each file on an individual basis;
- clear procedures for destruction which take into account the need to protect client confidentiality;
- keeping a central record of all files destroyed including the date of destruction, the name of the person who authorised destruction and the reason for destruction.

The policy should be reviewed and monitored regularly to ensure it is being adhered to and remains legally compliant and cost-effective. There is little value in having a policy providing for most files to be destroyed after 7 years if the policy is not followed and files continue to stack up in an external storage facility.

## How Long Should You Store Closed Files?

Ultimately, each firm should decide on how long it retains closed files, bearing in mind issues such as:

- the type of work the firm does;
- the size of the firm and its client base;
- limitation periods;
- the possibility of claims or complaints against the firm, including the firm's record of claims and complaints and how long these have taken to surface;
- the firm's assessment of the risks of destroying files versus the cost of storage;
- whether it is the firm's normal practice to return files to clients when their matter is completed;
- the firm's experience of client's asking for the return of documents or files after they have gone into storage.

Most of the documents on a file belong to the client and, strictly speaking, should not be destroyed without the client's consent. In reality it is often impossible to obtain consent at the time you are considering destroying files, so this should ideally be dealt with in your retainer and/or closure letter. Where you do not have the client's consent to destroy the file you will need to strike a balance between the ongoing cost of storing files and the risks attached to destroying them (e.g. that the client will want the file back or will bring a claim or complaint against you.)

Even when a minimum period for storage of files has been decided upon, in many cases the decision whether to destroy files will need to be made on a file-by-file basis, taking into account issues such as:

- the nature and complexity of the work involved;
- whether the client was vulnerable, under a disability or particularly difficult to deal with;
- whether the client is likely to instruct you again on a related matter.

Most advice recommends minimum periods of between 6 and 15 years, with a few exceptions in relation to certain files and important original documents. These reflect the primary and long-stop limitation periods for the majority of claims. Previous Law Society guidance suggested 6 years, although most commentators now recommend at least 7 years to allow for claims made towards the end of the primary cut-off point. 12 years is a common compromise.

Some firms prefer to store all files for a minimum of 15 years, by which time the majority of claims would be statute-barred (although in some matters, for example relating to wills and trusts, or involving children, even this may not be long enough – see below). Others prefer to store different categories of file for different periods according to the level of risk involved, in which case a minimum of 7 years is recommended for less risky files.

## What Does The SRA Say?

The SRA Handbook is silent on this subject. However, in a “Question of Ethics” dated April 2015, (<http://www.sra.org.uk/solicitors/code-of-conduct/guidance/questionofethics/april-2015.page>) the SRA made clear that it expects firms, as a matter of professional conduct, to have in place a system that deals with the storage of old files effectively and systematically. This guidance does not, however, provide any detail on the length of time for which files should be kept.

In 2013/14 the SRA reviewed and amended its policy on storing the files of firms it has intervened in, following concerns about the substantial and increasing costs involved. The SRA made clear in its consultation that the issues discussed applied only to storage by the SRA and not to file retention by firms, where different considerations apply.

However, it may be possible to glean from the SRA’s revised approach some useful pointers for firms, in particular in relation to what is considered to be an “original document” and which types files should be retained for longer than the standard period of 7 years from the date of file closure (e.g. files relating to family matters, trusts, wills and probate will be retained for 21 years, medical negligence files for 15 years).

## Files And Documents That Need To Be Kept For Longer

Files relating to certain types of work need to be stored for longer. For example, special considerations apply to files relating to wills and trusts, where the risk of disputes appears to be increasing and claims can surface many years after the original work was carried out, particularly in relation to wills. In cases involving children, the normal limitation periods can be considerably extended.

### Wills

Original wills should normally be kept indefinitely, if they are not returned to the client. Even if a will is subsequently revoked, the original will may be relevant if the later will is subsequently disputed. It can also be important to keep records relating to the circumstances in which the will was made and make clear that appropriate advice was given, in case the firm is asked to justify its position in any subsequent dispute. Also bear in mind that documents relating to VAT liability need to be retained for at least 6 years, if you decide not to keep the whole file with the will. You should also consider whether it is necessary to keep details of the estate of a client's deceased spouse or civil partner in relation to the transfer of unused inheritance tax nil rate band allowance.

### Trusts

The original trust deed and any deeds amending its provisions or appointing new trustees are held to the order of the trustees and should be stored safely. As with wills, the risk of litigation is increasing and proper record retention is essential. Disputes can arise several years after the original trust was drawn up and the normal limitation periods will not always apply. Without adequate records your firm may not be able to defend its position. The file should normally be retained for at least the duration of the trust. The Law Society recommends retaining trust administration files for the duration of the trust plus six years.

