

# EPA INFORMATION PROCEDURES

---

EPA Classification No.: CIO 2155-P-3.0	CIO Approval Date: 04/04/2014
CIO Transmittal No.: 13-011	Review Date: 04/04/2017

## *Collection and Retention Procedures for Electronically Stored Information (ESI) Collected Using E-Discovery Tools*

---

### 1. PURPOSE

This procedure is designed to support the collection of potentially responsive information using automated E-Discovery tools that rely on keywords, key phrases, index queries, or other technological assistance to retrieve Electronically Stored Information (ESI) from EPA systems in response to information requests. This procedure recognizes that automated information collection may result in large volumes of data, and is intended to provide guidance for preserving all information for the shortest time necessary and consistent with law. This ensures that both our legal obligations for preservation are met and that unnecessary retention does not adversely impact EPA's computer systems operation or other business processes. **This procedure is designed to be used in conjunction with the EPA's suite of E-Discovery tools or similar automated data collection tools that result in large collections of data responsive to keywords, key phrases, or index queries.**

---

### 2. SCOPE AND APPLICABILITY

This procedure applies to data collected from EPA computer systems using automated E-Discovery tools. "Data" as referred to in this procedure is the data that will be collected by creating a logical (forensic) copy of electronic data from EPA systems. This document does not supersede any applicable records schedule or retention obligation for the original files or data as stored by information custodians on EPA systems.

---

### 3. AUDIENCE

The audience for this procedure includes all EPA personnel handling E-Discovery and responses to information requests such as requests under the Freedom of Information Act (FOIA). In particular, this procedure is intended for IT staff, program staff and legal staff that are responsible for case management and data collection or data processing using the EPA's suite of E-Discovery tools as part of the Agency's legal obligations to search for and process data in response to information requests and court-mandated legal discovery. The audience includes examiners, case managers, and individuals responsible for maintaining EPA's E-Discovery infrastructure.

---

### 4. BACKGROUND

Electronic data collection presents new challenges to Agency resources. Even with carefully crafted search parameters, a large volume of ESI is gathered, including keyword responsive, but not relevant, information. This collected data must be preserved in a manner consistent with applicable records schedules or E-discovery data retention requirements; litigation can span years and even decades, compounding the problems of storage. Business needs (such as real expense from storage methods) and other risks of over-preservation should be considered as part of the launch of electronic data collection tools.

---

---

## 5. AUTHORITY

### *Statutes*

- **40 U.S.C. Chapter 25** - Information Technology Management  
(Clinger-Cohen Act of 1996, also known as the Information Technology Management Reform Act of 1996)
- **44 U.S.C. Chapter 31** - Records Management by Federal Agencies  
(Federal Records Act)
- **44 U.S.C. Chapter 33** - Disposal of Records
- **44 U.S.C. Chapter 35** - Coordination of Federal Information Policy  
(Paperwork Reduction Act of 1980, as amended, Paperwork Reduction Reauthorization Act of 1995, and Government Paperwork Elimination Act)
- **5 U.S.C. § 552** – Freedom of Information Act (as amended)

### *Rules*

- **Federal Rules of Civil Procedure:**  
[www.uscourts.gov/uscourts/rules/civil-procedure.pdf](http://www.uscourts.gov/uscourts/rules/civil-procedure.pdf)
- **Federal Rules of Criminal Procedure:**  
<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Criminal%20Procedure.pdf>
- **Federal Rules of Appellate Procedure:**  
<http://www.uscourts.gov/uscourts/rules/appellate-procedure.pdf>

### *Guidance*

- **EPA Records Management Policy CIO 2155.1**
- **OMB Circular A-123 - "Management's Responsibility for Internal Control" (2004).** This Circular provides guidance to Federal managers on improving the accountability and effectiveness of Federal programs and operations by establishing, assessing, correcting, and reporting on internal control.
- **OMB Circular A-130- "Management of Federal Information Resources" (1996).** This Circular clarifies the requirements of the Clinger-Cohen Act and requires agencies to "use electronic collection techniques where such techniques can reduce burden on the public, increase the efficiency of government programs, reduce costs to the government and the public, and/or provide better service to the public" (Sec. 8(1)(3)).
- **EPA Records Schedules 030 (Freedom of Information Act Requests), 032 (Freedom of Information Act Appeals), 141 (Controlled / Major Correspondence), and 675 (Litigation Involving EPA)**

