

<b>DEPARTMENTAL REGULATION</b>		<b>NUMBER:</b> 3090-001
<b>SUBJECT:</b>  Litigation Retention Policy for Documentary Materials including Electronically Stored Information	<b>DATE:</b> May 28, 2008	
	<b>OPI:</b> Office of the General Counsel	

1. PURPOSE

Both record and non-record documentary materials in paper or electronic format frequently become the subject of litigation. Employees create and maintain an increasing portion of business information using computers. This electronically stored information (“ESI”) must be managed alongside traditional paper records to ensure compliance with Federal laws and records management regulations. While not all papers or ESI are agency records, they may nevertheless be relevant evidence subject to discovery that is compelled or sanctioned by a court or administrative tribunal in litigation. Unmanaged and unidentified ESI residing on USDA computers also poses a threat to the Department's ability to document and reconstruct business and decision-making processes.

The purpose of this policy is to prescribe Departmentwide enterprise policies and responsibilities related to the retention of record and non-record documentary materials, including ESI, for discovery or other litigation-related purposes.

2. REFERENCES

DR 3080-001 [[HTM](#)] [[PDF](#)] (04/11/07) Records Management

DM 3570-001 [[HTM](#)][[PDF](#)] (02/17/05) Disaster Recovery and Business Resumption Plans

DR 1700-002 [[HTM](#)] [[PDF](#)] (06/17/97) OIG Organization and Procedures

36 CFR 1222.12(b)(1) Definition of “Documentary Materials”

Federal Rules of Civil Procedure:

- a. Chapter III, Pleadings and Motions, Rule 16, Pre-Trial Conferences; Scheduling; Management.
- b. Chapter V, Depositions and Discovery, Rule 26(a), General Provisions Governing Discovery; Duty of Disclosure; Required Disclosures; Methods to Discover Additional Matter.

### 3. SCOPE

The retention policy set forth herein applies to all employees and contractors of the USDA and applies to all documentary materials, including record and non-record ESI made, sent, or received in the transaction of USDA business.

### 4. DEFINITIONS

**Discovery:** Discovery is the process of identifying, locating, securing and producing evidence, including testimony, things, information, and materials for utilization in the legal process. The term is also used to describe the process of reviewing all materials which may be potentially relevant to the issues at hand and/or which may need to be disclosed to other parties, and of evaluating evidence to prove or disprove facts, theories or allegations. There are several formalized methods of conducting discovery, the most common of which are interrogatories, requests for production of documents and depositions.

**Electronic Discovery (ediscovery):** The process of collecting, preparing, reviewing, and producing ESI in the context of the legal process. See Discovery.

**Electronic Record:** Information recorded in a form that requires a computer or other machine to process it and that otherwise satisfies the definition of a record.

**Electronically Stored Information (“ESI”):** Any information that is created, received, maintained or stored on local workstations, laptops, central servers, personal digital assistants, cell phones, or in other electronic media. Examples include, but are not limited to: electronic mail (“email”), calendars, word processing documents and spreadsheets, databases, videos, video files, digital images, audio files, text messages, voicemails, activity logs, *etc.* ESI includes metadata.

**Preservation Obligation:** The obligation of agencies, managers and individual employees to ensure the preservation of documentary materials that might be or might become relevant to pending or threatened litigation. If the documentary material was created in electronic format, it must be preserved in that original native format.

**Litigation Hold:** The procedure for locating and ensuring the retention of ESI subject to a preservation obligation

See [Appendix A](#) for litigation hold procedures/guidelines.

**Record:** All books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference and stocks of publications and of processed documents are not included. (44 U.S.C. 3301)

## 5. POLICY

The retention period for ESI will be consistent with Departmental and agency policies for records management or with Departmental and agency policies for maintaining and retaining data on backup media for purposes such as disaster recovery. *See, e.g.*, DR 3080-001, Records Management, and DM 3570-001, Disaster Recovery and Business Resumption Plans.

