



Preservation of Evidence in the State's Records Management Process

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Records Management vs. Rules of Civil Procedure

- 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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Verdict: Rules of Civil Procedure Win

- Monetary Sanctions
- Evidentiary Sanctions
- Claim or Case Dismissal



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Solution:

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

* The time to do this is now, not after litigation is commenced or becomes reasonably foreseeable.



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Remember:

The "Litigation Hold" process applies whether the Agency will bring the litigation (is the Plaintiff) or will defend the litigation (is the Defendant).



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What constitutes "reasonably foreseeable" litigation will depend on the circumstances.

May be based on one or multiple trigger events. Error on the side of consulting with Risk Management or legal counsel.



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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 Applies To:

- Paper - drafts, copies, and originals
- Word processing documents
- Email and email attachments
- Calendars and planners
- Spreadsheets and databases
- Instant messages
- Network logs
- PowerPoint slide shows
- Graphics files and Images
- Voicemail
- Manuals, Publications, and Pamphlets
- Information on agency Website
- Social Media



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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 on currently available information.
3. Arrange a meeting to determine whether a litigation hold should be implemented.

Attendees should include:

- appropriate agency personnel, including people knowledgeable about the potential claim and the person or persons most knowledgeable about agency records and 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 portable storage devices
- Offsite storage
- Remote computers with network connections
- Home computers or equipment



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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 reminding and 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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- e. Identify when to end the litigation hold and issue a written release notification.

Decision to release litigation hold should be made in conjunction with legal counsel.



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Results of Proper Implementation:

- Increased Comfort
- Reduce Risks
- Lower Costs
- Improve Efficiency
- Be Better Prepared for Litigation & Avoid Sanctions
- Not Annoy the Courts



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Additional Information: nd.gov/risk/publications/forms/risk-management-fund-forms

1. Litigation Hold Instructional Memo
2. Litigation Hold - Document Preservation Team Meeting Agenda
3. Litigation Hold Memorandum (Pre-Litigation)
4. Litigation Hold Memorandum (Post-Filing of Litigation)

