

# Custody & Compliance

Challenges and strategies in  
law firm information management



# We always offer you more.

**In many ways, law firms are ahead of the game when it comes to information management. While other industries have only just begun to grapple with data breaches and privacy violations, the legal sector has long had the advantage of a constitutional obsession with information security.**

Compliance has never been complicated either. Unlike in the construction industry, intimate acquaintance with legislation has meant that document retention and destruction has been a simple matter of course. Yet as information flows digitise and accelerate, the legal sector is in danger of falling behind. Habitual confidentiality no longer necessarily confers meaningful protection, and the relatively recent addition of the Privacy Act to a firm's list of compliance checkboxes has created conflicts with conservative retention practices.

As disruptive thinking creates new innovations that allow people to manage many traditionally billable processes themselves, downwards pressure is being placed on the value of a legal expertise. Law firms are increasingly being forced to focus on the quality of their service offering, which is directly affected by lawyer-client communication, speed of information access, and cost transparency.

Fortunately, solutions are emerging with the goal of helping law firms optimise information management in line with these challenges. This report will address the key areas of weakness presented by current information management practices in the legal sector and evaluate the solutions.



# “The Three C’s”

## Primary challenges in law firm information management

### › Keeping Confidence

*“We need to keep in mind that we have an obligation of confidentiality. The obligation is nearly absolute.”<sup>1</sup>*

– *Stafford Shepherd, Senior Ethics Solicitor*

Confidentiality is central to the legal process in Australia. Legal professionals have a responsibility at common law to protect information passing between them and those with whom they consult, even if those consultations do not produce billable clients. Unlike the duty of loyalty, the duty of confidentiality continues beyond the end of a retainer – even beyond a client’s death.

But perhaps more important than legal obligations are client perceptions. In an increasingly privacy-conscious marketplace, the information management practices of law firms are no longer solely an area of concern for larger clients. Weekly news reports of government and corporate data breaches have put confidentiality at the forefront of the public awareness. Now, data does not even need to be compromised before serious concerns are raised, as was seen in May 2016 when Telstra Health was awarded a contract to manage a national cancer screening register.<sup>2</sup> More so than ever before, law firms stand to profit through explicit demonstration of their ability to keep information private, secure, and firmly on Australian shores

Unfortunately, however, the information management practices of many firms are putting them at risk of breaching client confidence. Rapid technological advances in other industries have stolen the lead that the legal sector has traditionally held in its treatment of confidential information, and many firms are now struggling to catch up.

“We’re seeing many other sectors becoming just much faster fish,” says Dave Coughanour, director of security and information management at K&L Gates. “It’s harder to hack into a bank, it’s harder to hack into a defence-contractor or critical infrastructure company, so hackers are shifting their focus to what they perceive to be the weaker link in the chain, which is why law firms need to ensure their cyber security systems are keeping up with other industries.”<sup>3</sup>

Some firms have dealt with this by staying offline and largely paper-based. But in an on-demand legal era where the sector is under increasing pressure to minimise discovery costs, this creates its own problems.

Paper archives present two major issues. For in-house archives, firms must maintain a level of security – and allocate floor space – on premises that is costly and might otherwise be unjustified. Indexing can also be erratic, increasing the time staff have to spend locating documents. When storing archives off-site, firms may inadvertently expose their information to compromise during transit, especially over long distances where multiple handovers are involved. Very few information management companies have a secure chain of custody across all their delivery locations. Instead, when they have to deliver outside certain geographical boundaries or times of day, they outsource to contractors. This adds one or more unnecessary steps to the information transmission process. While it may only increase the risk of breach by a slight margin, it elevates the risk of data loss significantly.

1. Shepherd, S., Loose Lips Sink Ships, Queensland Law Society Ethics Centre, (January 2014)

2. <http://www.smh.com.au/federal-politics/federal-election-2016/election-2016-telstra-wins-contract-to-manage-your-health-records-20160525-gp3go9.html>

3. <https://www.lawyersweekly.com.au/corporate-counsel/20837-legal-profession-lagging-behind-on-cyber-security-front>

## › Maintaining Compliance

A solicitor or law practice may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legislation to the contrary.<sup>1</sup>

Another information management challenge for law firms is in compliance, where a conflict emerges in the interplay between a firm's aversion to having claims made against it for destroying client documents, general retention and destruction requirements, and the cost of ongoing document storage.


The strategy employed by many law firms in Australia is to simply to keep everything. This eliminates the risk of documents being unavailable for future cases, and of a client (should they wish to take custody of the documents created for their case and which are therefore legally their property) launching a malpractice claim.

