

## Legal records at risk: does the legal profession care about preserving its heritage?

## What could be done to rescue private sector legal records



Photograph above of the records of a local law firm courtesy of the Derbyshire Record Office

**Abstract:** This article is written by Clare Cowling, Director, Legal Records at Risk Project, Institute of Advanced Legal Studies, University of London. Her article explores the hypothesis that modern private sector legal records are at more at risk of loss than their historical equivalents. There are many reasons for this, but one factor, detailed in this article, appears to be the indifference or reluctance of legal practitioners themselves. The LRAR project seeks to allay any concerns practitioners may have about confidentiality and to raise their awareness of the potential commercial and historic value of their legal records. It will do this by a combination of case studies, interviews with stakeholders and investigations into the current information management and archiving practices of institutions specialised to law. In so doing it will provide guidance and advice on the more cost-effective management and preservation of legal records so that the history of change to non-governmental legal services in the UK over the past century will be accurately documented.

Keywords: archives; digital continuity; information management; law firms; legal practitioners; legal records; legal research; legal services; solicitors.

### What is the issue?

Private sector legal records are at risk of becoming lost or inaccessible through globalization, digital obsolescence, physical neglect, lack of interest on the part of information owners or reduced archive resources to preserve and provide access to the records. All records in the private sector face similar challenges, but modern legal records (early twentieth century to the present day) are particularly vulnerable due to recent developments which are transforming the nature, organisation, regulation and economics of legal services. These changes are outstripping the capacity of the traditional providers of legal research facilities to preserve and make available relevant records. Additionally, unless systematic efforts are made towards collecting private sector legal records, research using modern legal records will continue to be weighted towards the study of government policy, legislation and the courts, producing a lopsided historical picture of the UK's legal framework. In short we are in danger of losing a significant proportion of our legal heritage.

### Why is it important to save records documenting our legal heritage?

Records of historical value (in other words, archives) are important because they provide evidence of activities and tell us more about individuals and institutions. They also increase our sense of identity and understanding of cultures. They can even ensure justice<sup>i</sup>. Records weren't usually created for the purpose of historical research so they often provide a less biased account of events than secondary sources.

Private sector legal records in particular have a much wider significance than just for students of law. The legal practitioner's role as an integral part of UK business, cultural and social development needs to be understood; therefore it must be studied and evaluated. Without relevant records this will be an uphill task.

Most private sector legal records comprise the business records of legal bodies such as law firms, barristers' chambers, membership or regulatory bodies. There is no national archive legislation<sup>ii</sup> in the UK requiring historical business records to be retained permanently. Some legislation requires certain records generated by businesses to be retained for a minimum set period before they can be destroyed, particularly within heavily regulated industries. Yet within many organisations no consideration is given to whether their records are, or will be, historically important; those records are therefore at risk.

### **Are private sector institutions specialised to law (ISLs) aware of this?**

Our initial research suggests not<sup>iii</sup>. 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, the legal sector (with some notable exceptions<sup>iv</sup>) simply does not seem to be aware of – or is indifferent to - the risk of losing records documenting the developments in legal services over the past century.

Of course we understand that legal practitioners are busy people and that appraising the potential research 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 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.
- 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 community<sup>v</sup>.

### **What is being done?**

The Legal Records at Risk Project, based at the Institute of Advanced Legal Studies, University of London, commenced in September 2015 to:

- Broaden the concept of "legal" records from their traditional definition as court records or deeds to the records of private sector institutions specialized to law (ISLs), including arbitration and mediation services, barristers, insolvency practitioners, legal executives, licensed conveyancers, multi-disciplinary practices, notaries, patent attorneys, pro bono legal services, scriveners, solicitors, trade mark attorneys and providers of ancillary services such as law publishers and legal stationers.
- 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.
- Broaden the perspective of legal research, which has hitherto been primarily concerned with investigating the pre C20 records of the courts, possibly due to the dearth of alternative sources.
- Widen the use of C20 and C21 legal records by demonstrating their relevance to a number of research disciplines in addition to legal research, such as sociology, biography, economics, geography, race and gender.
- Identify and facilitate the rescue of legal records of potential value by developing a co-ordinated, cost-effective model (as opposed to the current ad hoc arrangements) for the transfer of records in both hard copy and digital format to appropriate repositories.