ESI that constitutes a "record" is subject to USDA's records management policies and to the records retention schedules that have been established for each Department agency and staff office. Any ESI containing information that documents the business of the Department and is, therefore, an "agency record," must be moved to an auditable file structure, such as an electronic file designated as containing a record series, or a paper document file in an auditable paper series, in accordance with its applicable Records Disposition Schedule. Records not properly scheduled for disposition may not be destroyed. Records may be destroyed only in accordance with National Archives and Records Administration ("NARA") approved records disposition schedules.

A litigation hold for described documents or ESI overrides any records retention schedule or any other agency policy that may otherwise call for the transfer, disposal, or destruction of the relevant documents or ESI until the hold has been removed by the relevant Division or Field Office of the Office of the General Counsel ("OGC"), Office of Inspector General ("OIG"), or other authorized authority that ordered the hold. A litigation hold is generally accompanied by a records search for all responsive information. Records searches initiated pursuant to a hold must be coordinated with agency officials, including the relevant program officials, the information technology ("IT") staff, and the agency records officer. A litigation hold should trigger notice as well to the USDA Records Officer. Each organization is responsible for notifying its subordinate activities that a hold exists or has been removed. See litigation hold guidelines in [Appendix A](#).

Many IT organizations back up email and other ESI for the purpose of restoring electronic systems in the event of disaster. Any decision concerning retention periods for electronic backup media should be established based upon consideration of reasonably anticipated business needs for data recovery in the event of system failure, as well as upon legal considerations such as the extent the agency or component has otherwise archived the ESI. However, backup tapes are not ideally suited as a record retention mechanism because of the difficulty and expense of reconstituting them to readable format. Thus, agencies are encouraged to seek true archiving solutions for ESI. Additionally, email archived to the individual workstation should not be considered part of the institutional backup – but a part of the individual’s filing system. However, such individually maintained material is potentially discoverable, and therefore may be the subject of a litigation hold.

## 6. SANCTIONS

Failure to comply with this policy in preserving documents and ESI can result in unfavorable discovery orders, sanctions against the Government, disadvantage to the government’s position in litigation or judgment against the Government. It can also result in monetary or other contempt sanctions against individuals who failed to take appropriate steps to locate and segregate information subject to litigation hold. In extreme cases, agency performance based action or disciplinary sanction may be warranted under 5 U.S.C. 4301, *et seq.* or 5 U.S.C. 7501, *et seq.*

## 7. RESPONSIBILITIES

### a. Office of the Chief Information Officer will:

- Advise on records management issues and develop Departmentwide records management policies, procedures, guidance, and training.
- Advise on backup media management and retention policies, procedures, guidance, and training.
- Work with program, OGC and OIG staff to help ensure that paper and electronic records and other non-record documentary materials, including ESI, are accessible for ediscovery purposes.

### b. Agency and Staff Office Heads will:

- Advise on backup media management and retention policies, procedures, guidance, and training.
- Cooperate with OGC and OCIO in locating and preserving paper and electronic records as well as non-record ESI subject to a litigation hold.

- c. Agency/Staff Office Records Officers will:
  - Develop and maintain the mission area, agency, and staff office records management program in conformance with the Department's policies and standards.
  - Work with program, IT, and OGC staff to help ensure that paper and electronic records are accessible for ediscovery purposes.
  
- d. USDA Employees will:
  - Maintain paper and electronic records and non-record ESI according to prescribed Department policy and procedures, including litigation holds.
  
- e. OGC will:
  - With regard to litigation holds initiated by OGC, work with program, IT, and Records Management staff to help ensure that paper and electronic records, as well as non-record ESI, is accessible for ediscovery purposes.
  - Ensure that the Departmental Records Officer is notified of all litigation hold requests and hold removals.
  
- f. OIG will:
  - With regard to litigation holds initiated by OIG, work with program, IT, and Records Management staff to help ensure that paper and electronic records, as well as non-record ESI, is accessible for ediscovery purposes.
  - Ensure that the Departmental Records Officer is notified of all litigation hold requests and hold removals.

