

## LEGAL CONSIDERATIONS FOR DOCUMENT IMAGING

***As document imaging (scanning) rapidly becomes the preferred means of keeping records, organisations are faced with the question whether physical source documents can be destroyed after being imaged and whether imaged documents will stand up in court. Compliance and evidence are two fundamental legal considerations underpinning an imaging process.***

### ***Compliance***

Various laws prescribe requirements on record keeping, including minimum retention periods and the form of retention (e.g. *microfilm or electronic etc*). Record retention *regulatory* requirements arise from statutes, regulations, notices, proclamations, directives, practice notes and rules of industry representative or self-regulatory bodies established or recognised by statute. Non-compliance may expose organisations to various risks, including penalties or imprisonment for committing an offence.

With effect from August 2002, the Electronic Communications and Transactions Act, 25 of 2002 ("ECT Act") permits the keeping of records in electronic form (s14 and 16). However, the ECT Act states the general legal principle but does not provide details or guidelines on what organisations should implement in practice (see *Good practice guideline* later). You will still have to prove that the imaging process was trustworthy and that (for purposes of imaging) an imaged record is a true copy of the physical source document.

It is important to emphasise that the ECT Act does not override provisions in other laws where electronic retention is specifically excluded or where requirements are prescribed. It is advisable to perform a review of regulatory requirements before physical source documents are destroyed after imaging.

### ***Evidence***

Information is not only the bloodstream of any commercial body, it is also the most important commodity to protect it against legal liability and enforce its rights in legal proceedings. The veracity of evidence is paramount to ultimate success or failure. In many instances, victory or defeat can turn on the trustworthiness of a single document (for instance, the encrypted fax in the Shabir Shaik trail).

While section 15 of the ECT Act ensures the *admissibility* of imaged documents as evidence, the *evidential weight* thereof (which is assigned by the courts) can be substantially diminished or even destroyed if the reliability of the imaging process is discredited (e.g. haphazardly conducted or if it was prone to tampering).<sup>1</sup>

Certain documents may have evidentiary attributes other than the information they contain. Consideration should be given whether these documents may be needed for evidentiary purposes which cannot be satisfied by the electronic copy. These include forensic attributes such as signature pressure points, fingerprints, stains, smell, composition of the paper or ink, etc.

Document subject to existing litigation proceedings (or reasonably probable legal proceedings) should not be destroyed unless approved by internal or external legal advisors.

### ***Good practice guideline***

To assist organisation with ensuring the legal admissibility of imaged records, the South African Bureau of Standards (SABS) recently adopted an international good practice framework: *SANS 15801: 2005 Electronic imaging - information stored electronically - recommendations for trustworthiness and reliability*.

SANS 15801 is a voluntary framework for organisations to adopt as the benchmark against which their imaging processes must be aligned. Some organisations may require their auditors or legal advisors to independently verify "compliance" with this standard in order to provide a certificate to that effect to courts or regulators.

### ***SANS 15801 Legal requirements***

The standard requires organisations to perform a review of regulatory record retention requirements and draw up a retention schedule and requirements for controlled destruction of records.

Organisations should also create a policy around the imaging process which should deal with various aspects. The policy document should, in turn, be supported by a Procedures Manual outlining the technical processes and procedures.

The policy must be approved by senior management and should be regularly reviewed.

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*Please note: this guideline does not constitute legal advice and you should consult your legal advisors.*

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<sup>1</sup> Although section 15(4) of the ECT Act creates a prima facie presumption of trustworthiness, this presumption can be rebutted by the other party by creating doubt on the trustworthiness of the imaged record or the imaging process.