---

## 6. PROCEDURES

### I. Information Collection for Freedom of Information Act Responses, Congressional Inquiries, and Other Non-Litigation Requests for Data Collection:

#### A. Collection for Processing a FOIA Request

For requests that may require processing using E-Discovery tools, both the EPA and the requestor are better served by focusing the search. For these requests, the EPA should engage the requestor in efforts to refine the request and tailor the search to the narrowest scope possible before collection begins. Collection should be limited, to the extent possible, to specific custodians, time frames, data sources, file extensions, file types, and key words or phrases. Keywords or phrases suggested by requestors should be evaluated and negotiated as necessary in an attempt to identify the keywords or phrases most likely to locate relevant and responsive information. The EPA may use E-Discovery tools to collect metadata fields or to collect information from a small number of custodians for internal review purposes, such as to adequately and efficiently identify those keywords most likely to locate relevant and responsive information. The FOIA-specific Collection Questionnaire will be used by legal, program, and technical staff to provide information regarding the search, collection, and review.

#### B. Retention of Collected ESI Responsive to the FOIA Request

This data retention procedure relates only to the ESI collected by E-Discovery tools in the course of processing a response to a FOIA request using automated collection tools; the official file copy of EPA's response to a FOIA request is subject to a separate retention schedule and storage requirements. This section incorporates EPA Records Schedules EPA-030 and EPA-032 and/or future applicable records schedules by reference.

In the absence of a litigation hold or other preservation obligation, ESI that was electronically collected as part of an overall data collection in the course of processing a FOIA request may be deemed a convenience copy for records purposes and may be destroyed once no longer needed as described below. The technical point of contact and the designated case manager will work cooperatively to manage storage of the collection on the E-Discovery servers and any secondary locations. Written concurrence between the technical point of contact and the designated case manager will be required before a collection may be moved from the E-Discovery servers and/or destroyed.

- 1) *Initial Grants of Requests.* If EPA grants access to all responsive documents requested, ESI that is determined to be responsive to the request and which has already been collected by E-discovery software in the course of processing the request may be destroyed as a convenience copy in the following instances:
    - a) If the responsive ESI has been transferred to an approved records management system for records management purposes, the collected ESI in the E-discovery system may be destroyed as a convenience copy;
    - b) If the responsive ESI is not transferred to an approved records management system for records management purposes, it must be retained for two years after the date of reply, or until such time as it is transferred to an approved records management system for recordkeeping purposes. [EPA-030a(1)]
  - 2) *Initial Denials of Requests.* If EPA denies access to all or part of the responsive documents requested, which have already been collected by E-discovery software, and the requestor does not appeal the adverse determination within 30 days, ESI that is determined to be responsive to the request and that was collected by E-discovery software in the course of processing the request may be destroyed as a convenience copy in the following instances:
-

- 
- a) If the responsive ESI has been transferred to an approved records management system for records management purposes, the collected ESI in the E-discovery system may be destroyed as a convenience copy;
  - b) If the responsive ESI is not transferred to an approved records management system for records management purposes, it must be retained for six years after the date of reply, or until such time as it is transferred to an approved records management system for recordkeeping purposes. [EPA-030a(3)(a)]
- 3) *Appeals*. FOIA requesters are entitled to 30 days from the Agency's response to appeal. During the appeal period, the responsive documents, which have already been collected by E-discovery software, should be maintained in a readily reviewable and accessible format.
- a) If, after the 30 day appeal period, the requestor has not filed an appeal of EPA's response, the EPA contact responsible for initiating the collection request must notify OEI that there has been no appeal. The technical point of contact and the case manager will then work cooperatively to manage storage of the collection on the E-Discovery servers and any secondary locations.
  - b) If the requestor files a timely appeal of EPA's response, the responsive ESI should be retained in a readily accessible/reviewable format for a period of no less than 30 days after OGC has completed its response to the appeal. The OGC attorney assigned to the appeal must contact OEI to notify them when the appeal is complete and to provide guidance on how long the information must be retained before moving to secondary storage or an approved records management system.
  - c) If, following the appeal, the responsive ESI is transferred to an approved records management system for records management purposes, the collected ESI in the E-discovery system may be destroyed as a convenience copy.
- 4) *Litigation*. The retention procedures described in section 6(I)(B) are to be suspended in cases where a litigation hold has been placed on the records or where the agency is in litigation regarding the records request. Where the collected ESI is subject to a litigation hold as described in section 6(II)(A), Agency staff responsible for E-Discovery systems should follow the procedures described in section 6(II)(B) and (C), below. The OGC attorney assigned to the FOIA litigation is responsible for notifying relevant IT staff and contacts of any additional preservation obligations. These preservation obligations, including any applicable litigation holds, will supersede the procedure defined in this document.

