



Ownership & Withholding of Client Documents

Effective from May 1, 2019

1. Introduction

For an accountant providing services to clients for fees, a common potential area for dispute is the return of client documents, particularly when an engagement comes to an end.

This guidance is for CIMA Members in Practice ('MiPs') when considering whether documents belong to them, meaning they can be retained, or to a client, which generally speaking means they have to be returned.

This is particularly important when an engagement ceases, and a request is made for information to be transferred either to the client, or an incoming accountant ('handover information').

Whilst it is important to accept that some clients may choose to leave you for another accountant, it is equally important that you should respond professionally when this happens.

It is not the intention of this guidance to encourage members in practice to withhold documents. There are other methods of securing payment. However, if you do decide to withhold documents you should make sure that you are acting both within the law and the CIMA Code of Ethics.

If you read no further, then the key message of this guidance is to use professional judgement, stay within the law and the Code of Ethics and be able to justify any decisions made around withholding documents, if challenged.

This guidance document may be a helpful addition to your CPD plan.

2. What is a document?

The term 'document' is not limited to physical hard copy documents or papers. A document for these purposes includes any information which can be made intelligible by the use of equipment.

Accounting records of a company stored electronically (N.B.: sections 386 and 389 of the *Companies Act 2006* do not require the accounting records of a company to be stored on paper). This means that the term 'document' extends to information stored electronically, such as in databases or on online platforms.

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Examples of other information which may be considered a 'document' include:

- Information recorded within software and online platforms, such as Sage, QuickBooks, Xero
- Any information stored electronically, including emails, text messages and any other messages sent using online platforms
- Anything in hard copy documentary format, such as invoices, statements, letters, etc.
- Information recorded on microfilm
- Information retained on hard disks, CD's, USB's, external hard drives or any other hardware

3. Ownership of documents

The question of ownership is not always easy to determine and is often a mixed question of fact and law. You should always consider seeking legal advice where a question of ownership of documents and/or information arises.

There is no conclusive list of the factors which decides who owns documents where a dispute arise. Generally speaking, where documents and records are not owned by you as a MiP, they will belong to the client. In order to assess whether documents belong to you, you will need to consider:

- a) The capacity in which you act in relation to your client.
- b) The contract between you and your client (see [terms of engagement](#)).
- c) The purpose for which the documents and records exist or are brought into being.

3 (a). Capacity – Principal or Agent?

A member may act for a client as either a principal or as an agent, depending on the nature of the work covered by the engagement. Whether acting as principal or agent, any original documents, information or records provided to you by the client will generally remain their property.

(i) *Principal and principal*

Generally speaking, where the relationship is one of principal and principal (i.e. a member in practice acting as an accountant for a client), any documents created or brought into being by you *solely for your own purpose* as a principal, such as working papers, would belong to you.

However, documents brought into being upon the specific instructions of a client, such as end of year financial statements prepared for the client, would belong to the client.

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For example, a client requests a preparation of accounts investigation report to be compiled on their behalf in order to respond to a HMRC investigation. As the report has been commissioned by the client, you would be acting as principal in this example. The final report and any supporting schedules would therefore belong to the client, whereas any working papers used or created by you to prepare the report would belong to you.

(ii) *Principal and agent*

If you are working in an area of practice which requires you to act as agent for your client (i.e. if instructed to negotiate a client's tax liabilities with HMRC) any documents created by you as agent may belong to your client.

This is as a result of the decision by the Court of Appeal in *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205 which held that documents created by an agent are the principal's documents.

Examples of document ownership (not exhaustive and for guidance only):

Type of work	Document ownership
Bookkeeping and accountancy	If instructed to prepare accounting records for a client, the records will generally belong to the client.
Preparing financial statements <i>(principal and principal)</i>	The final product, i.e. the financial statements will belong to the client whereas any working papers will belong to you. Any drafts completed in the course of undertaking the work, or correspondence with third parties would also belong to you.
Work of a tax compliance nature <i>(principal and principal)</i>	The entire tax file will belong to the client, as will calculations and correspondence between you and HMRC regarding the clients' accounts and tax computations
Advisory work	For example, to give tax or other advice to a client will generally establish a principal and principal relationship. Any drafts, internal memoranda or similar documents would therefore generally belong to you.
Other accountancy	Any records prepared by you which are required by law to be kept by the client will generally belong to the client. File copies, attendance notes and drafts, including working papers, will generally belong to you.