-END-

## Appendix A

### DOCUMENTARY MATERIAL HOLD AND SEARCH POLICY GUIDANCE

#### 1. What is the purpose of this guidance?

This guidance instructs USDA management and staff on requesting, issuing, implementing, and removing “holds” on USDA operational records in both paper and electronic format and other related documentary materials, including non-record Electronically Stored Information (“ESI”). This guidance also provides additional instructions to USDA staff as to the execution of searches pursuant to a hold.

#### 2. What are the authorities?

- a. 44 U.S.C. 2909
- b. Title 44, U.S.Code, Chapter 33
- c. 36 CFR 1228.54
- d. Federal Rules of Civil Procedure
  - (1) Chapter III, Pleadings and Motions, Rule 16, Pre-Trial Conferences; Scheduling; Management.
  - (2) Chapter V, Depositions and Discovery, Rule 26(a), General Provisions Governing Discovery; Duty of Disclosure; Required Disclosures; Methods to Discover Additional Matter.
- e. The Inspector General Act of 1978, as Amended (5 U.S.C., Appendix 3; § 6(a), “Authority of Inspector Generals; information and assistance from Federal agencies; unreasonable refusal; office space and equipment.”)
- f. DR 1700-002 [[HTM](#)] [[PDF](#)] (06/17/97) OIG Organization and Procedures

#### 3. To whom does this guidance apply?

This guidance refers collectively to “USDA staff” or “USDA staff members,” who include:

- a. All employees;
- b. Contractors where contracts specify which documentary deliverables or other ESI belong to the Government.

#### **4. What is a hold or search?**

A “hold” is an agency’s temporary suspension of disposition action(s) related to documentary materials, as well as segregation and preservation of such materials, because of legal, audit, or investigative needs. Documentary materials, regardless of physical location, are required to be kept for as long as a hold is in place. Non-compliance with a hold could result in penalties on individual staff (see paragraph 16) or on USDA as an agency (see paragraph 17). Subsequent to, or contemporaneous with, the issuance of a hold, the agency may be requested to “search” the held material for specific, relevant documentary material, and to segregate it for safekeeping.

#### **5. Is a freeze considered a type of hold?**

Yes. A “freeze” is a more specific implementation of the broader “hold” concept. A freeze refers to a set of standard procedures whereby a Federal Records Center (“FRC”) temporarily suspends disposition actions for an agency’s records and other documentary materials that are in the physical custody of the FRC, but for which legal custody resides with the originating agency. *Example:* OGC and/or the agency Records Officer issues a hold on operational records and other documentary materials related to a specific personnel action in litigation. The majority of these records and materials are maintained in office space. However, some affected operational records are stored at the FRC. Upon receiving the appropriate agency Records Officer’s request letter and copies of applicable SF 135’s, the Federal Records Center Program temporarily halts disposition actions by placing a freeze on the affected operational records stored at the FRC. Within the FRC, the “freeze” implements the broader “hold” for those records and documentary materials related to the personnel action in litigation.

#### **6. What circumstances may warrant the issuance of a hold?**

A hold may be issued when:

- a. USDA is a party to a lawsuit that names USDA expressly as a party *or* in which the United States is participating as a plaintiff or defendant. The Department of Justice (“DOJ”), with the assistance of OGC, acts as attorney for USDA and its officials.
- b. An administrative proceeding, such as a case involving an equal employment opportunity matter, a Merit Systems Protection Board matter, or a contract before the Civilian Board of Contract Appeals may require the preservation of designated records and related documentary materials.
- c. The OIG, independent public accountants, or the Government Accountability Office (“GAO”) conducts a financial, performance, or contract or grant audit.
- d. OIG leads an administrative or criminal investigation.
- e. Congress has requested the production of certain documents as part of its oversight responsibilities.