## **What are our Objectives?**

The primary goal of this project is to change the culture surrounding the perception of what legal records actually are and to facilitate their use in academic research. In doing so we hope to enhance the relationship between legal practitioners, researchers and archivists. This work is being undertaken in collaboration with the Business Archives Council (BAC), the British Records Association (BRA), The National Archives (TNA) and others.

The first priority will be to identify and save private sector records at risk by devising a co-ordinated strategy for the identification and preservation of business records of value, including legal records. 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.

The project will not collect records but will act as a conduit through which legal records of value (in all formats and media) are identified, preserved and made available for research. It will publish a short book describing the project, its methodology and its successes and failures. The book will include details of case studies into the records and record keeping of specific ISLs and into collections of legal records – and their reference use - held in business and higher education archives. The book will include a census of private sector ISLs in

England and Wales, with details of what, if any, provision has been made to preserve their archives and details of specific case studies, including:

- Solicitors' records: in partnership with the BRA, 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.
- Legal records held in business archives: a case study of dispute resolution records held in the Transport for London Corporate Archives, with the twin aims of demonstrating the scope and content of legal records within business archives and the business context within which they sit, is shortly to be published.
- Legal publishing records: a case study of the records of a prominent legal publisher has been published.
- Records of a solicitor's practice: a firm outside London with a professional archivist has agreed to be the subject of a case study which should provide other legal practitioners with an example of how instituting best practice in managing information reduces costs, improves efficiency and assists in preserving our legal heritage.
- Further case studies are intended on:
  - Records of law firms held by selected archive repositories.
  - Records of licensed conveyancers
  - Arbitration records held privately.
  - Arbitration records held by construction companies.

## **What particular issues apply to law firms?**

One major category of legal records with which the project is concerned is solicitors' records. 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 older 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.<sup>vi</sup>

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<sup>vii</sup>. 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<sup>viii</sup>.

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<sup>ix</sup>.

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."<sup>x</sup>

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<sup>xi</sup>.

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<sup>xii</sup>.

## **Why are law firms reluctant to preserve their archives?**

### **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 3<sup>rd</sup> 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<sup>xiii</sup>. 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).

### **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 so 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.”<sup>xiv</sup>

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. <sup>xv</sup>

## What solutions does LRAR offer?

1. LRAR is seeking, through seminars, articles like this one and word of mouth, to raise awareness among legal practitioners of the commercial and historical value of their information.
2. LRAR and the BRA intend to develop a co-ordinated process to facilitate the rescue of solicitors' records following the demise of the BRA's historic central warehousing facility.
3. LRAR also intends, in consultation with selected firms and the BRA, to develop a generic information and records retention schedule and best practice guidelines which can be applied to their records and information management processes by all solicitors.
4. LRAR, the BRA, the BAC and TNA are collaborating on providing better information to businesses, including law firms, on how, when and where to dispose of their records.

## What are the benefits for law firms?

Commercial benefits:

The project can help institutions specialised to law to reduce on-going information management costs and to identify records of potential research value by:

- Giving practical advice on recordkeeping to facilitate efficient and compliant business practices.
- Reducing "re-inventing the wheel" as non-current information of business value is more readily available for re-use.
- Reducing storage costs – including IT costs - as records are systematically disposed of.
- Identifying ISLs with similar issues, developing a community of practice.

Reputational benefits:

- Giving a clearer picture of the importance of private sector ISLs in the development of the UK's legal and business framework.
- Giving ISLs a reputation for enhanced transparency and honesty.
- Greater client confidence due to improved efficiency in client records management.

