Washington State
Military Department

Department Policy No. DIR-007-10

Title:	Management of Document Identification, Preservation, Collection and Production for Litigation
Authorizing Source:	Rules of Civil Procedure (State and Federal) Chapter 40.14 Revised Code of Washington (RCW), Preservation and destruction of public records Chapter 4.92 RCW, Actions and Claims against the state
Information Contact:	Risk Manager Building 33 (253) 512-7950
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Approved By:	Bret D. Daugherty, Major General The Adjutant General Washington Military Department Director

Purpose

This policy establishes expectations, procedures and responsibilities for managing the identification, preservation, collection and production of Washington Military Department (WMD) records when reasonably anticipated litigation or an actual lawsuit or tort claim against the WMD or its employees is determined to exist.[1]

All WMD employees must be familiar with this policy and its procedures, because any WMD employee may:

- Be involved in litigation.
- Need to determine if an event may reasonably lead to litigation.
- Receive a Litigation Hold Notice.
- Receive a Discovery Request or Deposition Notice.
- Receive direction through their chain of command or the Office of the Attorney General to identify, preserve, collect or produce WMD records.

[1] Communications by WMD with the Washington State Office of the Attorney General (AGO) about potential or actual litigation, including matters relating to discovery of WMD records, are protected by attorney-client privilege. AGO representatives may ask WMD for information or assistance, and information developed pursuant to these requests may be protected by the attorney work product doctrine. This policy and procedure is not a waiver of the attorney-client privilege, nor is it intended to interfere with the attorney work product doctrine.

Scope

This policy applies to the WMD, its Divisions, and employees, and describes the basic obligations and responsibilities of all WMD employees for identification, preservation, collection and production of records when reasonably anticipated litigation or an actual lawsuit or tort claim against the WMD or its employees is determined to exist. The procedures in this policy apply only to the management of Litigation Hold Notices and Discovery Requests related to actual or reasonably anticipated litigation and tort claims by the WMD Risk Manager. The detailed procedures in this policy do not normally apply to legal, administrative, or other proceedings related to personnel actions unless directed by the Risk Manager.

Definitions

Affected Individuals: WMD Employees or others who have identified an event in which litigation may be reasonably anticipated, or who have received a Litigation Hold Notice or Discovery Request from the Attorney General's Office (AGO) or Risk Manager.

AGO Representative: Staff from the AGO assigned to manage legal matters involving WMD and the State of Washington. Typically, this is an Assistant Attorney General (AAG), paralegal, legal assistant or an investigator.

Deposition Notice: A legal notice directed to a WMD employee to appear at a certain time and place in order to give sworn testimony about WMD business, in response to questions posed by an attorney.

Discovery Request: A request from another party to a lawsuit or from an AGO representative for information or WMD records.

Information Technology (IT) Staff: For this policy, persons identified by the IT Division to support the Risk Manager with technology issues related to electronically stored information (ESI).

Electronically Stored Information (ESI): WMD records created or stored in an electronic form. ESI includes all file types, such as: Email, Outlook, Word, Excel, Access, Publisher, PowerPoint, Adobe Acrobat, SQL databases, information in SharePoint sites, or any other software or electronic communication program or database used by WMD or affected individuals doing WMD work. WMD ESI can be located on network drives, backup tapes, personal data assistant (PDA) devices, thumb or flash drives, compact disks (CD), digital video disks (DVD), floppy disks, work computers, cell phones, laptops computers or any other electronic storage device used to do WMD work. ESI also includes any WMD information or records that employees store on personally owned electronic devices that were used to conduct or transmit WMD work directly, through Outlook Web Access, or other means (such as home computers, laptops, netbooks, notebooks, cell phones, or PDAs).

Litigation Hold Notice: A written communication that instructs 'affected individuals' who are likely to have WMD records pertaining to a legal issue to take immediate action to identify and

preserve the records for future retrieval.

Preservation: The process of locating and safeguarding WMD records from destruction that reasonably and likely relate to a potential or actual lawsuit or tort claim.

Reasonably Anticipated Litigation: A reasonable expectation that an event may lead to the filing of a lawsuit or a tort claim against WMD or its employees. There is no formal standard to determine whether an event will lead to a lawsuit.

Redaction: The process of editing records to protect any confidential information that is not discoverable or disclosable under the Rules of Civil Procedures or laws relating to the protection of confidential information.

Spoliation (Spoilage): Destroying, significantly altering, or failing to preserve WMD records that might contain potential evidence relating to pending or reasonably anticipated litigation.

Tort Claim: A formal written filing with the State Office of Risk Management under RCW 4.92.100 in which the claimant alleges that certain kinds of harm or damages were caused by the State of Washington, its agencies, state employees, or state volunteers.

