

Executive Summary

Intelefile aims to explain the key issues about the legal admissibility of electronic documents and the relevant standards applicable.

Legal and regulatory requirements dictate we retain many types of documents for many years before we can finally destroy them. All this means is that huge areas of space are dedicated to storage and time is spent on retrieval. More and more businesses are deciding to move from paper based solutions to electronic solutions, enabling companies to deploy staff, time and space profitably.

One of the main reasons companies feel comfortable with paper is that they believe that it is accepted as valid or admissible in a court of law. However the questions often asked are;

"Will electronic files represent a legally viable record and be acceptable in Court of Law?"

The simple answer is 'YES'

Courts and governing bodies now accept that electronic filing is normal procedure for many Businesses and fully accept electronic documents as evidence, or supporting material, so long as Companies can prove that they have applied the appropriate measures to ensure their integrity. By this they mean that the **"chain of custody"** which can demonstrate the electronic copy has not been altered or tampered with. The British Standard Code of Practice BSI DISC PD0008:2004 (also now referred to as BSI BIP008) relating to 'Legal Admissibility and Evidential Weight of Information Stored Electronically' published by The British Standards Institution, provide best practice guidelines to minimise the potential reduction in the weight of evidence, if the authenticity of the copy is questioned.

What is "Chain of Custody?"

The issue of Legal Admissibility is at the core of records management principles. An organisation needs to be able to prove (to a court of law or some other statutory body) that the contents of a particular document or data file created or existing within an Electronic Document Management System have not changed since the time of storage. If the data file is an electronically stored image of an original paper document, an organisation must be able to prove that the electronic image is a true representation of the original. Proving the authenticity of electronically stored documents is crucial to their admissibility in a court.

In England and Wales, the main statute governing the admissibility of documents is the Civil Evidence Act 1995. This Act resolved many of the outstanding legal difficulties that had arisen through the use of computers for information storage. The Civil Evidence Act shifted the argument from legal admissibility to evidential weight or value. It makes it easier to prove the authenticity of documents, by producing the original or a copy, irrespective of the number of removes between the original and the copy and irrespective of whether or not the document is a paper one or an electronic one. The court needs to be satisfied as to the authenticity of the copy, and therefore an organisation needs to be able to demonstrate that it has administrative procedures that will satisfy the court as to a document's authenticity.

An organisation needs to demonstrate that it complies with the five principles of information management encapsulated into the code of practice - the "Code of Practice for Legal Admissibility and Evidential Weight for Information Stored Electronically" (BIP0008) published by the British Standards Institute. Compliance with BIP0008 will ensure that the organisation manages its information according to best practice, thereby maximising the chance of electronic records being satisfactorily authenticated. Company should be able to demonstrate at any time, in a manner acceptable to a court of law, that the contents of a specific data file created, has not changed since the time of storage - i.e. when the file is 'scanned'.

Intelefile Enterprise use software that is compliant with the code of practice and will confirm the integrity of the scanned images against the documents we process, we can apply a 'Certificate of Authenticity' to each document image, if it is a requirement. Your solicitor should be able to give an opinion on which types of documents are most likely to be disputed in court. There may also be different considerations for civil (on the balance of probabilities) and criminal (beyond reasonable doubt) law. The issue being addressed again is that of authentication.

"Whether to destroy original paperwork once it has been converted into electronic format or not?"

Whilst many Companies who already have 'off-site' storage facilities may choose to then store the originals indefinitely this way, many more go on to have their paperwork shredded securely (Secure Destruction).

What is "Secure Destruction?"

The shredding of sensitive materials when carried out to an acceptable recognised standard e.g. to MoD Restricted Level and issued with a certificate of destruction upon completion.

Let's look at what some of the main regulatory bodies say

1. HM Customs & Excise - International Trade notice - Cargo Notice: IT/014/02 -1 March 2002.

Section 5 Documents Held Electronically

The Customs Traders (Accounts & Records) Regulations 1995 allows for the storing of documentary evidence in an electronic format, as long as an original copy is capable of being produced there from.

