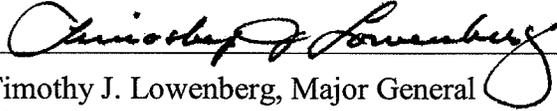




Department Policy No. DIR-007-10

Title:	Management of the Litigation Discovery Process
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
Effective Date:	November 1, 2010
Mandatory Review Date:	November 1, 2012
Revised:	
Approved By:	 Timothy J. Lowenberg, Major General The Adjutant General Washington Military Department Director

Purpose

This policy has two purposes:

1. It sets expectations for managing Washington Military Department (WMD) records when litigation is reasonably anticipated or when a lawsuit or tort claim has been filed against WMD or its employees.¹
2. It establishes a function and procedures to manage the discovery of WMD records when a reasonably anticipated or actual lawsuit or tort claim exists for certain types of legal-related proceedings.

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.

The policy describes basic obligations of all WMD employees in any legal-related matter. However, the procedures section of this policy is limited to the management of Litigation Hold Notices and Discovery Requests related to actual or reasonably anticipated lawsuits and tort claims which involve the WMD Discovery Manager. The detailed procedures in this policy do not normally apply to legal, administrative, or other proceedings related to personnel actions.

Definitions

Affected Individuals: 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 their Discovery Coordinator (DC).

AGO Representative: Staff from the Attorney General's Office 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 Coordinator (DC): The person appointed by each Division to coordinate with and assist AGO representatives when litigation is reasonably anticipated, or a Litigation Hold Notice or a Discovery Request is issued that involves their respective division. May consult with Discovery Manager for additional guidance.

Discovery Manager (DM): The single, central point of contact in WMD identified to receive Discovery Requests or Litigation Hold Notices from the AGO. The DM notifies affected Divisions of the Discovery Requests or Litigation Hold Notices, and assists in coordinating the agency's responses, within and between divisions, where necessary. The Discovery Manager is the WMD Risk Manager unless otherwise designated by WMD executive management.

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 Discovery Coordinators (DC) and the Discovery Manager (DM) 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 servers, 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.

Records Coordinator: The person appointed by division management to assist with records management and retention duties. See Department Policy DIR-005-08.

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

Spoilation (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 preserve records exists for all legal related proceedings, including: potential or actual lawsuits against WMD or its employees, grievances, or legal actions initiated by WMD. Therefore, employees are required to preserve potentially relevant records relating to all legal related proceedings until the matter concludes and the records retention policy permits destruction.

However, within the procedures of this policy, it is not usually necessary for the Discovery Manager, Discovery Coordinators and others to be involved - or for a Litigation Hold Notice to be issued - for legal proceedings that do not involve a potential or actual lawsuit against WMD or its employees.

- C. WMD employees must take immediate actions to 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; a grievance; an action initiated by or against the WMD; or any other WMD legal proceeding.

Specifically, any employee who is involved in any legal proceeding or matter, believes litigation is reasonably anticipated, or who 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 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. To assure coordination of, and timely, proper response to litigation-related matters within the scope of the Procedures established in this policy, a Discovery Manager function is created within the WMD.
- E. All WMD employees and Divisions must work with the Discovery Manager and the Office of the Attorney General, and must follow the Procedures of this policy for any legal-related matter within the scope of these Procedures.
- F. For legal-related matters not within the scope of the Procedures of this policy, all WMD employees and Divisions must follow other applicable procedures and protocols established by WMD and its Divisions, in cooperation with the Office of the Attorney General. 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

A. Discovery Manager (DM)

For matters of potential or actual litigation within the scope of these Procedures, the DM:

1. Notifies and consults with the Attorney General's Office (AGO) representative about reasonably anticipated litigation.
2. Receives Litigation Hold Notices or Discovery Requests from the AGO.
3. Forwards Litigation Hold Notices and Discovery Requests to the Discovery Coordinator (DC) of affected Divisions and to the WMD Records Officer.
4. Coordinates agency actions with the DC and AGO representatives when a request includes more than one Division.
5. Receives Division response status information from the DC.
6. Notifies the WMD Records Officer and the DC when the legal matter covered by these Procedures has been resolved and the Division can resume normal records retention procedures under Department Policy DIR-005-08a.
7. Notifies the WMD Public Records Officer and AGO representatives for coordination regarding any related public records requests made under the Public Records Act (chapter 42.56 RCW).
8. Provides appropriate training and guidance to WMD staff regarding this policy and the procedures for managing Litigation Hold Notices and Discovery Requests.