WMD Records: Any document or recorded information, regardless of physical form or characteristics, created, sent, organized or received by the agency in the course of public business, including paper documents, drawings, graphs, charts, audio and video tapes, photographs, phone records, data compilations, planners, calendars, diaries, and draft documents. This term includes electronically stored information (ESI).

Policy

A. All WMD employees have basic responsibilities when they know, or reasonably should know, a person or business has a potential or actual lawsuit pending against WMD or its employees. These responsibilities include identifying reasonably anticipated litigation and the accurate identification, preservation, collection and production of WMD records for any potential or actual litigation. An employee's failure to understand these responsibilities could:

- Spoil potential evidence.
- Compromise the proper management of WMD-related litigation.
- Expose WMD to court-ordered sanctions.
- Subject the employee to departmental disciplinary action and/or to sanctions imposed by a court.

B. The obligation to identify and preserve records exists for all legal-related proceedings, including reasonably anticipated or actual lawsuits against WMD or its employees, grievances, legal actions initiated by WMD, and any other legal proceedings by or against WMD. Therefore, employees are required to identify and preserve potentially relevant records relating to all reasonably anticipated or actual legal-related proceedings until the matter concludes and the records retention policy permits destruction.

To assist in meeting these requirements, all WMD employees must notify their supervisor when they reasonably anticipate an event that may lead to litigation against the WMD or its employees. The employee will consult with their supervisor whenever there are any questions or concerns about whether an event may lead to litigation. If there is a reasonable belief that litigation may occur, the supervisor, through their appropriate chain of command, will notify the division director. The division director will notify the Risk Manager about reasonably anticipated litigation. The Risk Manager will notify and consult with the AGO representative about reasonably anticipated litigation and determine whether a Litigation Hold Notice should be issued.

C. WMD employees must take immediate actions to identify, preserve, protect and manage all WMD records they hold, or for which they are otherwise responsible, that could relate to a reasonably anticipated or actual lawsuit against WMD or its employees, grievances, an action initiated by or against the WMD, and any other WMD actual or reasonably anticipated legal proceeding.

Specifically, any employee who is involved in any legal proceeding or matter, believes litigation is reasonably anticipated, or has received a Litigation Hold Notice or Discovery Request must:

1. Identify and locate all WMD records in their possession, or for which they have a responsibility to maintain, that may reasonably relate to the potential or actual lawsuit, tort claim, or other legal proceeding.
2. Suspend destruction of all identified records.
3. Separate all identified records from other records, and preserve the identified records without redaction or alteration.
4. Provide the identified records when and as directed.
5. Continue to identify, preserve and produce all related records created or located until the legal matter or proceeding is fully resolved.

These requirements apply to records in any form, including all electronically stored information (ESI).

D. The WMD Risk Manager will be responsible for assuring implementation, compliance and coordination of this policy and its procedures, to ensure timely and proper identification, preservation, collection and production of records when reasonably anticipated litigation or an actual lawsuit or tort claim against the WMD or its employees is determined to exist.

E. All WMD employees and Divisions shall work cooperatively with the Risk Manager and the AGO, and comply with this policy and its procedures.

F. For any legal-related matter to which this policy and its procedures are not applicable, all WMD employees and Divisions shall comply with other applicable procedures and

protocols established by WMD, its Divisions and the Risk Manager, in cooperation with the AGO. Typically, those matters where other procedures and protocols may apply include:

- Actions initiated by WMD.
- Legal, administrative, or other proceedings related to personnel actions.

Procedures

Identification of Actual/Reasonably Anticipated Litigation:

The WMD and its employees must act to identify and preserve all WMD records, including Electronically Stored Information (ESI), that may relate to reasonably anticipated litigation or an actual lawsuit or tort claim against the WMD or its employees.

- Notice of actual litigation or a tort claim may come from a variety of sources, including U.S. Mail, email, service of process, or other means. Upon receiving any such notification, an employee must immediately notify their supervisor. The supervisor, through their appropriate chain of command, will notify the division director. The division director will notify the Risk Manager. The Risk Manager will notify and consult with the AGO representative.
- Reasonable anticipation of litigation is determined on a case by case basis considering the facts and circumstances known to the WMD regarding the potential of litigation. The standard, however, requires more than a mere possibility of litigation. The Risk Manager will consult with the AGO representative and make the final determination of whether litigation is reasonably anticipated.

  Employees must notify and consult with their respective supervisor immediately or as soon as reasonably possible of any actual or reasonably anticipated litigation. If there is a reasonable belief that litigation may occur, the supervisor, through their appropriate chain of command, will notify the division director. The division director will notify the Risk Manager about reasonably anticipated litigation within 24 hours. The Risk Manager will notify and consult with the AGO representative about reasonably anticipated litigation and determine whether a Litigation Hold Notice should be issued.

