



USAID
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ADS Chapter 158

Litigation Holds

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ADS 158 – Litigation Holds**

This is a new chapter.

Table of Contents

| | | |
|-------------------------|---|------------------|
| <u>158.1</u> | <u>OVERVIEW</u> | <u>2</u> |
| <u>158.2</u> | <u>PRIMARY RESPONSIBILITIES</u> | <u>2</u> |
| <u>158.3</u> | <u>POLICY DIRECTIVES AND REQUIRED PROCEDURES</u> | <u>3</u> |
| <u>158.3.1</u> | <u>Information and Materials That May be Held</u> | <u>3</u> |
| <u>158.3.2</u> | <u>Formats and Media</u> | <u>4</u> |
| <u>158.3.3</u> | <u>Conditions for a Hold</u> | <u>5</u> |
| <u>158.3.4</u> | <u>Authority to Issue and Remove a Hold</u> | <u>6</u> |
| <u>158.3.4.1</u> | <u>Issuing a Hold</u> | <u>6</u> |
| <u>158.3.4.2</u> | <u>Delivery of a Request</u> | <u>7</u> |
| <u>158.3.4.3</u> | <u>Responding to a Request</u> | <u>7</u> |
| <u>158.3.5</u> | <u>Penalties for Not Preserving Relevant and Responsive Information and Materials</u> | <u>8</u> |
| <u>158.3.5.1</u> | <u>Penalties for Individuals Not Preserving Relevant and Responsive Information and Materials</u> | <u>8</u> |
| <u>158.3.5.2</u> | <u>Penalties for the Agency for Not Preserving Relevant and Responsive Information and Materials</u> | <u>8</u> |
| <u>158.3.6</u> | <u>Removing a Hold</u> | <u>9</u> |
| <u>158.4</u> | <u>MANDATORY REFERENCES</u> | <u>9</u> |
| <u>158.4.1</u> | <u>External Mandatory References</u> | <u>9</u> |
| <u>158.4.2</u> | <u>Internal Mandatory References</u> | <u>9</u> |
| <u>158.5</u> | <u>ADDITIONAL HELP</u> | <u>9</u> |
| <u>158.6</u> | <u>DEFINITIONS</u> | <u>10</u> |

ADS 158 – Litigation Holds

158.1 OVERVIEW

Effective Date: 01/15/2009

This chapter prescribes the policy directives and required procedures for requesting, issuing, implementing, and removing litigation holds on USAID records and information. A litigation hold is a suspension of [disposition](#) action(s) of paper and electronic materials because of legal, audit, investigative, or other needs. This policy applies to all USAID employees. This policy also applies when the Office of General Counsel (GC) determines that paper, electronic, or other materials subject to USAID control and in the possession of contractors, sub-contractors, and grantees doing business with USAID at the time the litigation hold is issued is relevant to potential litigation.

158.2 PRIMARY RESPONSIBILITIES

Effective Date: 01/15/2009

- a. The **Office of the General Counsel (GC)** has the primary responsibility for issuing and removing litigation holds. GC provides an explanation of the [hold](#), including the specific reasons for issuing the hold, what material is being held, and who the point of contact is for the hold (see **158.3.4.1**). GC issues appropriate periodic reminders of the hold and its terms. GC works with the Department of Justice to secure any concurrences required to sequester or suspend disposition of any classified information. Regional Legal Advisors at Missions ensure that GC/Washington instructions are followed overseas.
- b. The **Bureau for Management, Office of Administrative Services, Information and Records Division (M/AS/IRD)** responds to holds issued by GC. M/AS/IRD ensures that any and all responsive and relevant material under its control, including materials located at offsite storage facilities, is retained and provided to GC as directed. M/AS/IRD must ensure that all disposition cycles that may affect relevant and/or [responsive material](#) are suspended. M/AS/IRD creates a plan and facilitates the resources and business processes to ensure immediate and full compliance with all litigation holds.
- c. The **Bureau for Management, Chief Information Officer, Chief Information Security Officer (M/CIO/CISO)** responds to holds issued by GC and ensures that any and all responsive and relevant electronic material under its control is retained and provided to GC as directed. M/CIO/CISO must determine the relevant information systems that may contain accessible materials relating to the hold and suspend any routine disposition or destruction of such information. M/CIO/CISO creates a plan and facilitates the resources and business processes to ensure immediate and full compliance with all litigation holds.

