

File retention following an intervention into a firm - analysis of responses and SRA response

Introduction

1. This report follows the SRA's recent consultation on file retention following an intervention into a firm or individual's practice and includes SRA's response to the issues raised by respondents.
2. The consultation set out proposals relating to the length of time that particular types of files and documents were to be retained by the SRA. Central to the consultation was the need for the policy to be proportionate and balance the rights and interests of the individuals affected by an intervention with the costs to the profession, which are ultimately borne by consumers.
3. It was noted that a significant and increasing portion of costs of intervention are those associated with collecting, archiving and retaining of files, which is in part determined by the length of time that a firm's closed files are kept. Intervention costs have increasingly been driven by the need to secure and manage a disproportionately large number of closed files.
4. The consultation:
 - sought views on our proposals (including whether there were any consequences, risks and/or benefits which had not been outlined); and
 - if the proposal was not agreed, views were sought on alternative ways of managing the costs associated with file retention.

Responses received

5. The SRA received 14 responses to the consultation from stakeholders, including: The Law Society ('TLS'), The Legal Ombudsman ('LeO'), The Information Commissioner's Office ('ICO'), The Immigration Law Practitioners' Association ('ILPA'), The Council of Mortgage Lenders ('CML'), three regional Law Societies, four practising and one retired solicitor. A list of respondents is attached at the end of the paper.

General analysis

6. The proposed policy outlines a course of action that the SRA wishes to apply to file retention following intervention. However, we will need to apply to court on each intervention for approval to destroy files – our approach will, therefore, be subject to judicial oversight on a case by case basis and potentially subject to change.
7. Furthermore, given that we will always need to make an application to court for approval to destroy files, there will always be a period of time for clients to come forward to claim files, however old they are, before any destruction begins. This has been formalised in the policy, which now makes clear that no documents will be destroyed in the first 12 months following an intervention.

8. We reiterate the low numbers of files reclaimed by clients. As the consultation document highlighted, only 0.55% of papers are ever claimed. 75% of these are claimed within the first three years following an intervention, meaning that very few are ever claimed over longer periods.
9. The points made by the ICO accord with our understanding of the position of these files in relation to data protection issues. As the ICO point out, the 'reasoning used takes into account legal requirements, alternative availability of original documents, limitation periods and the SRA's practical experiences of storing and repatriating these files and documents.'
10. It is particularly worth bearing in mind, when reviewing the responses to the consultation, that the ICO's view is 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 DPA.'

Consumer protection

11. The most significant point of concern was over potential impact on client protection by introducing shorter retention periods for files post-intervention. This concern related both to the case file retention periods and classification of original documents.

"Reducing the time period for holding property files from the current requirements, would cause potential difficulty for claimants, including lender claimants, if they are unable to access historic files required to pursue claims that are outside of typical limitation periods."

"...the SRA could be damaging access to justice for clients who do not discover there is a problem with the service provided until significantly after the event."

"The time limits proposed by the SRA may mean that claims are made after a file is destroyed. This means that it will be very difficult to assess whether a claim is valid or not and, as a result, consumers may lose redress because a court or regulator is unable to determine whether there are grounds or not."

12. Respondents cited statutory limitation periods and were concerned that relevant files could have been destroyed when a claim was still in time. Most of these concerns related specifically to property and will related matters, due to the length of time that problems generally take to come to light.
13. LeO highlighted their recently amended time limits for submitting a complaint (ordinarily, within six years from the act/omission; or three years from when the complainant should reasonably have known there was cause for complaint) and emphasised the role played by available evidence. Without suitable evidence, which in many circumstances includes client case files, they will not be able to proceed with a complaint. They were concerned that shorter retention periods may restrict their ability to provide a means of redress, thereby impacting access to justice.
14. TLS, along with general concerns about shorter retention periods, were particularly concerned about the proposed time limits for criminal case files - especially where a life or indeterminate sentence has been passed down or in cases of significant

reputational damage, such as sexual offences - due to the fact that criminal appeals may be heard after the proposed seven year retention period.