The problem with the practice of "infinite retention", however, is that it costs shelf space and is generally correlated with highly chaotic indexing.

Not only does this have obvious implications for the discovery process and recovery rates, but for compliance with the Privacy Act. Where it may have once been optional to discard client documents that had no primary purpose, failure to do so can now constitute a legal violation.

And yet, to ensure this compliance, firms are faced with having to spend a vast amount of money on audit, which can realistically take years. The time- and money-consuming task of going through the archives would require a financial investment equivalent to the cost of decades of static storage.

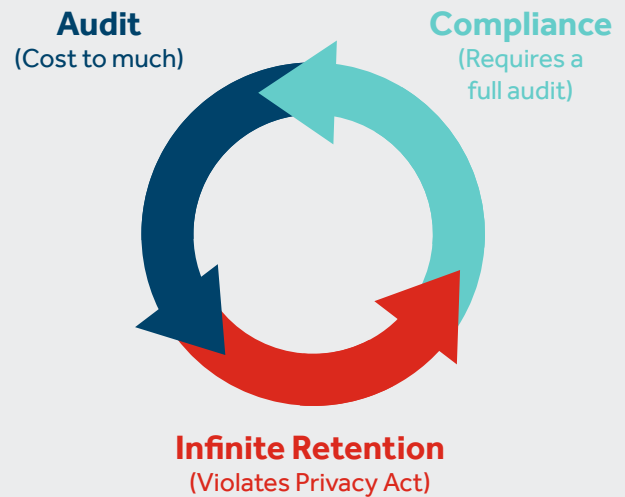
1. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015



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Minimal as they are, however, storage costs can still reach unacceptable levels. Author Paul Wilkinson cites the 2004 example of Arup, a multi-disciplinary consultancy that, over 70 years of project work, “had accumulated more than 100,000 archive boxes,”<sup>1</sup> much of which was likely no longer legally relevant nor of any historical interest. If the company was storing their boxes in-house, they would have been paying for it through poorly optimised real estate. If they were using a third-party storage solution, they would have been committed to an unnecessarily large storage contract.

Firms that are already using digital systems can also suffer from these problems. The practically infinite storage capacity of cloud-based systems has the potential to encourage an “out of sight, out of mind” approach to information management, which preserves the infinite retention paradigm of paper archives without the conspicuous use of floor space. Without space restraints, information is more likely to be over-collected, redundantly duplicated, and poorly indexed – all of which can make it difficult to set up proper lifecycles for documents.



Neglecting sentencing schedules for digital information also unnecessarily elevates liability in the event of a breach. According to a Ponemon Institute study released in 2016, the average cost to a company per record breached is AU\$142.<sup>2</sup> This amount merely represents the direct cost of resolving the breach and indirect cost of customer churn – it does not include the cost of dealing with any resulting legal action. Because of their duty of confidence to their clients, law firms that redundantly retain electronic information are courting reputational disaster along with serious financial consequences.

1. Ponemon Institute, 2016 Cost of Data Breach Study: Australia, p. 1.

2. Queensland Law Society, Client Care: Communication and Service, p. 8.



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## › Staying Connected

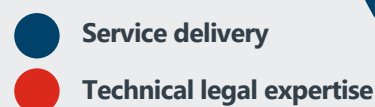
Around 75% per cent of the incentive for choosing one lawyer over another is linked to service delivery, and only 25% to technical/legal expertise. In most situations, clients will already expect a lawyer to know his or her law, so in choosing a lawyer, the level of service will nearly always be more important.<sup>1</sup>

As clients increasingly focus on the quality of a firm's service offering, virtuosity and expertise are becoming less marketable. In order to stay competitive, the onus is now on law firms to provide value-added services. There are three key elements to this paradigm: quality of communications, speed of information access, and cost transparency. All three are directly affected by a law firm's information management practices – and by how digitally savvy they are.

Firstly, clients expect correspondence to be meaningful. Law firms still relying heavily on paper-based information management are less capable of efficiently aggregating important data and providing that data in a format their clients can access. Even for firms with well-connected online workflows, digital is not an automatic boon because it is often poorly optimised. "IT is grafted onto existing working practices and so replaces or perhaps enhances current systems," notes a 2015 study by the CJC. "This approach tends to be costly, difficult, and, in the end, often delivers 'mess for less', that is, it replaces today's inefficient, paper-based processes with IT-based systems. It does not fundamentally change the underlying processes and procedures."<sup>2</sup> Delays that were once the result of a lack of automation are now caused by a dearth of information that is indexed poorly, or not at all. Information management industry experts claim that as a result law firm staff can still spend up to 30% of their workday chasing down documents.