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3 (b). The Contract (i.e. Terms of Engagement)

A key consideration when looking at the question of ownership is the contract, or Terms of Engagement you have agreed with your client. Any specific agreement reached between you will override any other considerations, such as the capacity in which you are acting (see above) and the purpose for which the document was created (see below).

You may wish to address the question of ownership of documents produced in the course of an engagement in your standard Terms of Engagement. In the interests of certainty, and to minimise the likelihood of a dispute, any agreement you come to with a client about ownership of documents should be in writing (eg a copy of the Terms of Engagement signed by the client to confirm agreement).

The current CIMA example terms of engagement state:

“5.2 Payment of fees rendered by invoice are due within [X] working days from the bill date. Interest may be applied to any overdue accounts at a rate of [3%]. Where payment has not been received we reserve the right to withhold services, documents and information, and have the right to cease to work on your account, and to terminate the engagement if payments are unduly delayed.”

You may wish to consider expanding upon this statement in your own terms/engagement letter to make it clear that you reserve the right to exercise a lien, as far as is permitted by law and/or professional guidelines.

3 (c). The purpose for which the documents and records exist or are brought into being

The purposes for which documents and records exist may also affect the question of ownership. The capacity in which you act will also have a bearing on ownership.

For example, as a general rule, communications between yourself and your client will belong to you. However, if acting as an agent, correspondence to and from you may belong to your client.

The same can be said in relation to file notes. File notes made when acting as agent will belong to the client, whereas file notes made when acting as a principal will belong to you.

You will also need to consider the capacity in which you act when determining ownership of communications between yourself and third parties. When acting as agent, correspondence to and from third parties may belong to the client. This includes correspondence which may have been created for the purposes of obtaining specialist advice for the client. Conversely, when acting as principal, the correspondence between you and third parties will most likely belong to you.

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4. Exercising a Lien

What is a lien?

A lien is a creditor's right to retain possession of a debtor's property until the debtor pays what he or she owes to the creditor, or person in possession. So, for instance, where a client wishes to transfer instructions to another accountant but has not paid an outstanding bill to the former accountant, the former accountant **may** be entitled to retain the client's papers until the bill is paid.

Liens are most frequently considered in circumstances where there is an outstanding balance on a client account and the client wishes to transfer to a new accountant. There is more than one type of lien at law and various factors to take into account when seeking to exercise a lien. It is important to note that this guidance is not a substitute for obtaining legal advice and you should always consider taking legal advice when considering whether or not to exercise a lien over a client, or former client's property.

Two types of lien exist in UK law:

Particular lien

This is a lien over a particular piece of property which can be retained only until payment of a particular debt due in respect of that property is paid.

You only have a right to exercise a particular lien when all the following conditions are met:

- (i) *The documents retained must belong to the client who owes the debt and not to a third party. This applies no matter how closely connected the third party may be with the client.*

For example, an accountant may be engaged to work for a company and by the Directors to prepare their end of year self-assessments. If fees remain outstanding in relation to the self-assessments, then no right of lien exists in relation to the company documents.

- (ii) *The documents must have come into your possession by proper means.*

If you receive documents belonging to a client from a third party in error, you would not be entitled to exercise a lien over them.

- (iii) *Work must have been done by the member in respect of the documents.*

In order for a particular lien to exist, there must be evidence that the work has been carried out. Case law also indicates that a particular lien may not exist if a fee note has not been submitted, or an oral demand for payment has not been made in a reasonable timeframe¹.

¹ *Albemarle Supply Co v. Hind [1928] 1 KB 307, Woodworth v. Conroy [1976] QB 884.*

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- (iv) *The fees for which the lien is exercised must be outstanding in respect of that work and not in respect of other unrelated work.*

Where documents have been created or belong to a client in relation to an earlier or alternative engagement where all fees have been paid, there is no right of lien over any documents which relate to those engagements.

For example, if an accountant is holding documents in relation to tax advice, where fees are outstanding, they are not entitled to hold documents relating to an earlier engagement (e.g. to complete the client's financial statements) if the fees in relation to that engagement have been paid.

General lien

This allows the creditor to retain possession of any property belonging to the debtor in respect of any debt, which does not necessarily have to be the debt which relates directly to the retained property itself.