Procedure for Implementation of Litigation Hold Notice/Discovery Request:

All Litigation Hold Notices and Discovery Requests will be received by and processed through the Risk Manager, who is responsible for WMD implementation, compliance, and coordination of the response. The following procedure outlines the actions the Risk Manager and other WMD staff will take when receiving and processing requests for Litigation Hold and Discovery:

1. Upon receipt, the Risk Manager reads and reviews the Litigation Hold Notice/Discovery Request and consults with the AGO representative to determine the scope of its application and the search for relevant records.

2. The Risk Manager creates a chronology log and tracks all steps taken to implement and

comply with the Litigation Hold Notice/Discovery Request.

3. The Risk Manager concurrently notifies the following people of the Litigation Hold Notice/Discovery Request within 24 hours of receipt:
   - **Human Resources Director** who immediately notifies TAG/ATAG and affected Executive Management Team members of the Litigation Hold/Discovery Request.
   - **Intergovernmental Affairs & Policy Director** who is responsible to lock e-mail accounts as determined by the Litigation Hold Response Team.
   - **Chief Information Officer** who is responsible to lock all ESI records located on WMD network drives as determined by the Litigation Hold Response Team.

4. The Risk Manager establishes and meets with the Litigation Hold Response Team to plan and administer implementation of the Litigation Hold Notice/Discovery Request. The team should include the Risk Manager and a representative from each of the following areas: Information Technology, Intergovernmental Affairs & Policy Office, Human Resources, and the Division Director or designee from the area of the agency to which the dispute arises.

   The Litigation Hold Response Team will:
   - Identify and list all WMD affected individuals with knowledge of facts that may relate to the pending or potential litigation, including affected individuals who created, edited, communicated, handled, or had custodial responsibility for potentially discoverable documents and tangible items.
   - Identify search terms to be used by affected individuals identified above and the Intergovernmental Affairs and Policy Director, or designee of that Office, to identify records subject to the Litigation Hold Notice/Discovery Request.
   - Identify all IT architecture within scope and subject matter of pending or potential litigation.
   - Develop an ESI preservation plan.
   - Establish deadlines for implementation of the Litigation Hold Notice/Discovery Request.

5. The Risk Manager will notify and direct all WMD affected individuals of the Litigation Hold Notice/Discovery Request to stop records destruction activities for identified records.

6. The Risk Manager meets with the WMD affected individuals identified by the Litigation Hold Response Team and provides training and guidance on implementation of the Litigation Hold Notice/Discovery Request. These individuals will be responsible for searching their own hard drive, paper records and removable storage devices. Once an employee completes the search, they will sign a document certifying that they have searched all their records and provide all identified records to the Risk Manager.

7. The Intergovernmental Affairs and Policy Director, or designee of that Office, and Risk Manager will:
   - Notify and consult with the WMD Public Records Officer and AGO representatives for coordination regarding any related public records requests made under the Public Records Act (ch. 42.56 RCW).

- Direct the WMD Public Records Officer to search all WMD network drives and email for ESI records subject to the Litigation Hold Notice/Discovery Request using a search form with the terms identified by the Litigation Response Team to identify records subject to the Litigation Hold Notice/Discovery Request.
- Direct the WMD Public Records Officer to copy and save all relevant ESI files found in this process into a storage location on the WMD network drive designated as the repository for all ESI records related to this Litigation Hold Notice/Discovery Request.
- As necessary to comply with a Litigation Hold Notice/Discovery Request, direct the WMD Public Records Officer to conduct ongoing searches to identify records subject to the Litigation Hold Notice/Discovery Request, copy and save to the designated repository.

8. The Human Resources Director, or designee of that Office, will identify applicable personnel records subject to the Litigation Hold Notice/Discovery Request, make copies of those records (paper or electronic), and provide them to the Risk Manager. As necessary to comply with a Litigation Hold Notice/Discovery Request, conduct ongoing searches to identify records subject to the Litigation Hold Notice/Discovery Request, copy and provide to the Risk Manager. Additionally, this person will keep the Risk Manager informed of progress in conducting these activities and any significant issues that could delay or compromise the WMD's response.

9. The Risk Manager will regularly update the AGO representative on implementation of the Litigation Hold Notice/Discovery Request by WMD and any significant issues that could delay or compromise the WMD's response.

11. The Risk Manager will coordinate the screening and organization of records identified as being subject to the Litigation Hold Notice/Discovery Request.

12. The Risk Manager will notify the AGO representative when the Litigation Hold Notice/Discovery Request has been implemented and responsive records have been identified, collected, preserved and are ready for production.

13. The Risk Manager is responsible for maintaining all records (paper and electronic) identified and collected pursuant to a Litigation Hold Notice/Discovery Request separate from regular work files for possible production and to prevent the possibility of spoliation.

14. The Risk Manager will notify the Litigation Hold Response Team and affected individuals when the legal matters covered by this procedure have been resolved/appeal period expired and the Division can resume normal records retention procedures under WMD Policy DIR-005-08.