NB: The only exceptions to this ruling are Preference Certificates, which due to the need to check original stamps, must be retained in their original paper format.

Note: The term 'original' in light of the second paragraph above is understood to mean a copy which is equivalent in every

relevant legal respect in its characteristics to the original document. This implies a high standard of legibility such that no ambiguity of interpretation is introduced that is not also in the original. <http://www.hmrc.gov.uk/home.htm>

2. VAT and HM Customs & Excise

Customs & Excise only refer to 'records' in their guidelines. Their only prerequisite is that you inform them as to the format you use to retain your records.

Section 5.4 of VAT notice 700/21 reads as follows:

'If you keep all or part of your records and accounts on a computer, you must make sure that you can meet your legal obligations to:

Account for VAT

Provide information to us when ever we visit you and

Keep records in the required detail for the required length of time

A business should advise their VAT office of their intention to store scanned images of their paper records.'

At present Customs & Excise do not recommend any particular file format or software system and only say they are stored to an acceptable standard which has not been precisely defined. They do however say that 'this may be taken to mean that all details on the reproduced documents are clear and legible'.

For VAT purposes a 6 year plus current is the document retention requirement. Obviously if a company were to use an electronic document management system this would pose little or no storage or retrieval problem.

http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000099&propertyType=document

3. Inland Revenue

The Inland Revenue has issued its own guidelines. INLAND REVENUE TAX BULLETIN.

Issue 37 says:

'For unincorporated business we have already indicated in Tax Bulletin Issue 21 (February 1996) that records may be preserved on optical imaging systems, and the originals discarded, provided that what is retained in digital form represents a complete and unaltered image of the underlying paper document. We are now able to go further. Both in the case of companies and unincorporated businesses we can accept other methods which preserve the information in the records in a different form. This is so long as those methods capture all the information needed to demonstrate that a complete and correct tax return has been made and are capable of yielding up that information in legible form. Businesses need to bear in mind this second condition when they change or up-date computerised accounting packages and ensure they have the software to access the old data.' In this Tax bulletin the Inland Revenue also acknowledges the importance of British Standard BSI DISC PD008 (see below) and compliance with this standard will automatically satisfy the tax requirement for keeping documents as electronic records.

<http://www.hmrc.gov.uk/bulletins/tb37.htm>

4. The Civil Evidence Act 1995

This is one of the most important acts in the UK. Here the onus is to move the question of admissibility to actual evidential weight carried by the scanned document. This is determined by the procedures followed by a company presenting any documents to the court.

A company presenting documents that have not been altered since its creation or has a clear audit trail that shows any and all changes since its creation holds a greater 'weight' than a document that cannot show these procedures.

Section 8 & 9 of the act demonstrate the legal guidelines for electronic documents as evidence:

Section 8 states:

- (1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved:
 - (a) by the production of the original
 - (b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it, authenticated in such a manner as the court may approve.
- (2) It is immaterial for this purpose how many removes there are between a copy and its original.

Section 9 states:

- (1) A document that is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without any further proof.
- (2) A document should be taken to form part of the records of a business or public authority if there is produced to a court a certificate to that effect signed either by an officer of the business or authority to which the records belong.

The law can be interpreted to show that an original document is not the only admissible evidence in a civil court. Electronic copies of documents are acceptable so long as their integrity can be shown. The criminal court system which is based upon 'beyond reasonable doubt' involves different requirements and businesses wishing to adhere to these should consult a specialist lawyer. The above information will lead to the question of how to show integrity and the level of standard companies are required to adhere to for their document management needs.

5. Disclaimer

This overview of the law and regulatory framework surrounding document imaging, retrieval and destruction should not be treated as legal advice. You should always seek legal advice from a suitably qualified expert or solicitor.

Acknowledgements

This is a high level summary of some of the main legal and regulatory issues around electronic image storage retrieval and destruction issued for general guidance and drawn from various online sources including HM Customs and Excise, The British Computer Society, ACPO, The Law Society, and other document management sites.