It should be noted that in the absence of an **express contractual provision** which states that a member is entitled to retain all client property where a debt is owed, such liens will rarely be established in law. In general, the courts tend to favour particular liens, over general liens.

Members are therefore advised not to exercise a general lien in relation to all client information without a specific contractual provision which permits you to retain such information. Doing so may compromise your ethical obligations as outlined in the Code of Ethics (see section 6 below).

Exceptions

There are a number of exceptions established in law which must be considered when considering whether a lien can be established. They include, but are not limited to the following:

- (i) *Statutory books of a Company*

Established case law provides that a lien cannot exist over books or documents of a registered company which, either by statute or through the articles of association for the company, have to be available for public inspection or to be kept at the registered office or some other specified place or be dealt with in any special way².

This means that documents such as the register of members and directors' minute books cannot be the subject of a lien.

² *Re Capital Fire Insurance Association [1883] 24 Ch.D 408 and Re The Anglo-Maltese Hydraulic Dock Co Limited [1885] 54 LJ Ch. 730.* Both cases concerned solicitors' liens; however, the same principles apply to accountants.

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(ii) Accounting records of companies

Similarly, case law suggests that a lien **cannot** be exercised over “accounting records” (as defined in s.386 of the *Companies Act 2006*³ (“the Act”), which requires companies to maintain “adequate accounting records”). This is because there is a mandatory requirement to keep such records, which must be open to inspection in accordance with the Act.⁴

Section 386(2) the Act defines “adequate accounting records” as records that are sufficient—

- (a) to show and explain the company's transactions,
- (b) to disclose with reasonable accuracy, at any time, the financial position of the company at that time, and
- (c) to enable the directors to ensure that any accounts required to be prepared comply with the requirements of this Act.

Consequently, this will not necessarily encompass all the accounting records relevant to a particular company held by an accountant in the course of a professional engagement.⁵

(iii) Administrations and liquidations and administration receiverships

In the event that a company becomes subject to an administrative order or is liquidated, it is still possible to exercise a lien over any records of the company where the administrator or receiver has no other way of obtaining them in line with the provisions of the *Insolvency Act 1986*.⁶

Equally, where an accountant has a lien over the books of a company, the appointment of a receiver does not affect the lien.

Providing that the above conditions have been met and there are no special exceptions, it **may** be lawful for an accountant to assert a particular lien over documents belonging to his or her client (e.g. a self-assessment return submitted on the client's behalf) in respect of which the accountant has performed work (e.g. preparation of the self-assessment) and for which s/he has not been paid.

In the example above and in line with the guiding principles, the accountant will only be entitled to exercise a particular lien over documents which relate to the self-assessment. They would not be entitled to exercise a lien over all documents they may hold for the client just because the self-assessment fee is outstanding. To do so would be to attempt to exercise a general lien, which, in the absence of an express term in the contract which permits all client information to be withheld, is unlikely to be lawful.

³ See specifically, s. 386(3) and 386(4) of the *Companies Act 2006*

⁴ As established in *DTC (CNC) Ltd v Gary Sargeant & Co [1996] 1 BCLC* (this case was decided in relation to the *Companies Act 1985*)

⁵ See s. 386 (2) *Companies Act 2006*

⁶ S. 246 *Insolvency Act 1986*

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Before seeking to exercise a lien over client property you should consider the points laid down in this guidance. For anything but straightforward cases, you are strongly encouraged to seek legal advice.

5. Requests for Handover Documents

There is no prescribed form for requesting handover documents by an incoming accountant (sometimes termed a “superseding accountant”) and in practice requests can vary depending on the accountant. An incoming accountant may typically ask to receive some or all of the following:

- sets of previous accounts;
- schedules;
- fixed asset lists;
- copies of VAT returns

In order to disclose a client’s documents to an incoming accountant, you should have the client’s consent, preferably in writing.

As set out in the guidance above, you may need to think about who owns the documents requested. Most handover requests are for information which belongs to the client, however the position is not always clear.

Where there is a fee dispute with the client concerned and you are considering withholding documents, you are advised to consider this guidance. In more complicated cases, you should also think about obtaining legal advice.

You are strongly discouraged from exercising a general lien over all client property in the absence of any specific agreement with your client which allows you to retain all client information. Doing so may constitute a breach of your ethical obligations and could result in a complaint being made against you to Professional Conduct.