Difficulty with digital also means lawyers are preventing from corresponding on the fly across multiple devices, causing them to spend more time issuing requests for the physical transmission of files. This adds to the cost of discovery and diminishes recovery rates. Clients notice the speed with which their legal counsel operates and make hiring choices accordingly.

## What do clients look for when choosing a lawyer?



In addition to this, there is increasing sensitivity over the amount, and manner in which, clients are charged for information management-related expenses. Ethical standards and professional conduct rules make it clear that law firms must not charge for the storage and retrieval of documents without obtaining their clients' informed consent, and violation of this is a serious disciplinary matter. "If you are being sold scanning or archiving services on the basis that these can be automatically billed to the client under a "standard" costs agreement, such claims need to be considered carefully," warns ethics solicitor David Bowles.

The storage, access, digitisation, auditing or archiving of client information is typically regarded as part of a law firm's internal processes, and therefore unbillable. However, there are certain information management tasks performed in service of clients, such as scanning documents to make them accessible remotely, whose costs might be more easily externalised. Lack of clarity in this area can cause firms to unnecessarily refrain from outsourcing their files, accrue costs they could be passing on, or overcharge their clients.

1. Ponemon Institute, 2016 Cost of Data Breach Study: Australia, p. 1.

2. CJC, Online Dispute Resolution for Low Value Civil Claims – Online Dispute Resolution Advisory Group (Report, CJC, 2015) p. 4.

# The Solution: Minimising risk and maximising efficiency

## › The Solution

To tackle the challenges presented by a growing need to ensure confidentiality, compliance and connectivity, law firms are increasingly turning towards external information management solutions that go beyond the scope of traditional access and archiving partnerships.

Security of hard copies is addressed with off-site facilities designed and equipped to protect documents from fire and water damage, as well as theft. Archiving is set up in such a way that even employees of the information management company cannot identify their contents at a glance, with access only available to them once a request has been issued from an authorised individual inside the firm. To ensure the same level of security when transporting documents, these companies maintain an entirely secure chain of custody, never outsourcing collection or delivery to contractors, even when working outside urban areas or normal trading hours.

Good information management companies have also invested heavily in digital security infrastructure. They provide on-shore cloud-based systems that allow access only to pre-vetted firm employees, with customisable access privileges to ensure the right people have access to the right information.

Engaging a good third-party information management solution immediately simplifies compliance by making documents easier to find. These companies are conscious of the evolving legislative environment and can keep track of stored information over time, setting up retention and sentencing schedules that ensure destruction occurs when documents reach the end of their lifespan. They can also assist with proof of compliance by providing certificates of destruction.

Even when documents must be retained beyond their strict period of usefulness, transforming from a paper-reliant firm into highly digital business reduces or entirely eliminates the inefficiencies associated with hard copies. Company archives can be audited for content, then digitised using existing indexing systems for rapid searching and retrieval, and easy removal of over-collected or duplicate content. Alternatively, paper documents can simply be directly indexed, stored until they are needed, and then directly delivered or scanned.

## **We can provide on-shore cloud-based systems.**

As a law firm migrates to digital, the best information management companies provide intuitive systems that allow workers to access information in any format they wish, from any device.

*Digitisation makes information available in real time, providing immediate access across the business to the most up-to-date versions of documents in a fast, secure, cloud-hosted system.*

An information management partner with a good understanding of legal sector billing practices will also allow firms to set up sub-accounts within their system for each case, so storage and retrieval costs can be itemised in an easy-to-digest format during billing. They will also be able to help law firms establish which of their information management costs can be ethically externalised.

## **A good information management solution not only directly addresses the major data-handling challenges of the legal sector, but also provides additional security, compliance and accessibility benefits.**

### › **Confidential**

With information stored off-site, much of the pressure is taken off firms that are currently maintaining a high level of physical and cyber security in their office premises. The cost savings to be had here are significant. Done properly, digitisation can also dramatically increase information security, which in turn elevates clients' faith that a firm has their best interests at heart.

A law firm that can ensure the safety and security of its information assets is one that will stand out for all the right reasons to the privacy-conscious public.

### › **Compliant**

Having an information management partner paying close attention to sentencing schedules means that documents are less likely to occupy costly shelf space, allowing for a dramatic reduction in information storage overheads. Healthy sentencing schedules also help ensure all of a firm's records comply with the Privacy Act and other relevant legislation without significantly driving up costs. With greater compliance also comes less exposure to risk in the event of a security breach, with potential savings in the millions of dollars.