15. ILPA cited various types of immigration case that may become live long after the original file was closed but the original file is likely to be highly relevant. They were therefore concerned that destruction of such files, especially in light of delays with Home Office applications, was likely to pose a significant risk.

Our response

16. Our proposal for wills and trust file retention is 21 years from the date of file closure, as opposed to 21 years from the date of intervention. For criminal, immigration and property files, the proposal is seven years retention from the date of file closure, as opposed to seven years from intervention. We consider that these time frames appear to give clients sufficient time to claim files, especially in light of the number of files that have actually been returned.
17. In the last seven years, 18 wills and trust, 52 property, three criminal and one immigration file have been claimed where the intervention occurred more than seven years prior. Hundreds of thousands of such files are currently held in line with existing retention periods.
18. We have no information on how many of these were required for a claim, appeal or application (as opposed to a client simply wanting the papers back) but we believe that retaining these numbers of files, in light of the numbers reclaimed, is disproportionate.

Passports; birth, death and marriage certificates

19. ILPA were also concerned about the proposal to remove these from the original document list, particularly in immigration cases, because it may be all but impossible or particularly burdensome to obtain replacements from the country of origin.
20. For example:
 - refugees are assumed to be unable to approach their country of origin and approaches may put them at risk or be held as evidence that they are not in need of international protection;
 - in some countries the applicant needs to be present to obtain a replacement and record keeping in the country of origin may be poor;
 - registering as a British citizen will, in some cases, depend on the immigration status of the applicant's parents. Relevant records and documents, particularly given the legacy of empire, will often be held at an overseas embassy or consulate and may be impossible to retrieve.

Our response

21. Whilst we appreciate the risks posed to such clients, especially given their potential vulnerability, since 2006 we have only returned two passports more than seven years after the intervention and have not returned any birth, marriage or death certificates beyond this point. Therefore, whilst these do seem to be valid concerns, the actual

number of old documents being requested is low and, in the SRA's practical experience of repatriating such documents, retention on the current basis appears to be disproportionate.

Unregistered property deeds

22. TLS stated that unregistered deeds should not be destroyed until the property was registered, although the point was not developed further.

Our response

23. Whilst we understand that official copies of unregistered property cannot be obtained from Land Registry, all unregistered deeds will be kept for a minimum of 21 years after intervention where a contact address is available. Letters will have been sent, outlining the retention timescales and asking for urgent instructions. When no such contact address is available, these documents will be kept for a minimum of 80 years. We consider that these retention periods are proportionate and allow consumers sufficient time to reclaim such documents.

Life assurance, mortgage of life, endowment policy documents and guarantee certificates

24. Various respondents were concerned that proposals to reclassify these documents from originals could result in significant client detriment. In particular:

- clients may have forgotten who the provider was and the policy document may be the only available evidence;
- where the policy holder is a third party, there may be issues around data protection hindering disclosure by the provider.

Our response

25. In some circumstances, it may be difficult for clients to obtain copies as insurance companies merge or changes names and clients may be unable to remember the provider. Furthermore, the repatriation figures suggest that they are more regularly reclaimed than other types of original documents (in the last seven years, 19 were reclaimed where the intervention occurred more than seven years prior). In light of the consultation feedback, these documents will remain classed as original documents.

Medical records

26. TLS cited the fact that medical negligence cases may include original documents, such as x-rays, and believed that such documents should not be destroyed.

Our response

27. We understand that copies of original medical documents cannot usually be obtained through alternative means; however, medical negligence case files will be retained for 15 years from the date of file closure, as opposed to the current seven years from the date of intervention. As with unregistered deeds, we consider that the proposed

retention periods are proportionate and allow those wishing to reclaim such documents sufficient time to do so.

Express provisions made for retention

28. In some instances, practitioners will make provisions to clients that documents and/or files will be retained for longer periods than those proposed. There were concerns from various respondents that there may be significant client detriment if, following intervention, documents were destroyed before this time frame, given potential client expectations around their retention.

