



Preservation of Evidence in the State's Records Management Process

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Dilemma:

- Records Management directs we destroy paper and electronic records after a certain period of time.
- Rules of Civil Procedure and case law require relevant evidence not be destroyed.



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Solution:

Establish a “Litigation Hold” process -
a process to identify and
preserve materials relating to pending or
“reasonably foreseeable” litigation.



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What constitutes “reasonably foreseeable” litigation will depend on the circumstances.

The duty to preserve applies to e-mail and other electronic documents to the same extent that it applies to paper documents and files.



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“Litigation Hold” Process would address:

- Paper originals and copies
- Word processing documents
- Email and email attachments
- Calendars and planners
- Spreadsheets and databases
- Instant messages
- Network logs
- PowerPoint slide shows
- Graphics files
- Voicemail
- Information on agency Website



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Establishing the “Litigation Hold” Process:

1. When an employee becomes aware of potential or actual litigation, the employee should notify the employee's supervisor.

The supervisor should contact the agency's attorney or the North Dakota Solicitor General (Director of Civil Litigation).



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2. Issue a Destruction Hold Notice based upon currently available information.
3. Arrange a meeting to determine whether a litigation hold should be implemented.

Attendees should include:

- appropriate agency personnel, including persons most knowledgeable about the relevant computer systems and network, the storage and retrieval of information, and procedures for backing up and archiving electronic information; and
- The agency's general counsel and assigned litigation counsel.



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4. If a decision is made to implement a litigation hold, the individuals at the meeting will:

- a. Identify the information, including electronically stored information, that may be relevant to the litigation.
- b. Identify who may have the relevant documents, electronic information, or other materials in their possession.



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c. Identify all locations and storage media of materials including:

- Desktop and laptop computers
- Network servers
- Email servers
- Handheld devices
- Storage devices including CD's and ZIP drives
- Offsite storage
- Remote computers with network connections.



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d. Identify how best to implement the litigation hold to preserve paper and electronic data including:

- i. Sending a written notice to employees at all applicable organizational levels identifying the documents and other materials as to which diligent efforts should be made to preserve and the method and places of preservation;



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- ii. Notifying the appropriate agency personnel of steps the agency needs to take to preserve electronic data, such as requesting segregation, removal, or exchange of computers or hard drives and the copying or cloning of drives;

- iii. Notifying ITD of steps ITD needs to take to preserve electronic data, such as halting routine deletion of email, preserving backup tapes beyond the routine write-over cycle, or transferring certain electronic data to a dedicated server;



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- iv. Establishing a method to monitor compliance with the litigation hold notice by periodically checking back with affected management and staff;
- v. Establishing a written record of steps taken to preserve documents, electronic information, and other materials to demonstrate compliance with the duty to preserve potential evidence.



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Attachments:

1. Agenda for the Document Preservation Team Meeting Agenda
2. Sample Internal Litigation Hold Memorandum (Pre-Litigation)
3. Sample Internal Litigation Hold Memorandum (Post filing of Litigation)