- f. Another Federal agency with appropriate investigative authority requests a hold (for example, the Office of Special Counsel)
- g. A dispute in any matter gives rise to a reasonable anticipation of litigation.

## 7. What are “documentary materials”?

According to [36 CFR 1222.12b\(1\)](#), “documentary materials” is a collective term for records, non-record materials, and personal papers that refers to all media containing recorded information, regardless of the nature of the media or the method(s) or circumstance(s) of recording.

## 8. What records and other documentary materials may be subject to holds?

This guidance applies to relevant USDA operational records and non-record materials, in all media (see para. 9 for types of media), that may constitute evidence or lead to the discovery of relevant evidence in a particular lawsuit, administrative proceeding, audit, or investigation.

- a. **Operational records** – Those records created or maintained by USDA staff while conducting USDA business.
- b. **Non-record materials** - Those Government-owned documentary materials that do not meet the statutory definition of “records” ([44 U.S.C. 3301](#)) *or* that have been excluded from coverage by the definition. Non-record materials expressly excluded from the statutory definition of records are:
  - (1) library and museum materials made or acquired and preserved solely for reference or exhibition purposes,
  - (2) extra copies of documents kept only for convenience of reference, and
  - (3) stocks of publications and processed documents
- c. **“Working files and similar materials,”** including preliminary drafts, rough notes, worksheets, correspondence and memos, reports, and other similar materials (see [36 CFR 1222.34\(c\)](#)), fall within the scope of “documentary materials” in paragraph 7 above, regardless of whether such materials qualify as USDA operational records. USDA staff *must* preserve these working files and similar materials if USDA issues a hold.

## 9. What are the formats and media for records and other documentary materials covered by this guidance?

“Formats” and “media” refer to the physical characteristics of documentary materials. Particular holds, as each case arises, may call for retention of data in various electronic formats or media to be



determined. After consultation with the appropriate agency Records Officer, supervisors and managers must provide to their staffs more specific information regarding formats and media for records and other documentary materials subject to a hold. Types of formats and media may include, but are not limited to:

- a. textual (paper);
- b. electronic formats and storage media:
  - (1) email messages;
  - (2) word processing files, spreadsheets, and databases;
  - (3) digital images;
  - (4) Web pages;
  - (5) network server information, including metadata;
  - (6) voicemail messages;
  - (7) backup tapes;
  - (8) hard drives;
  - (9) removable computer storage media (e.g., CD-ROM's, tapes, disks, and cards);
  - (10) personal digital assistants (PDA's) and Blackberry-type devices;
- c. photographic;
- d. audiovisual (e.g., videotapes and sound recordings);
- e. cartographic (e.g., maps and architectural and engineering drawings); and
- f. micrographic (e.g., microfilm and microfiche).

**10. Who is authorized to issue and remove a hold affecting USDA operational records and other related documentary materials, and authorize a search of such held materials?**

A hold or search may be directed by an OGC staff attorney, OIG, an agency human resources representative, an agency civil rights investigator, or the head of the agency or staff office. Any request for a hold by an agency contractor counsel or contractor representative must be made through OGC or the applicable agency human resources office. A litigation hold may be removed by the person or current holder of the position that issued the hold, or that person's supervisor.

**11. To whom must a hold or search request be issued?**

- a. The hold must be addressed to:
  - (1) The agency or staff office unit directly responsible for the program or subject matter that is the subject matter of the hold, *i.e.*, the “owner” of the dispute.
  - (2) Any key individuals or “players” likely to be holding documentary materials relevant to the subject of the hold. Key individuals or key players include persons transactionally involved in the relevant event or dispute, persons having custody of relevant records because of position or opportunity, and any other person who might be called to testify at the trial or hearing of the matter because of his or her knowledge of the matter in dispute.
  - (3) The agency CIO or equivalent.
  - (4) The agency Records Officer with a copy to the Departmental Records Officer.
  - (5) When applicable, any collateral Department agency or staff office that may manage Department systems that could reasonably be expected to have relevant documentary evidence (*e.g.*, Office of the Chief Financial Officer (financial and travel transaction records), Departmental Administration (procurement transaction records and personnel records)).
- b. The hold must be copied to the deputy administrator for management or equivalent for the involved organization(s).
- c. If not a required recipient, a copy of the hold may be sent to the agency or staff office head for informational purposes.