Our response

29. We are not stepping into the shoes of the intervened firm, but acting as a regulator with our own duties and obligations. All clients for whom we have a live file, a will or set of deeds will have been contacted by us following intervention. It is also worth noting that original documents (as set out in the proposals) will be retained for much longer periods and, in light of the low level of reclaimed files, we do not consider the potential risks justify amending the policy to take effect of such provisions.

Date file was closed

30. Some respondents were concerned that calculating the relevant period of retention based on the last action on a file could lead to inappropriate periods being applied, due to inaccurate or incomplete case files. In particular, ILPA noted that this was likely to be exacerbated in cases of intervention, where things happen quickly. They considered that a file retention policy that depended on a perfect system of archiving, such as knowing the date of the last action, carried risks that files could be destroyed prematurely, increasing the risks to client protection.

Our response

31. As explained earlier, we will need to apply to court in each case for approval of the process we have applied to retention before being able to destroy any files or documents. To be able to satisfy the court, it may be the case that we need to make alterations to the proposals to take account of specific circumstances of an intervention. The type of situation envisaged by ILPA is possible and, should we find it to be the case in an intervention, we would need to change our processes to be able to satisfy ourselves and the court that we had complied with our public law obligations, thereby mitigating such risks.

Defending claims against the profession

"There is ... the consequence that the lack of files could lose the profession tens of millions in professional negligence claims brought during standard limitation that cannot be defended."

32. Linked to concerns about client protection were concerns about the ability of the profession and insurers to defend itself from claims, for example in negligence, if case file retention periods were shortened. The corollary of such concerns would, in

all likelihood, result in increased PII premiums, which could be passed onto consumers.

Our response

33. The points made above, in relation to the low number of files that are reclaimed after a period of time, are relevant to this concern. In addition, the ongoing costs of file retention are ultimately borne by the profession (through practising fees and Compensation Fund contributions), so there should be clear cost savings to the profession in implementing the proposed policy.

Digitising documents

34. Three respondents suggested that destroyed files should be digitised or that the SRA should undertake a further cost-benefit analysis of such a policy. They considered this to be a potentially cost effective way to address their various concerns, such as those around client protection or protecting the industry from potential claims.

Our response

35. Notwithstanding data protection concerns around retaining large numbers of documents that have little likelihood of being reclaimed, the SRA have previously explored the possibility of scanning destroyed documents for the purposes of a court application to destroy files on some interventions. Although a direct cost saving analysis has not been undertaken in relation to the proposed policy, the exercise highlighted that scanning documents for retention is significantly more expensive than the existing retention policy. Given the generally shorter retention periods put forward here, this price gap would only increase. The possibility of digitising documents was therefore not tabled in the current consultation as a viable policy option.

Publicising file retention policy

36. A number of respondents questioned what information would be available to consumers about the proposed changes to the SRA policy and availability of documents from other sources, noting that awareness of the policy may beneficially impact on consumers. TLS were also concerned that practitioners were unaware that the SRA held a large number of files containing wills and would, therefore, not contact the SRA to try and locate a copy.

Our response

37. We understand that increased awareness amongst the public and profession of the policies implemented by the SRA, particularly where they may affect consumers, is a positive outcome. Therefore, we will be considering ways of making such information available through suitable channels.

Policy considerations

38. A number of responses provided comment on how costs of file retention could be managed or other procedures could be put in place to further improve storage and retention practices. The suggestions included:

- encouraging new market entrants and existing firms to implement appropriate archiving and destruction policies
- actively publicising interventions in the area where the firm is based

39. We are grateful for the suggestions made and where appropriate, we will consider engaging further with respondents who have made suitable suggestions.

Respondents

Organisations

Birmingham Law Society
Council of Mortgage Lenders
Devon and Somerset Law Society
Immigration Law Practitioners' Association
Legal Ombudsman
The Information Commissioner's Office
The Law Society
Tonbridge Wells, Tonbridge & District Law Society

Individuals

Alan Robertson (retired solicitor)
Edward Austin (solicitor)
Paul Bird (solicitor)

Three individuals who responded to the consultation did not provide consent to disclose their details.