TNA summarises the benefits to businesses of maintaining archives (whether in-house or transfer to a third party archive repository) as follows: "Across the globe communications and marketing teams are re-engineering corporate branding and identity to emphasise their pasts. Most successful companies have secret commercial weapons in the form of their archives, an often under-used asset that can be used to increase brand awareness, build commercial identity and help grow business.

Information is a powerful business tool that can be turned to corporate advantage. Companies already know that research and development information is valuable, but the knowledge, experience and investment locked in company archives is an asset that can underpin core business.

Business archives contain the evidence that gives a company its edge or marks it out as different and special, making it stand out from its competitors".<sup>xvi</sup>

## How can legal practitioners help the LRAR project?

The project needs champions from individuals within the legal practitioner community. Without the involvement of the profession there will be a huge gap in material available from which to study the rapid changes to our legal services over the past century. This gap will widen exponentially as almost all records are now created and managed digitally, yet digital continuity and obsolescence is not on the radar of most ISLs nor even of many research institutions and archives.

The project would benefit from legal practitioners describing the issues they may be facing in managing and disposing of legal information; asking for advice on particular challenges such as digital continuity; seek guidance on how to identify records of value both for business use and for external research; request contacts to relevant archival repositories.

## Benefits for Legal Education

A key problem in legal education is to make the education fit for purpose in an increasingly rapidly changing legal environment. If law teachers and trainers had improved access to the business records of legal practitioners this would help to make legal education more relevant to modern business practice.

The project would benefit from input from law schools to: advise on their research requirements and the categories of records in which they might be interested; ask for help in locating potential archive repositories and records; suggest ways to make legal records already held in archives more accessible.

To assist law firms, legal educators and researchers we have devised two research questionnaire which are here: [http://ials.sas.ac.uk/research/lrar/lrar\\_research\\_survey.htm](http://ials.sas.ac.uk/research/lrar/lrar_research_survey.htm). We do know, however, that many individuals dislike questionnaire, so an email summarising issues which affect your firm, law school or legal research institution and any practical help which you feel would be of benefit would be equally valuable.

The project is being led by Clare Cowling, an experienced archivist and records manager; contact her at [clare.cowling@sas.ac.uk](mailto:clare.cowling@sas.ac.uk). For the latest project news see our website: <http://ials.sas.ac.uk/research/lrar/lrar.htm>.

**Biography:** Clare Cowling is an Associate Research Fellow and the Director of the Legal Records at Risk project at the Institute of Advanced Legal Studies. She began her career as an archivist and records manager at the Tasmanian Archive and Heritage Office and The National Archives of Australia. On settling in the UK she undertook research projects into Legal Records in the Commonwealth and Records of Legal Education before resuming her career as an archivist and records manager in the Higher Education sector, then at The Law Society, The Solicitors Regulation Authority and Transport for London.

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## Endnotes:

<sup>i</sup> As evidenced by the recent Hillsborough inquest findings.

<sup>ii</sup> With the exception of those records which are designated as Public Records under the 1958 Public Records Act eg those of the National Coal Board.

<sup>iii</sup> Of 34 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), 2 negative responses (ie flat refusal to be involved) and 24 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).

<sup>iv</sup> 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.

<sup>v</sup> 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.

<sup>vi</sup> 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.

<sup>vii</sup> Auction information gathered during a meeting with personnel from TNA's Manuscript Sales Monitoring Service, 17/11/15

<sup>viii</sup> Any document which is not the property of the exporter and is over 50 years old must have an export licence.

<sup>ix</sup> 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."

<sup>x</sup> Legal Ombudsman, [Learning from complaints: case study publication](#), March 2016. P.3

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<sup>xi</sup> 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/>

<sup>xii</sup> 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>

<sup>xiii</sup> TNA [Code of practice for archivists and records managers under Section 51\(4\) of the Data Protection Act, 2007](#)

<sup>xiv</sup> 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

<sup>xv</sup> 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

<sup>xvi</sup> TNA, [Corporate Memory: A guide to managing business archives](#), 2009