

# Client Confidentiality and the *Privacy Act 1988* (Cth)



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obligations under  
the *Privacy Act 1988*.”

**C**lient confidentiality and the transmission of data have resulted in emails and documents having “certificates and encryption” to authenticate and secure data. This has ensured that sensitive and personal data is encrypted whilst in transit and received by the intended recipient.

However, utilising present technology, has the lawyer who sent this data legally relinquished their responsibility for client confidentiality and privacy? An undeniable fact is that once the email has been sent, control and ownership is relinquished to the recipient. A legal clause can state that the data is confidential, subject to legal privilege and that interference, disclosure or copying of the data is prohibited. But does this assure client confidentiality? The reality is that the recipient may, at their discretion, forward data to colleagues or third parties. Increasingly sophisticated computer viruses also threaten to disclose information without the sender's consent. No privacy clause in an email can stop this occurrence.

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Enter, new privacy provisions in the *Privacy Act 1988* (Cth). Businesses to which the legislation applies will be bound by the National Privacy Principles (NPPs) unless they choose to be bound by a privacy code approved by the Federal Privacy Commissioner. The NPPs place demands on organisations to handle information responsibly and give people control over the way information about them is handled.

The new privacy provisions in the *Privacy Act 1988*, which commenced on 21 December 2001, will impact on the legal sector's transmission of data. The guidelines state that a company or its representative "must take reasonable steps to protect personal information from misuse, loss, unauthorised access, modification or disclosure; and implement policies on how personal information is held, collected, used and disclosed"<sup>1</sup>

The *Privacy Act 1988* challenges the legal fraternity to implement client agreements that allow lawyers and clients to share data. The question is, when a lawyer forwards, cuts and pastes, copies or downloads data they hold or receive, are they in breach of the new privacy legislation? The answer to this question is *possibly*. The *Privacy Act* states that the sent data must be secured by the receiving company or individual to protect client confidentiality. The question is, how do you secure the information across the Internet and stop the intended company or recipient from altering or forwarding information to an unknown company or person or email account? What is required is a technology that allows the sender and recipient to benefit from sharing, managing, controlling and maintaining ownership of client information, thereby controlling information distribution in a secure environment.

It is possible to guarantee protection and control of information by:

1. Authenticating the receiver of data,
2. To "LOAN" data without loss or re-distribution,
3. To stop unauthorised access, and
4. To specify a person's access rights to data.

Present workflow technologies, using certificates and encryption for the authentication and security of emails and documents, do not provide this functionality.

Technology can provide ways of managing information to suit individual needs and meet obligations under the *Privacy Act 1988*. For example, Active Rights Management (ARM) technology can assist law firms to protect data and client confidentiality.

In contrast to certificates and encryption technologies, ARM technology not only provides security but also total "after delivery control" and a legally binding audit trail for verification, data integrity and privacy. ARM technology interfaces

with certificates, provides 128-bit RSA encryption, and importantly allows a lawyer to control and audit the recipient's access to data information and unauthorised re-distribution such as printing, faxing, forwarding on. Effectively, ownership and control of data is maintained by specifying whether the recipient can print, cut and paste, copy, forward, or granting individual page and document access, or increasing or removing the recipient's access rights in real time.

This software provides the type of email functionality that could prevent embarrassments like that experienced by Claire Swires, the English woman who recently became the centre of a worldwide forwarding email scandal. Logic implies that the embarrassment Ms Squires met could occur (and be prevented) in legal communication. **PL**

#### Footnote:

- <sup>1</sup> Information Privacy Principles under the Privacy Act 1988, The Office of the Federal Privacy Commissioner, <http://www.privacy.gov.au/publications/ipp.html#d> (15 Jan 2002)

## Engineering and Ergonomics Expert

I am a professional engineer, a qualified ergonomist and have been an APLA member for several years. My consulting group has advised about 2000 enterprises since 1977 in safety, engineering and ergonomics. We also assist many Australian law firms in their personal injuries matters, and have prepared over 5000 reports on public and workplace accidents. We appear regularly in court in several States, giving independent expert opinion, most commonly on **back and upper limb strains; machinery incidents; slips and falls; RSI; and vehicle accidents.** Fee options for plaintiffs include deferred payment, with no-win-no-fee for regular clients. See our fee schedule with terms, a brief CV and a searchable list of cases at [www.ergonomics.com.au/expert](http://www.ergonomics.com.au/expert).

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