### **C. Retention of Collected ESI Responsive to Congressional Inquiries or Information Requests**

This data retention procedure relates only to the documents collected as part of a response to Congressional inquiries or information requests; the official file copy of the response is subject to a separate retention schedule. This section incorporates EPA Records Schedule EPA-141 and/or future applicable schedules by reference.

- 1) When a senior EPA official receives a Congressional inquiry or information request, information responsive to that request is considered a permanent record.
  - 2) Following EPA's response to the information request, ESI that is determined to be responsive to the Congressional request and that was collected by E-discovery software in the course of processing the request may be destroyed as a convenience copy in the following instances:
    - a) If the responsive ESI has been transferred to an approved records management system for records management purposes, the collected ESI in the E-discovery system may be
-

---

destroyed as a convenience copy;

- b) If the responsive ESI is not transferred to an approved records management system for records management purposes, it must be retained. These collections are to be preserved in secondary storage consistent with appropriate records schedules and applicable statutes and then transferred to the National Archives and Records Administration (NARA) in five-year increments, or as specified by schedule. The electronic collection held by EPA may be destroyed upon completion of transfer to NARA. [EPA-141a(2)].

#### **D. Retention of Collected ESI for Other Internal or External Requests**

Section 6.I of this data retention procedure relates to ESI collected as part of responding to FOIA requests or Congressional inquiries or information requests. Section 6.II of this data retention procedure relates to ESI collected in Agency litigation or that is subject to an Agency litigation hold. For other internal or external requests for data collection using E-Discovery software, separate collection procedures and/or Agency records schedules may apply.

- 1) Following EPA's response to the information request, ESI that is determined to be responsive to the request and that was collected by E-discovery software in the course of processing the request may be destroyed as a convenience copy in the following instances:
  - a) If the responsive ESI has been transferred to an approved records management system for records management purposes, the collected ESI in the E-discovery system may be destroyed as a convenience copy;
  - b) If the responsive ESI is not transferred to an approved records management system for records management purposes, it must be retained until such time as it is transferred to an approved records management system or until no longer subject to a retention schedule. These collections are to be preserved in secondary storage consistent with appropriate records schedules and applicable statutes as may apply.

## **II. Information Collected in Litigation or that is Subject to a Litigation Hold**

### **A. Issuance of a Litigation Hold to Information Custodians**

EPA has implemented systems to standardize the issuance of a litigation hold notice, directing custodians to preserve potential evidence. Preserving evidence is a legal obligation, and complying with a litigation hold issued by agency counsel is mandatory. A litigation hold suspends all applicable records schedules, retention policies and procedures, and instructs that any and all potentially relevant documents must be preserved until the litigation hold is released.

### **B. Collection for Discovery in Civil or Criminal Litigation**

In some instances contested litigation proceeds to legally mandated information collection ("discovery"). The EPA acknowledges that the large-scale collection of documents is resource-intensive and should not be initiated until it is clear that discovery will occur. The EPA's legal staff will advise as to when collection is appropriate in a particular case.

When feasible using available technology, legal staff will direct that the collection will be completed in multiple phases. The initial phase may consist of the identification and refinement of search parameters based on metadata collection or collection limited to key custodians prior to a full collection of relevant documents from all custodians. As part of this process, multiple collections of metadata with sets of increasingly refined search parameters will result until the final search expression is in place. Although the search parameters are chosen to maximize the relevant information collected, there may still be a portion of the collected material that is keyword responsive but is irrelevant to the specific case or matter. The E-Discovery Collection Questionnaire will be used by legal and technical staff to provide information regarding the search, collection, and review.

