



DEPARTMENT OF ADMINISTRATION

Enterprise Policy

LEGAL SERVICES- LITIGATION HOLD-2010

DIVISION OF LEGAL SERVICES

Litigation Hold Policy

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1. Objective

- a. Court rules and case law require a party to take steps to preserve potential relevant evidence in whatever form when litigation has been filed or is reasonably anticipated or foreseeable in order to avoid potential court sanctions. The consequences of a failure to preserve will vary depending on the circumstances, but may include: regulatory fines and penalties; civil litigation consequences such as increased litigation costs, fines, adverse inference instructions, default judgment and civil contempt; vicarious liability for responsible senior management; and criminal liability for organizations and individuals.¹

2. General Policy

- a. This document sets forth the authority and process for initiating, implementing, monitoring, and releasing litigation holds. This policy applies to all potential evidence in whatever form owned or under the control of the Department of Administration ("Department") when litigation against the Department, or an employee acting within the scope of employment, has been filed or is reasonably anticipated or foreseeable. This policy also applies to litigation that has been filed, or is reasonably anticipated or foreseeable to be filed, on behalf of the Department.
- b. This policy suspends any records retention policy that would otherwise authorize destruction, deletion or disposal of such potential evidence.

3. Procedures

a. Relation to Records Retention Policy

Upon receipt of a Litigation Hold Notice, or when litigation is otherwise reasonably anticipated or foreseen, Affected Parties shall immediately suspend destruction, deletion, or disposal of Records that are Potential Evidence. This policy supersedes any provision of a records retention policy that would otherwise authorize destruction, deletion or disposal of such Potential Evidence. In accordance with this Policy, the Administrator shall send written notice to the Secretary of State to suspend destruction, deletion or disposal of Records in the Secretary of State's control that are Potential Evidence.

b. Tigger Events and Duty to Preserve

Employees have a duty to preserve Potential Evidence when litigation to which the Department is a party is initiated, or is reasonably anticipated or foreseeable. Employees

¹ The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (2nd Ed. November 2007), p.6.

must immediately conserve Potential Evidence in such circumstances and suspend deletion, destruction, purging, overwriting or disposal even if a litigation hold has not been issued.

- (i.) **Duty to Preserve Evidence whether or not a Litigation Hold Notice has been issued.** Employees have a duty to preserve Potential Evidence when litigation to which the Department is a party is initiated, or is reasonably anticipated or foreseeable, even if a litigation hold is not issued.
- (ii.) **When Litigation is initiated against the Department.** Litigation is initiated against the Department when a complaint or petition is filed or served.
- (iii.) **When Litigation is reasonably anticipated or foreseeable against the Department.** The following is a non-exhaustive list of events that may indicate whether litigation is reasonably anticipated or foreseeable against the Department:
 - 1. Receiving a document preservation request or notice letter from an adverse party or legal counsel;
 - 2. Receipt of a communication threatening litigation;
 - 3. Notice of an administrative claim or complaint;
 - 4. A complaint was made to an external or internal investigatory agency or unit;
 - 5. Similar past experience or circumstances resulted in known and significant litigation;
 - 6. Violation of a statutory or regulatory obligation;
 - 7. Receipt of a cease and desist letter;
 - 8. Department notice based on "key player" knowledge;
 - 9. Events occurred that resulted in known and significant injury;
 - 10. Receipt or anticipation of receipt of a subpoena;
 - 11. Government audit or investigation;
 - 12. Press or media reports suggest litigation is likely; or,
 - 13. Receipt of an APRA request similar to those preceding other law suits or otherwise indicative of litigation
- (iv.) **When litigation is initiated or reasonably anticipated or foreseeable by the Department against another party.** The following is a non-exhaustive list of events that may indicate whether litigation is reasonably anticipated or foreseeable by the Department against another party:
 - 1. When the litigation is authorized by the Director or other authorized party;
 - 2. When litigation is filed;
 - 3. When a formal demand mentioning litigation is sent;
 - 4. Sending a documentation preservation letter;
 - 5. A time frame and strategy for litigation is discussed or established;

6. Similar past experience or circumstances resulted in known and significant litigation;
7. Events occurred that resulted in known and significant injury;
8. There have been serious internal management discussions regarding potential litigation; or,
9. When an examination of records is made to determine whether a claim or litigation shall be initiated.