**12. How is a hold request made?**

- a. **Request must be in writing** - The request for a hold or search must be in writing, signed, and on agency letterhead. An email request alone is not sufficient but an emailed PDF of a signed request on letterhead is.
- b. **Scope of hold** - The hold should cover only those documentary materials that are responsive to the situation warranting the hold (*e.g.*, litigation, audit, investigation).
- c. **Contents of hold** - A hold request must include the following information:
  - (1) Basis for the hold (*e.g.*, litigation, audit), including copies of relevant supporting documents (*e.g.*, court order, letter from GAO) if applicable;
  - (2) Disposition action(s) to be suspended;
  - (3) Concise descriptions of documentary materials (including records series, if applicable and known), including information about content (*i.e.*, subject matter and topics), media format, date spans, and volumes;

- (4) Estimated period of time for the hold or event(s) triggering removal of the hold, if known;
- (5) Known physical or electronic locations in agency space, including buildings, rooms, interior areas, (e.g., at individuals' workstations, in centralized file cabinets, in agency) email systems, databases and, if applicable, in FRC's; and
- (6) Names of contact person and alternate who are knowledgeable concerning the subject matter of the hold and can answer questions and provide advice in connection with the execution of the hold.

### **13. What actions should be taken by the recipient of a hold?**

**a. Owner of the dispute or owner of relevant Departmentwide systems** - The head of the agency or staff office unit directly responsible for the program or activity that is the subject matter of the hold, *i.e.*, the "owner" of the dispute, or the owner of relevant Departmentwide systems who receives a hold, sends an email or memorandum to staff regarding the reasons for the hold, suspends disposition action(s), describes affected documentary materials, and likely duration of the hold. Supervisors and managers issue specific instructions for carrying out the hold within their organizations. They must also inform new employees and must periodically remind staff about the hold requirements.

**b. Key individuals** - Take actions necessary to ensure documentary material responsive to the hold that is within their control is retained in its native format, segregated for production when requested, and that any routine destruction of documentary material that they created or control is halted.

#### **c. Records Officer**

##### **(1) Requests a "temporary extension of retention period(s)"**

- (a) In accordance with 36 CFR 1228.54(c)(1) through (4), the agency Records Officer sends a letter, signed by the appropriate official, to the Director of the Life Cycle Management Division at NARA requesting approval of a "temporary extension of retention period(s)."
- (b) The agency Records Officer also sends to NARA copies of SF 135's regarding those operational records and documentary materials that are subject to the hold and stored at any or all FRC's .
- (c) NARA then notifies the agency Records Officer by letter regarding the formal extension of the retention period.

**(2) Notifies the Assistant Archivist for Regional Records Services if the hold applies to operational records and other documentary materials stored at any or all FRC's** - The agency Records Officer sends to the Assistant Archivist for NR a courtesy copy of the letter that was addressed to NARA(see subpar. a), along with copies of applicable SF 135's. NARA's Federal Records Center Program then carries out the hold by placing a "freeze" on

disposition actions affecting those subject records and documentary materials stored at the FRC(s).

- d. **Agency/Staff Office CIO** - The agency CIO determines relevant agency information technology systems that may contain information responsive to the hold and suspends routine disposition, deletion, or destruction of such information, including suspension of any recycling of backup media, as requested by the issuer of the hold, and works with the requester to segregate and preserve responsive information.