6. Handover Requests – complying with the Code of Ethics

All members have a duty to comply with the Laws of the Institute, including the Code of Ethics. For further detail on your ethical obligations specifically in relation to changes of professional appointment, see part [210.9 to 210.14](#) of the Code.

Misconduct is defined under Byelaw 1 of the Royal Charter as a failure to comply with the rules of the Institute. You could have a complaint made against you if you do not comply with the Code of Ethics and this may result in an investigation under CIMA’s Professional Conduct processes. Ultimately, a failure to comply with the Code could give rise to a finding of misconduct by one of CIMA’s disciplinary committees.

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In order to reduce the likelihood of a misconduct investigation and a complaint being made against you, you should be fully aware of your professional obligations under the Code and act accordingly.

Changes in professional appointment can and do give rise to complaints of misconduct being made against members to Professional Conduct. Common issues reported include:

- (i) Outgoing accountant failing to respond at all to a request for professional clearance and/ or handover information
- (ii) Outgoing accountant responding unprofessionally or only in part to a request for professional clearance and/ or handover information
- (iii) Insufficient handover information provided by the outgoing accountant
- (iv) All client information being withheld by an outgoing accountant on the basis of outstanding fees
- (v) Some client information being withheld by an outgoing accountant on the basis of outstanding fees

Other related issues have included:

- (vi) Member restricting or denying access to a client to online platforms or databases due to outstanding fees / fee dispute
- (vii) Incoming accountant failing to seek professional clearance from the outgoing accountant

Some of the examples listed above have been found to constitute professional misconduct by CIMA's Conduct Committees as outlined in the [Indicative Sanctions Guidance](#).

Please see the following scenarios which illustrate some of the issues in relation to liens (note – these are illustrative examples only)

Example 1

In relation to point (iv) above, in the case of all client information being withheld by an outgoing accountant on the basis of outstanding fees, exercising a general lien over all client property on the basis of outstanding fees relating to a specific piece of work (i.e. not the entirety of the work completed for the client) may be unlawful. This is because the court will generally only recognise a general lien if that is what the parties have agreed, and it is fair to do so.

As stated above, section 100.5 (e) imposes an obligation on all members to comply with relevant laws and regulations and avoid any action which discredits the profession.

In order to comply with the law, you will need to take all reasonable steps (such as obtaining independent advice and following the principles in this guidance) to exercise a lien correctly. A failure to follow the guiding principles could result in a lien being exercised incorrectly and potentially unlawfully, engaging this part of the Code.

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Example 2

In relation to point (i) above: a failure to respond at all to a request for professional clearance and/or handover information, could breach the following sections of the Code:

100.5 – Fundamental Principles

(c) Professional Competence and Due Care – notably the obligation to ‘act diligently and in accordance with applicable technical and professional standards’

(e) Professional Behavior – ‘to comply with relevant laws and regulations and avoid any action that discredits the profession’

The relevant duties incumbent on you under the fundamental principles above, include the duty to ‘act diligently’ and the duty to ‘avoid any action which discredits the profession’.

Though it would depend on the individual facts of the case, failing to respond at all to a request from a fellow professional or client could amount to a breach of the Code as a failure to act diligently. Equally, failing to respond may also constitute action which discredits the profession within the meaning of 100.5(e) and the corresponding section, 150.1.

Whilst each individual complaint will turn on its own facts and raise different issues, it is important to be aware of your professional obligations under the Code to prevent a complaint being raised in the first instance.

The above scenarios are given by way of illustration and should not be taken as a definitive guide of acts or omissions which may attract a conduct investigation. However, you should always be aware of your ethical obligations when responding to a request for handover information. If in doubt, the Ethics Helpline will be able to provide guidance on the Code and can be contacted on +44 (0)20 3814 2303 or by email cima.ethics@cima-aicpa.com.

7. Obtaining legal advice

On occasion CIMA will pay for a call to Law Express – a helpline providing legal guidance for Members in Practice. This is strictly on referral and is a one-time use. You will be asked for a code before proceeding with your free call. If you need to access to the service, please email prof.standards@aicpa-cima.com with the title “Law Express Telephone Referral” and a short explanation of your issue. If your question cannot be addressed in-house by CIMA staff, you will be given a number to call along with a code to quote.

Law Express also offers low cost professional advice on commercial/business issues as part of a MiP’s membership benefits.