B. Division Executive Manager

1. Appoints a Division employee as the Discovery Coordinator (DC) and notifies the agency's Discovery Manager (DM) and the Attorney General's Office (AGO) in writing of any change to that appointment.

C. Discovery Coordinators (DC)

1. Receive Litigation Hold Notices, Discovery Requests, and related material from the Discovery Manager (DM) or from the Attorney General's Office (AGO) representative.
2. Consult with the AGO representative to determine the scope of search.
3. Notify affected individuals and Division management, including Records Coordinators and IT Staff, of Litigation Hold Notices and Discovery Requests.
4. Coordinate the Division's response to Litigation Hold Notices and Discovery Requests.
5. Direct all affected individuals to stop records destruction activities for identified records.
6. Notify and consult with the DM and AGO representative about reasonably anticipated litigation.
7. Notify their Division management, the DM and AGO representative of significant issues that could delay or compromise the Division's response.
8. Provide consultation and technical assistance to Division staff on responding to Litigation Hold Notices or Discovery Requests.
9. Notify the DM and AGO representative when the Litigation Hold Notice has been implemented or when documents responsive to a Discovery Request have been identified, collected, preserved and are ready for production.
10. Notify the Records Coordinators and affected individuals when the legal matters covered by these procedures have been resolved and the Division can resume normal records retention procedures under Department Policy DIR-005-08a.

D. Information Technology (IT) Staff

1. Create and maintain a detailed written description of WMD's Electronically Stored Information (ESI) and IT portfolio, including data sets (e.g., databases), computer hardware (e.g., servers, workstations, and laptops), library of deployed software (e.g., XP Operating System, Office 2007, Adobe Acrobat) and network switching equipment (e.g., component switches).

2. As required, assist the Discovery Coordinator(s) (DC) and affected individuals in identifying, preserving, collecting or producing required Administration electronically stored information (ESI).
3. Assist the DC(s) in responding to Litigation Hold Notices or Discovery Requests that include ESI.
4. Assist supervisors in preserving ESI managed or held by employees who have left, or are leaving WMD positions.

E. Employees

1. Notify their supervisor when they reasonably anticipate an event may lead to litigation against WMD or its employees.
2. Consult with their supervisor whenever there are any questions or concerns about whether an event may lead to litigation. If there is reasonable belief that litigation may occur, the supervisor, through their appropriate chain of command, notifies the Division's Discovery Coordinator (DC).
3. Identify and preserve all records they hold, or for which they are responsible, that they reasonably determine to relate to actual or anticipated litigation, whether or not a Litigation Hold Notice has been issued.
4. Follow the supervisor's and Discovery Coordinator's guidance in responding to Discovery Requests, Litigation Hold Notices, or other litigation/discovery procedures.
5. Follow any instructions provided by the Discovery Manager (DM), DC, or Attorney General's Office (AGO) representative regarding the identification, preservation, collection or verification of WMD records under this policy.
6. Provide all identified records as directed by the DM, DC or AGO representative.
7. Retain all identified WMD records relevant to a Litigation Hold Notice or Discovery Request until notified that preservation is no longer necessary, even if copies of those records have been provided under this policy.
8. Keep all records (paper and electronic) identified and collected pursuant to a Litigation Hold Notice or Discovery Request separated from regular work files for possible production and to prevent the possibility of spoliation.
9. Contact the Division's DC with any questions about the identification, preservation, collection or production of WMD records under this policy.