c. Duty to Notify the Administrator of Legal Services

Any employee who becomes aware of litigation to which the Department is a party, or is reasonably anticipated or foreseeable, shall immediately notify his/her immediate Division Head. Such Division Head shall immediately notify in writing the Administrator of Legal Services (" Administrator").

d. Decision to Initiate Litigation Hold Notice and Implementation

The Administrator, or the attorney handling the matter in consultation with the Administrator, shall make a good faith and reasonable written evaluation² of the relevant facts and circumstances as they are known at the time to determine whether litigation to which the Department is a party is initiated, or is reasonably anticipated or foreseeable and whether to initiate a Litigation Hold Notice, the scope of the hold³ with a response consistent with this Policy and the identification of Affected Parties. Later facts or

² Making a determination as to whether litigation is reasonably anticipated requires considerations of many different factors. Depending on the nature of the organization making the analysis and the nature of the litigation, factors that might be pertinent to consider could include:

- The nature and specificity of the complaint or threat;
- The party making the claim;
- The position of the party making the claim;
- The business relationship between the accused and accusing parties;
- Whether the threat is direct, implied or inferred;
- Whether the party making the claim is known to be aggressive or litigious;
- Whether a party who could assert a claim is aware of the claim;
- The strength, scope or value of a potential claim;
- The likelihood that data relating to the claim will be lost or destroyed;
- The significance of the data to the known or reasonably anticipated issues;
- Whether the company [Department] has learned of similar claims;
- The experience of the industry;
- Whether the records are being retained for some other reason; and
- Press and industry coverage of the issue either directly pertaining to the client [Department], or of complaints brought against someone similarly situated in the industry.

The preceding list of factors is not exhaustive; they and other considerations must be weighed reasonably and in good faith in the context of what steps are reasonable and practicable as well as the scope and burden of an anticipated litigation hold. The Sedona Conference Commentary on Legal Holds, p. 9 (August 2007).

³ In determining the scope of information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the accessibility of the information are factors that may be considered ... Organizations should be cautious in determining whether to preserve inaccessible data; the Federal Rules Committee has stated that, "[a] party's identification of the sources of ESI as not reasonably accessible does not relieve the party of its common-law or statutory duty to preserve evidence." (quoting Fed. R. Civ. P. 26(b)(2)(B)(2006 Committee Note). Id. at pp.13-14.

information may require the Administrator to reevaluate/amend such determination. The Administrator shall:

- (i.) Advise whether litigation to which the Department may be a party is reasonably anticipated or foreseeable;
- (ii.) Determine a response consistent with this Policy;
- (iii.) Understand where and how ESI is stored within Department, including architecture of the server(s);
- (iv.) Direct that retention schedules be suspended so as to preserve records and other Potential Evidence as provided in this Policy;
- (v.) Coordinate consistent preservation and production advice and practices for the particular matter;
- (vi.) Identify Affected Parties reasonably expected to have Potential Evidence and to whom to send a Litigation Hold Notice;
- (vii.) Issue, confirm, receipt of, and take appropriate follow-up action concerning Litigation Hold Notices;
- (viii.) Identify the need to engage internal IT personnel or external consultants to preserve existing ESI and ESI created after the Litigation Hold Notice is issued;
- (ix.) Develop written preservation plan(s) if and when deemed appropriate;
- (x.) Work with Department information technology personnel to determine the accessibility of various ESI forms, and the cost and feasibility of accessing and/or preserving such data for litigation or potential litigation;
- (xi.) Help individuals comply with the Legal Hold Notice;
- (xii.) Ensure follow-up; and/or
- (xiii.) Such other actions deemed advisable by the Administrator.

The Administrator may delegate any duty under this Policy to his or designee(s), including but not limited to the formation of a Litigation Response Team to coordinate efforts to preserve Potential Evidence. In addition to member(s) of DO A's Legal Division and depending on the circumstances, such team may include, but not be limited to, representatives from IT, HR, etc. The Litigation Response Team may delegate certain of its responsibilities to one or more team members.