M/CIO/CISO must inform GC when the data requested is inaccessible, cost prohibitive, or if extensive resources are required that would prevent compliance with the hold. In

these cases, USAID senior management, GC, M/CIO, M/CIO/CISO, and other relevant parties must determine the course of action.

d. The **Bureaus/Independent Offices (B/IOs) and Missions** respond to holds issued by GC and ensure that any and all responsive and relevant material under their control, electronic or otherwise, is retained and provided as directed. All B/IOs are also responsible for ensuring that any and all responsive and relevant classified material under their control is retained and provided to GC as directed by the hold. All B/IOs create a plan and facilitate the resources and business processes to ensure immediate and full compliance with all litigation holds.

e. **USAID staff** responds to holds issued by GC and ensures that any and all responsive and/or relevant material under their control, electronic or otherwise, is retained and provided as directed. USAID staff should advise GC of any other individuals who may have relevant materials. USAID staff receiving a hold notice may be asked to provide a written certification of receipt and compliance. Non-compliance with a hold may result in penalties on individual employees. (see **158.3.5.1.**)

158.3 POLICY DIRECTIVES AND REQUIRED PROCEDURES

Effective Date: 01/15/2009

A litigation hold is a temporary suspension of disposition action(s), such as destruction or retirement, of paper and electronic materials because of legal, audit, investigative, or other needs. A hold may be issued in the absence of pending litigation. All relevant materials, regardless of physical location, must be retained for as long as a hold is active. Non-compliance with a hold may result in penalties on USAID as an agency or on individual USAID employees.

158.3.1 Information and Materials That May be Held

Effective Date: 01/15/2009

A litigation hold applies to relevant and responsive information that may include [records](#), [non-records](#), and personal papers existing in a variety of formats and media. This may constitute relevant and responsive evidence in a particular lawsuit, administrative proceeding (including a protest submitted in accordance with [FAR 33.1](#)), audit, or investigation and refers to all media containing recorded information, regardless of its nature (see **158.3.2**) or the methods or circumstances of recording.

Examples of information and materials subject to holds are

- Operational records. These include records created or maintained by USAID staff while conducting USAID business.
- Non-record materials. These include Government generated materials that do not meet the statutory definition of records in [44 U.S.C. 3301](#) or that have been excluded from the definition. Examples of non-record materials expressly

excluded from the statutory definition of records, but still included when a litigation hold is issued are

- Library and museum materials that have been created or acquired and preserved solely for reference or exhibition purposes;
- Extra copies of documents kept only for convenience of reference; and
- Stocks of publications and USAID created public documents.
- Working files and similar materials. These include preliminary drafts, rough notes, worksheets, correspondence and memos, reports, and other similar materials regardless of whether such materials qualify as USAID operational records. USAID staff must preserve these working files and similar materials if USAID issues a hold.
- Files stored on a personal electronic device (for example, personal computer, personal digital assistant, and cell phone). Electronic materials that have been stored on a personal computer through remote access or any other method must be made accessible by USAID if such materials are responsive and relevant. This includes electronic devices purchased with personal funds, personal e-mail accounts, or other electronic storage locations used for business purposes.

158.3.2 Formats and Media

Effective Date: 01/15/2009

Formats and media refer to the physical characteristics of documentary materials. Particular holds may call for retention of data in various electronic formats or media. Specific information regarding formats and types of media subject to a hold must be provided in the hold request communication. Examples of a hold request communication include e-mail and written memoranda. Printing out electronic materials or copying them into another program may not fulfill the requirements of the hold.

Some examples of formats and media are

- Hard copy and printed materials (paper);
- Electronic formats and storage media, including but not limited to
 - E-mail messages and attachments;
 - Word processing files, spreadsheets, calendars, and databases;
 - Digital images;
 - Web pages;
 - Network server information, including metadata;
 - Voice-mail messages;
 - Back-up and disaster recovery tapes;
 - Hard drives;

- Removable computer storage media (for example, CD-ROMs, tapes, disks, cards, portable hard drives, and thumb drives.); and
- Laptops, BlackBerries®, and other portable electronic devices;
- Photographic;
- Audiovisual, such as videotapes and sound recordings;
- Cartographic, such as maps and architectural and engineering drawings; and
- Micrographic, such as microfilm and microfiche.

158.3.3 Conditions for a Hold

Effective Date: 01/15/2009

A hold may be issued when

- USAID is expressly listed as a party to a lawsuit or cases in which the United States is a plaintiff or defendant. The Office of General Counsel (GC), working with the Department of Justice (DOJ), acts as attorney for USAID and its officials.
- An administrative proceeding may require the preservation of relevant and responsive information if it involves an Equal Employment Opportunity (EEO), Government Accountability Office (GAO), Civilian Board of Contract Appeals (CBCA), Merit Systems Protection Board (MSPB), or Foreign Service Grievance Board (FSGB) matters. Note: This list is not exhaustive.
- USAID is not a named party to a lawsuit or administrative proceeding, but a subpoena, order, or other demand of a Federal, state, or local court or administrative or legislative proceeding is issued for the production, testimony, or disclosure of
 - Any material contained in the Agency's files,
 - Any information relating to material contained in the Agency's files, or
 - Any information or material acquired by a person while such person was an Agency employee when performing his or her official duties or because of his or her official status.
- Congressionally requested or when any entity within the Office of the Inspector General (OIG), an independent public accountant, or the GAO conducts a financial, performance, contract, or grant audit.
- Any OIG leads an administrative (non-criminal) or criminal investigation.
- Another Federal agency with appropriate authority –statutory, regulatory, or otherwise– requests a hold.
- A dispute in any matter gives rise to a reasonable anticipation of litigation.
- GC determines that it is in the Agency's best interest to issue a litigation hold.