The Law Society has produced detailed practice notes on the retention of documents in relation to wills and trusts:

[www.lawsociety.org.uk/advice/practice-notes/file-retention-trusts](http://www.lawsociety.org.uk/advice/practice-notes/file-retention-trusts)

[www.lawsociety.org.uk/advice/practice-notes/file-retention-wills-probate](http://www.lawsociety.org.uk/advice/practice-notes/file-retention-wills-probate)

## Electronic Storage

The same considerations apply if you decide to store files electronically and you will need to assess the risks before destroying the original files. Also, the electronic data will be subject to additional requirements under the Data Protection Act 1998. One of the effects of the Act is that you will need to pay close attention to the information that is retained, as the Act allows only information that is adequate, relevant and not excessive to be processed; and it should not be retained for longer than is necessary. You should also bear in mind the risk of data being corrupted during the migration process and you will need to put in place systems to ensure the authenticity, accessibility and security of the data. If you intend to store files electronically you should make this clear to the client in your retainer letter and give the client the option of having the original file returned to them.

## Firm Closure

When a firm closes it is important that files are dealt with properly: either returned to clients, securely stored or destroyed if appropriate. Once the firm has closed, members of the firm must take care not to practise or be held out as practising through the firm when dealing with the disposal of documents. It is unlikely that you will be considered to be practising if you are simply dealing with the disposal or storage of files, but you continue to use your firm's notepaper when dealing with these, or other outstanding administrative tasks, you will need to adapt it to make it clear that the firm has closed.

## Recommended Minimum Retention Periods

The table below sets out the suggested minimum period for which it is recommended different types of file should be retained, assuming that any important original documents are removed before destruction. It must be stressed that these are minimum periods and there may be reasons for retaining certain files for longer. Decisions to destroy files should generally be made on a file-by-file basis. Original documents should always be returned to the client where possible, with a record of the return retained by the firm (such as recorded delivery slip or a receipt

signed by the client). Where a firm decides to retain files indefinitely these may be reviewed periodically, for example after 10 years and then at 5 year intervals, to determine whether there has been any change in circumstances that would allow for the file to be destroyed.

Type of Matter	Minimum Retention Period	Exceptions/Reasons for Storing File for Longer
Crime	7 or 15 years depending on seriousness of crime	Where a life or indeterminate sentence has been imposed
Employment	7 years	
Immigration, including advice, asylum, tribunals, work permits, applications for citizenship / nationality / passport	7 years	
Wills and probate	Indefinitely if keeping with will or 21 years	
Trusts	Duration of trust plus 6 years	
Family, including divorce, separation, custody and contact, injunctions, child protection and court of protection	15 years	Young children involved. (The SRA proposes to retain such files for 21 years to cover all periods of childhood.)
Business, including company/partnership formation, insolvency, trademark / copyright / patent	12 years	Longer if complex issues
Property sale	7 years	
Property purchase and mortgage	15 years	

Type of Matter	Minimum Retention Period	Exceptions/Reasons for Storing File for Longer
Leasehold and tenancy	7 years or length of term plus 3 years (if longer)	
Personal injury	7-15 years, depending on seriousness of injury and complexity of case	Longer if involves, children, complex issues, e.g lifetime or provisional damages awarded
Medical negligence	15 years	Longer if involves, children, complex issues, e.g lifetime or provisional damages awarded
General litigation e.g. tribunals, mental health, prison matters, application for alcohol licence, harassment	12 years	If client is under a disability
Private client non-litigation advice, e.g. employment, pensions, powers of attorney, change of name, debt, personal insolvency, housing disrepair	7 years	

Original documents that should be retained indefinitely or as indicated:

- Unregistered property deeds
- Mortgage deeds (including assignment of mortgage)/legal charge, where unregistered title
- Abstract of title
- Lease documents – store for at least its term
- Power of attorney/ court of protection deputy
- Tenancy agreement – retain for at least its term

- Grave deeds
- Share certificates/bonds
- Will/codicil
- Deed of gift/trust
- Statutory declaration
- Life assurance/mortgage of life/endowment policies
- Mortgage of life policy
- Guarantee certificate
- Personal effects/valuables

The following documents may also be important to the client and difficult to replace, therefore you should exercise caution before destroying them:

- Certificates of birth or marriage for foreign nationals who may find it difficult to obtain replacements
- Deeds of partnership
- Patents/copyrights
- Medical records such as x-rays

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#### **Disclaimer**

In preparing this note, we are intending to draw your attention to existing regulations. This note is not intended as a substitute for careful study of the regulations. Legal Compliance Services does not provide legal advice and does not accept any liability for reliance on the content of this note. Readership of this guidance does not create any form of business or legal relationship.



## About The Author

Legal Compliance Services is a team of former SRA compliance experts who provide bespoke regulatory compliance and risk management services to law firms.



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