### › **Connected**

The increased efficiency that comes from better information management has a very real dollar value. In terms of discovery, a more streamlined and intuitive electronic document access system naturally increases retrieval speeds. For physical documents stored off-site there may still be a wait time, but this is almost entirely taken up by the transit process, and no longer by staff searching in vain for files. With document retrieval outsourced, staff can get on with more productive tasks. Clients will also be happy, assured that any costs they incur for third-party information management will be billed transparently and ethically.

**Sentencing schedules means that documents are less likely to occupy costly shelf space.**



# Top 7 Questions to ask when choosing an information manager

## **1. Can I adequately brief the information management company so that it understands what is required and expected?**

You're not looking for another cookie-cutter information management solution. Ensure the company you're evaluating assigns a consultant to get a proper grasp on what your firm needs to improve its information management. They should sit down with you to create a customised solution that caters to your specific storage, indexing, retrieval and sentencing requirements.

## **2. Is the process adequately supervised?**

A little-known fact about switching information managers is that the best ones will combine the relocation of your archives with a full audit of the files within them. This is an ideal way to discover which files are no longer needed and reduce your overall storage costs.

## **3. Can I make conflict checks?**

The practices of any good information management company should render this question redundant. They should provide an indexing system that offers no indication to their employees what an archive contains. Their job is simply to ensure that information is retrieved and delivered as rapidly as possible when you need it.

## **4. Do the employees of the information management company have an adequate legal education to undertake the tasks to be assigned?**

As above, employees of any third party you engage should have no access to the information in files beyond that required to effectively index and retrieve them. However, you should insist that all employees pass a police background check as standard.

## **5. Does the provider have a security system that will protect confidential information when being transmitted and subsequently held?**

Make sure that any information partner you consider using provides state-of-the-art security at their facilities, throughout their transportation network, and online. This means 24-hour surveillance, an unbroken chain of custody from A to B with GPS tracking, and dedicated cloud hosting with a system accessible only to you.

## **6. Does the provider have a security system that will protect confidential information when being transmitted and subsequently held?**

Once your clients know that their confidential information is being stored more securely, accessed more efficiently and destroyed in a more timely fashion than it would be if dealt with in-house, they'll be more than willing to consent to your use of third-party information management. Just make sure you tell them up-front how information will be managed.

## **7. Are the costs to be charged 'fair and reasonable'?**

When weighed against the cost of data breach or loss, the price of an external information management solution is negligible. But this is an important question. If engaging a new provider, ask what services they can combine with the initial mass-archiving of your firm's documents. You might be pleasantly surprised. Also, make sure they can create case-by-case sub-accounts in their billing system so it's easy for you to be transparent when externalising costs to clients.

# The Grace Advantage

**With over 50 years in the business, Grace is uniquely qualified to deliver excellence in information management.**

Grace provides solutions for the full range of legal sector information management requirements, from storage and indexing to retrieval and destruction. Here are the advantages your law firm will enjoy with Grace:

- › Expert consultants to assess the precise needs of your business and tailor solutions that address your specific information management challenges.
- › The speed, convenience and security of 26 information management centres across the country – more than any other provider.
- › Many facilities are protected by state-of-the-art safety systems, including sprinklers and fire doors – all linked directly to the local fire brigade. Plus, electronic intruder detection with back-to-base alarms.
- › Complete and customisable cataloguing, indexing and sentencing solutions for projects of any size, right across the country – with information management software that gives you total control from any device.
- › A scanning and digitisation process to make searching and retrieval as fast as possible. Digital files are audited to ensure 100% accuracy, and can be delivered in any electronic format or securely hosted in Grace's online data repository.
- › Fast and flexible retrieval, with a standard service that delivers documents twice per day, urgent scan-on-demand services that respond within just 3 hours, and the option to personally retrieve information on site.
- › The only secure chain of custody in the industry that spans the entire country. With GPS-tracked vehicles and police-checked staff, your documents never leave Grace's sight. Their client-anonymous indexing system also ensures your confidentiality at all times.
- › Real-time tracking of your documents, from anywhere in the world.
- › Secure destruction of documents (either on schedule or on demand) that operates under a strict authorisation process, protecting against both accidental data loss and unnecessary storage terms.
- › Innovative solutions that recruit Grace's commercial and fine-art removals expertise to cater to a wide variety of unique business requirements.

**Contact Grace today to find out how their specialised information management solutions and integrated services can help you. Visit [www.grace.com.au/information/contact-us](http://www.grace.com.au/information/contact-us) for your nearest office.**

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