158.3.4 Authority to Issue and Remove a Hold

Effective Date: 01/15/2009

GC is the only USAID office authorized to issue and remove a hold.

158.3.4.1 Issuing a Hold

Effective Date: 01/15/2009

a. Scope. GC, in coordination with Bureau for Management, Chief Information Officer, Chief Information Security Officer (M/CIO/CISO), determines the overall scope of the hold. Holds must be limited to operational records and other related information and materials that are responsive and relevant to the situation warranting the hold (for example, litigation, audit, and investigation). After a hold has been issued, GC may modify the scope of a hold. In these cases, GC must send written notification that updates all relevant B/IOs, Missions, and individuals of any change to the hold order.

b. Written request. GC must send a written request (e-mail, memoranda, or fax) to the M/CIO/CISO; Bureau for Management, Office of Administrative Services, Information and Records Division (M/AS/IRD); relevant B/IOs; Missions; and USAID staff, as appropriate. The request must include the following information:

(1) Justification for the hold (for example, litigation, audit, investigation), including copies of relevant supporting documents (for example, litigation filings, court orders, or letters from GAO, the Inspector General, and DOJ.);

(2) Concise descriptions of materials to be held, including information about content (for example, subject matters and topics), date spans, keywords, or other descriptive terminology;

(3) Disposition actions to be suspended;

(4) Disposition instructions cited from the USAID Records Schedules or the General Records Schedules;

(5) Physical locations where responsive information may be stored, including buildings, Missions, rooms, and interior areas (for example, at individuals' workstations, in centralized file cabinets, and on network servers.);

(6) Estimated time period for the hold or events triggering release of the hold;
and

(7) Names of contact people and alternates who are knowledgeable and able to answer questions about the hold subject matter and related information and materials subject to the requested hold.

158.3.4.2 Delivery of a Request

Effective Date: 01/15/2009

All hold requests must be delivered to M/AS/IRD and M/CIO/CISO via e-mail or hard copy memoranda. If any additional B/IOs or Missions receive hold requests, the most senior person in the B/IO or Mission who receives the request must communicate the hold to USAID employees and explain the reasons for the hold. All recipients of a hold request must provide a written statement of compliance to GC. The senior officials must issue specific instructions to their staff regarding how to respond to a hold within their organizations. Additionally, they must inform new employees of the procedures and periodically remind staff about hold requirements.

Note: When requested, GC is available to answer questions or provide information sessions to managers and staff regarding the hold.

158.3.4.3 Responding to a Request

Effective Date: 01/15/2009

Each request that is issued from GC is specifically written and tailored to respond to the litigation, audit, or investigation, and specific facts known at the time. GC provides points of contact for the delivery of the information if it decides that the information must be centralized. If it is likely that there will be no centralization of the information, the individual B/IO, Mission, or individual must sequester their own information until they receive further instructions from GC.

If necessary, M/AS/IRD must request a temporary extension of the retention period in accordance with [36 CFR 1228.54\(c\)\(1\)-\(4\)](#) to preserve and retain any materials relating to a hold. M/AS/IRD must take steps to suspend any disposition action involving material subject to a hold if the material is located at a Federal Records Center.

M/CIO/CISO must determine relevant information systems that may contain materials relating to the hold and suspend any routine disposition or destruction of such information.

All B/IOs, Missions, and individuals must follow GC's instructions about maintaining information and materials subject to a hold (for example, centralizing or keeping the records and materials in place versus transferring the records and materials to GC, M/AS/IRD, and M/CIO/CISO.).

Any B/IO, Mission, or individual that receives a hold request must NOT

- Destroy any responsive and relevant information and materials, including temporary records that are eligible for destruction, in accordance with USAID records schedules or General Records Schedules;

- Transfer permanent records to the [National Archives and Records Administration](#), unless a transfer is permitted in accordance with the hold instructions; or
- Transfer temporary records offsite, unless a transfer is permitted in accordance with the hold instructions.

158.3.5 Penalties for Not Preserving Relevant and Responsive Information and Materials

Effective Date: 01/15/2009

158.3.5.1 Penalties for Individuals Not Preserving Relevant and Responsive Information and Materials

Effective Date: 01/15/2009

Individual staff members may face severe penalties imposed by USAID, DOJ, or a civil or criminal court for not preserving information and materials subject to a hold.

