



FURTHER NOTE ON RETENTION OF DATA

Some people are still confused about retention. I hope this note will provide further clarification.

(a) CHAMBERS POLICES AND YOUR RESPONSIBILITY

1. Chambers policies merely spells out certain criteria which you must have regard to. Ultimately, what you keep and for how long is a judgment call which only you can make. No one can make it for you.

(b) GDPR

2. The basic position under GDPR is that you should retain personal data /case papers (i) only for as long as you need them and (ii) minimise what you do retain. I think the second part of that simply means that a legitimate reason to retain data does not provide a blanket excuse to retain everything. On the other hand, it does not prevent you from retaining everything if you genuinely deem it necessary.

(c) YOUR PROFESSIONAL OBLIGATIONS

3. Your professional obligations vary according to what you are doing and the type of case you are instructed in.

During the currency of the case

4. The material has been sent to you as counsel so that you can do your job. Keep everything while the case is current. Experience tells us you never know what might be useful and when.

When is a case concluded? - when it is resolved.

5. A case is no longer current when it is resolved: i.e. there is nothing left to be done; all relevant proceedings (including confiscation) have been completed; and all rights to appeal have been exercised or are time-expired. The right to appeal to the European Court of Human Rights expires 6 months after the final domestic decision: Art. 35(1) and requires the exhaustion of all domestic remedies.
6. Being sacked or withdrawing because of professional embarrassment is irrelevant. The test is whether the case is current, not whether you are still instructed.

After the Case has been resolved:

(a) Direct Access and Licensed Access clients

7. Barristers are normally instructed by solicitors. However, solicitors are not usually involved in public access (formerly Direct Access) or Licenced Access cases. (Licensed access is granted to organisations licensed by the Bar Council to instruct barristers directly e.g. accountants). To avoid potential problems arising from non-retention, the BSB require counsel *"to retain or take reasonable steps to ensure that the lay / licensed access client will retain for at least seven years after the date of the last item of work done:*

- (i) copies of all instructions (including supplemental instructions);*
- (ii) copies of all advices given and documents drafted or approved;*
- (iii) the originals, copies or a list of all documents enclosed with any instructions;
and*
- (iv) notes of all conferences and of all advice given on the telephone.*

(b) Other (solicitor instructed) work

8. Good solicitors tend to retain case papers for 6 to 7 or so years, but they are under no professional obligation to do so.¹ Nor is there any professional (BSB) obligation for you to retain work after the conclusion of a case where you have been instructed by a solicitor. However, we are all aware that issues can and do arise after the conclusion of a case: e.g. fees issues; appeals out of time; subsequent parole hearings; complaints against solicitors, complaints against counsel; related and civil issues arising out of confiscation proceedings or the main proceedings; Criminal Cases Review Commission applications etc. If you have not encountered such an issue yet, you will. When they occur, they are time consuming and often very difficult to answer without access to relevant papers etc.
9. To resolve this difficulty, Chambers has opted for the 7 years retention rule adopted by the BSB and Bar Council for Direct Access and Public Access work. The basic point is that if nothing has arisen within that period, then in the normal case, an issue is unlikely to arise thereafter. However, if something does arise within that period, e.g. because of a complaint, the 7 year retention rule will start again as from the resolution of the complaint. (The BSB actually requires counsel to retain all matters relevant to the complaint for at least 6 years from the date of resolution).

What do I keep in solicitor instructed work?

10. What you keep is a matter for you. You have to decide. No-one else can decide for you. But it is worth bearing in mind that defence solicitors are under no obligation to retain papers, although the better ones keep papers for 6 or 7 years or even longer.
11. As a basic rule you can, if you wish, discard/shred or return to your solicitor some or all of your instructions, proofs, exhibits, all prosecution papers etc. on the basis that the solicitor will retain them for a period. Always check and see what your solicitor wants done with the hard copy papers. Some solicitors and prosecution authorities like the SFO keep full sets of counsel's papers.
12. Points to consider:

¹ <http://www.lawsociety.org.uk/support-services/help-for-solicitors/practice-advice-service/q-and-as/how-long-should-i-retain-my-closed-files-in-storage/>

- a. As a rule of thumb, it is not a bad idea to return/shred all hard copy material you have been sent, although you can scan and retain any key documents which you feel you need to retain.
 - b. Consider your instructing solicitor. If from your dealings with your solicitor you have doubts about his efficiency or the efficacy of his document storage or retrieval systems, you might want to retain more than you would otherwise have done.
 - c. If you were instructed for the prosecution, try to find out what the prosecutor's retention policies are. They are not all the same. That might help you decide what you should keep.
 - d. It is likely that you may want to, and probably should, retain your own work product (schedules, advices, skeletons, notebooks and case and trial notes (especially if no other record other than your note exists), conference notes and a copy of any document you have annotated or commented on either manually or digitally. The more complex a case, the more material you might need to retain in order to be able to understand and deal with issues which can arise years later.
 - e. Representing a client who has been acquitted is less likely to give rise to a later need to refer back to papers. However, acquittal or discontinuance is never a guarantee. Some defendants are intensely litigious; some may have genuine grievances about the investigation; some ignore or fail to understand that an acquittal is not a finding of innocence. It can be important to recall precisely what a defence was and the way it was conducted.
13. The basic point is that only you know the full ramifications and background to the case. Only you can be aware of the relevant issues which you go to determine retention.

What should I keep after the Chambers 7 years' retention period has expired?

14. Again, what you keep is a matter for you. Only you can judge. The position of a client who is still imprisoned is obviously different from one who completed his prison term after 1 year. Some cases are veined with professional and forensic difficulty. Others are professional straightforward and forensically bland. If you do decide to retain the papers beyond 7 years, make a note of your reasons.
15. Review case data retained beyond 7 years annually. If the reasons have changed, or additional reasons have become relevant, add them to the note. In any event, note the date of your review. If, on review, you decide that it is unnecessary to retain the material, dispose of it appropriately.

Anonymisation

16. Finally, please note that all useful templates, advices etc. can be kept indefinitely if anonymised.
17. Some people have mentioned the time it takes to go through schedules, advices, skeletons in a case and anonymising each document using search and replace. There is software which will allow you to do a search and replace on a batch of files, or files within a particular directory. According to <https://www.makeuseof.com/tag/how-to-find-and-replace-words-in-multiple-files/> *Notepad++* or *Replace Text* are two programs that will do this. Others are:
 - MegaReplacer (<http://www.editorium.com/14843.htm>)
 - WordFisher (<http://www.wordfisher.com/wf4.htm>)
 - Word Search and Replace (http://www.funduc.com/search_replace.htm)
 - InfoRapid Search & Replace (<http://www.inforapid.com/html/searchreplace.htm>)
 - Advanced Find and Replace (<http://www.abacre.com/afr/>)
18. I have not used any of the above, and know nothing about them, but simply point out that they are there.

Tony Shaw 18 May 18