**14. What happens if resources (budgetary, human, technological, or other) are inadequate to meet the demands of conflicting hold or search requests within the time required?**

On occasion it may not be possible for the recipient of a hold or search request, in particular the agency CIO, to be able to meet all hold or search requests on a timely basis. In the event of such a conflict, the recipient of the hold shall request OGC to prioritize hold and search requests as follows:

- a. In the case of a conflict experienced by the OCIO, OGC shall convene a meeting of the Assistant General Counsels for Civil Rights Litigation, General Law, Conservation and Environment, Community Development, and International Affairs and Commodity Programs to review and prioritize the competing hold and search requests, in consultation with the Counsel for the IG when one of the competing requests is from OIG.
- b. In the case of all other conflicts, the recipient shall notify the Assistant General Counsel responsible for legal advice to the program who shall convene a meeting with the Assistant General Counsels for Civil Rights Litigation and General Law, as well as others as appropriate, to review and prioritize the competing hold and search requests, in consultation with the Counsel for the IG when one of the competing requests is from OIG.

**15. What must USDA staff members do to carry out a hold applying to operational records and related documentary materials maintained in office space?**

Until further notice:

- a. Do **not** destroy or manipulate any documentary materials, including those temporary records that are eligible for destruction in accordance with the [USDA Records Schedule](#) or the [General Records Schedules](#).
- b. Follow the supervisor's or manager's instructions about maintaining records and other documentary materials subject to the hold (*e.g.*, centralizing or keeping the records and materials in place; sending the records and materials to OGC, OIG).
- c. Do **not** transfer permanent records to NARA, unless a transfer is permitted in accordance with the hold instructions.

- d. Do **not** transfer records to an FRC, unless a transfer is permitted in accordance with the hold instructions.
- e. Do **not** donate to interested individuals or organizations any documentary materials or those temporary records that are eligible for destruction.

**16. What are the consequences if USDA staff members do *not* preserve operational records and other related documentary materials subject to a hold?**

Individual staff could face severe penalties imposed by a court, or agency performance-based action or disciplinary action for **not** preserving records and documentary materials subject to a hold.

- a. **DOJ** - Failure to preserve operational records could constitute an unlawful destruction of records that must be referred to the Attorney General under 44 U.S.C. 2905(a) and 3106.
- b. **Civil or criminal court** - If a USDA staff member fails to comply with a hold that is in place because of a court order, this individual could be individually sanctioned or held in contempt by the court. Finally, destruction of records under certain circumstances is potentially a criminal violation for which a staff member could be prosecuted under 18 U.S.C. 1519.

**17. What are the consequences to USDA, as an agency, if operational records and other related documentary materials subject to a hold are *not* preserved?**

USDA could be subject to sanctions if records and other documentary materials, deemed as “evidence,” are missing. For instance, the court could employ one or more of the following sanctions:

- a. Issue an adverse finding (*e.g.*, a court order) against USDA on the merits of the case;
- b. Instruct a jury that it is permitted to draw an “adverse inference” against USDA;

*Example:* In the hypothetical court case, *XYZ Corporation v. USDA*, operational records and documentary materials pertaining to USDA officials’ communications with XYZ Corporation (from 1999 to 2004) have **not** been preserved as required by agency policy. The judge then instructs the jury that it may logically conclude (or “infer”) that the content of USDA’s missing records and materials (as “evidence”) would have supported XYZ Corporation’s position against USDA.

- c. Preclude USDA from introducing certain evidence or calling certain witnesses;
- d. Hold individual USDA officials and USDA in contempt; or
- e. Impose monetary sanctions against USDA, or against involved individuals.

**18. How is a hold removed?**

When the need for the hold has expired, OGC, OIG, or any other official authorized to request a hold under paragraph 10, shall send a memorandum to all of the original recipients of the hold informing them that the hold has been removed and note the explanation for the removal.

**19. How is the Federal Records Center Program notified about the removal of a hold on operational records and documentary materials stored at any or all FRC's ?**

The agency Records Officer sends a letter to the Assistant Archivist, explaining that the hold has been removed.