- a. **USAID.** [The USAID Table of Offenses and Penalties \(Supplementary Reference to ADS 487\)](#) lists insubordination (defiance of authority) as an offense. For USAID staff members who defy a litigation hold request, USAID may impose penalties ranging from a written reprimand to removal.
- b. **DOJ.** Failure to preserve operational records may constitute an unlawful destruction of records under the [Federal Rules of Civil Procedure](#).
- c. **Civil or criminal court.** If a USAID staff member fails to comply with a hold that is in place because of a court order, this individual may be individually sanctioned or held in contempt by the court. Furthermore, destruction of records under certain circumstances is a potential criminal violation for which a staff member could be prosecuted under [18 U.S.C. 1519](#).

158.3.5.2 Penalties for the Agency for Not Preserving Relevant and Responsive Information and Materials

Effective Date: 01/15/2009

USAID may be subject to sanctions if records and other documentary materials deemed as evidence are missing. In the circumstance of a legal case, for instance, a court may:

- Issue an adverse finding against USAID on the merits of the case.
- Instruct a jury to draw an adverse inference against USAID. This means that the judge would rule that the content of the missing records and materials would have supported whatever argument that the opposing party has put forward.
- Preclude USAID from introducing certain evidence or calling certain witnesses.
- Hold individual USAID officials or the Agency in contempt.

- Impose monetary sanctions against USAID.
- Invoke a combination of the five items listed above.

158.3.6 Removing a Hold
Effective Date: 01/15/2009

When a hold is no longer necessary, GC must send instruction to remove the hold to M/CIO/CISO, M/AS/IRD, and relevant B/IOs, Missions, and individuals as appropriate. M/CIO/CISO, M/AS/IRD, and relevant B/IOs, Missions, and individuals that had been affected by the hold must respond by e-mail or memoranda to GC acknowledging that they have officially removed the hold.

158.4 MANDATORY REFERENCES
Effective Date: 01/15/2009

158.4.1 External Mandatory References
Effective Date: 01/15/2009

- [44 U.S.C. Chapter 3301](#)
- [36 CFR 1228.54](#)
- [18 USC 1519](#), U.S. Criminal Code, Crimes and Criminal Punishment, Obstruction of Justice
- [Federal Rules of Civil Procedure](#)

158.4.2 Internal Mandatory References
Effective Date: 01/15/2009

- [The USAID Table of Offenses and Penalties](#)

158.5 ADDITIONAL HELP
Effective Date: 01/15/2009

- [Freedom of Information Act \(5 U.S.C. 552\)](#)
- [Privacy Act \(5 U.S.C. 552a\)](#)
- [Inspector General Act Amendments of 1988](#) (5 U.S.C., Appendix; see Paragraph 8A, "Special provisions relating to the Agency for International Development.")
- [The Clinger-Cohen Act \(Pub. L. 104-106\)](#)
- [The E-Government Act of 2002 \(44 U.S.C. 101\)](#)

- f. [Government Paperwork Elimination Act \(Pub. L. 105-277\)](#)
- g. [USAID FOIA Regulations \(22 CFR 212\)](#)
- h. [Executive Order 12829 – National Industrial Security Program](#)
- i. [Executive Order 12958 – Classified National Security Information](#)
- j. [Office of Management and Budget Circular No. A-130](#)
- k. [Federal Rules of Evidence \(Title 28 U.S.C. - Appendix\)](#)
- l. [ADS 567, Classified Contracts, Grants, Cooperative Agreements, and Contractor/Recipient Personnel Security](#)
- m. [ADS 568, National Security Information and Counterintelligence Security Program](#)

158.6 DEFINITIONS

Effective Date: 01/15/2009

The terms and definitions listed below have been incorporated into the ADS Glossary. See the [ADS Glossary](#) for all ADS terms and definitions.

disposition

The transfer, retirement, and/or disposal of records or non-record material. **(Chapters 158, 502)**

hold

A hold is a temporary suspension of disposition action(s) of paper and electronic materials because of legal, audit, investigative, or other needs. **(Chapter 158)**

non-record

U.S. Government-owned informational materials excluded from legal definition of records; documentation/correspondence that does not document USAID's policies, procedures, practices or operations. Includes extra copies of documents kept only for convenience or reference, stocks of publications of processed documents, and library or museum materials intended solely for reference or exhibition. **(Chapters 158, 502)**

records

Definition is located in 3 FAM 695 3-3. (Chapter 408)

According to 44 U.S.C. 3301, "includes all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an 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."
(Chapters 158, 502)

responsive material

Interpreted broadly, any material or information that is directly relevant to or could lead to the discovery of material or information that is relevant to the subject of the hold.
(Chapter 158)

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