The Administrator may determine that a written preservation plan is needed if and when it deems appropriate such as when the litigation or reasonably anticipated or foreseeable litigation will contain a large quantity of records, where control over potential evidence resides in multiple locations throughout the Department or which focuses on the Department's management of records, such as public records litigation. A written preservation plan may include, but not be limited to, the following information: Affected Parties and contact information; when the Litigation Hold Notice(s), any amendments thereto and reasons therefore and any Potential Evidence Checklist/Verification Form (s) was/were sent; the time and response of the Affected Parties; notification to the Secretary of State to suspend destruction of Records; the time and nature of follow-up contacts with

the Affected Parties, including notes from any interviews conducted; and/or any other information as deemed appropriate by the Administrator.

Examples of preservation methods may include, but not be limited to:

- (i.) For ESI - suspension of auto-delete program(s); securing or imaging a hard-drive; securing and preserving a backup tape or backup media; and /or sequestering or archiving information/records.
- (ii.) For paper records - making photocopies, sequestering original paper records to protect from loss, destruction or alteration; and/or storage at the contracted Department's off-site facility approved by the Secretary of State for the storage of Records.
- (iii.) Any instruction contained in the Litigation Hold Notice.

Whenever possible, Potential Evidence shall be maintained in its native format.

a. Issuance of a Litigation Hold Notice

- (i.) Upon determination a Litigation Hold Notice should be issued, the Administrator shall notify the Affected Parties in writing that a litigation hold has been initiated. See Exhibit I for an example of a Litigation Hold Notice - THIS IS ONLY AN EXAMPLE AND THE LITIGATION HOLD NOTICE MUST ALWAYS BE ADAPTED TO THE SPECIFIC FACTS AND UPDATED WITH CURRENT CASE LAW. Litigation Hold Notice shall inform the Affected Parties of their obligation to identify and immediately preserve all Potential Evidence that may be relevant to the Litigation Hold Notice. The Litigation Hold Notice shall ask the recipient to confirm receipt and indicate within ten (10) calendar days (or sooner if the Litigation Hold Notice directs a shorter time period) whether the recipient has: (1) Potential Evidence, the form and location of such Potential Evidence and whether the recipient has taken steps to preserve it; or No Potential Evidence responsive to the Litigation Hold Notice; and (2) .Questions regarding the Litigation Hold Notice and need for clarification. The Litigation Hold Notice may incorporate or be followed by a potential Evidence Checklist. All Affected Parties shall respond to a Litigation Hold Notice within ten (10) calendar days or a shorter time period if directed by the Litigation Hold Notice and immediately preserve the Potential Evidence as instructed.
- (ii.) The Administrator shall meet with the Affected Parties (if it is not possible to meet, alternative communication shall occur), and any other Affected Party identified in a subsequent supplementation to the initial Litigation Hold Notice, to help the Affected Party: (1) understand the litigation hold and his/her/its obligations; (2) locate ascertain and retain all reasonably identifiable Potential Evidence in the Affected Party's possession or control; (3) notify the Secretary of State's Office to suspend destruction of Records, if applicable; (4) remind to preserve the Potential Evidence; (5) take appropriate steps to preserve Potential Evidence until advised it is no longer necessary to do so; and, (6) understand the need to preserve additional new Potential Evidence created or discovered after the litigation: hold is issued and how to handle such Potential Evidence.

Hereafter, references in this policy to "litigation to which Department is a party" shall include when a Department employee is acting within the scope of employment.

- f. Litigation Hold Notice:** Written notification, and any changes or amendments thereto, that litigation has been filed or is reasonably anticipated or foreseeable, that requires the recipients to preserve Potential Evidence in their possession or control.
- g. Potential Evidence:** Any Record that may reasonably be expected to be requested in discovery, used in, or related to litigation to which the Department is or may reasonably anticipated or foreseen to become a party.
- h. Records:** includes Documents, Correspondence and ESL Records also includes work related Documents and Correspondence kept off-site, at home or elsewhere (including any personal devices) for work related purposes.

4. Further Information

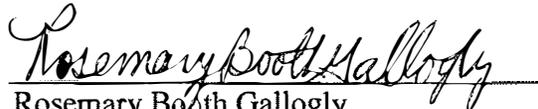
Department of Administration Legal Division: (401) 222-8880

5. Addendums

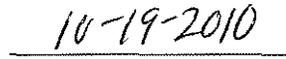
(A) Confidential-Attorney-Client Privileged/Attorney Work Product Letter

(B) Confidential-Attorney-Client Privileged/Attorney Work Product Certification

6. Signatures



Rosemary Booth Gallogly
Director, Department of Administration



Date