---

### C. Retention of Collected ESI in Civil or Criminal Litigation and Discovery

This data retention procedure relates only to the copies of ESI collected as part of production of information for civil or criminal litigation (such as in formal discovery); the official, original ESI should be maintained in its original location and format until the litigation is over and it again becomes subject to its separate retention schedule.

- 1) *Early Case Assessment.* The collection of ESI metadata from key custodians and/ or any preliminary ESI collections completed from those key custodians used to refine search parameters must be maintained where located, such as on E-Discovery Servers, until discovery is completed and all outstanding or potential discovery disputes have been resolved. The technical point of contact and the litigation team will work cooperatively to manage storage of the collection on the E-Discovery servers and any secondary locations. Written concurrence between the technical point of contact and the designated case manager will be required before information may be moved from a current location to secondary storage.
- 2) *Information Collected for Discovery.* ESI collected from all custodians, including the key custodians, using the final search parameters agreed to by the parties or ordered by the court, will be maintained in a readily accessible format in any software platforms into which it is loaded during the active review and processing phase of the litigation. After the active review and processing is complete, the litigation team and/or the technical point of contact may consider moving all or a portion of the information to secondary storage. Written concurrence between the technical point of contact and the designated case manager will be required before a collection may be moved from a current location to secondary storage. The technical point of contact and the litigation team will work cooperatively to manage storage of the collection on the E-Discovery servers and any secondary locations.
- 3) Relevant information must be retained by EPA in secondary storage until entry of final judgment with no further opportunity for appeal or until the litigation hold is otherwise lifted and **may not be deleted or destroyed** from secondary storage without approval of the EPA attorney in charge of the litigation in consultation with the Department of Justice, as appropriate. The attorney in charge of the litigation will inform OEI within 30 days of the end of the litigation that litigation is complete and the Department of Justice has approved the transfer of the information to longer term storage, if necessary.

---

## 7. ROLES AND RESPONSIBILITIES

### Office of Enforcement and Compliance Assurance, Attorneys

- When designated as case managers, attorneys are accountable for identification of individuals responsible for a legal case or project using E-Discovery tools. Responsibilities include filling out and approving questionnaires, formulating keywords and index queries, reviewing and approving initial metadata collections, and communicating with the technical and legal team regarding the case.
- Responsible for providing legal advice and consultation on issues of legal adequacy, legal defensibility, and other legal issues that may arise in the E-Discovery process.
- Responsible for working cooperatively with technical and legal staff to manage storage of a collection on E-Discovery servers and any secondary locations.

### Office of General Counsel, Attorneys

- When designated as case managers, attorneys are accountable for identification of individuals responsible for a legal case or project using E-Discovery tools. Responsibilities include filling out and approving questionnaires, formulating keywords and index queries, reviewing and approving initial metadata collections, and communicating with the technical and legal team regarding the case.
- Responsible for providing legal advice and consultation on issues of legal adequacy, legal defensibility, and other legal issues that may arise in the E-Discovery process.

- 
- Responsible for working cooperatively with technical and legal staff to manage storage of a collection on E-Discovery servers and any secondary locations.

#### **Offices of Regional Counsel and Regional Enforcement, Attorneys**

- When designated as case managers, attorneys are accountable for identification of individuals responsible for a legal case or project using E-Discovery tools. Responsibilities include filling out and approving questionnaires, formulating keywords and index queries, reviewing and approving initial metadata collections, and communicating with the technical and legal team regarding the case.
- Responsible for providing legal advice and consultation on issues of legal adequacy, legal defensibility, and other legal issues that may arise in the E-Discovery process.
- Responsible for working cooperatively with technical and legal staff to manage storage of a collection on E-Discovery servers and any secondary locations.

#### **FOIA Coordinators and EPA Program Office Staff with FOIA Responsibilities**

- When designated as case managers, program office staff and FOIA coordinators are accountable for identification of individuals responsible for a legal case or project using E-Discovery tools. Responsibilities include filling out and approving questionnaires, formulating keywords and index queries, reviewing and approving initial metadata collections, and communicating with the technical and legal team regarding the case.
- Program office staff and FOIA coordinators are responsible for working cooperatively with technical staff to manage storage of a collection on E-Discovery servers and any secondary locations.

#### **Office of Environmental Information, Office of Information Collection (OIC)**

- Responsible for technical implementation, maintenance, security and stability of EPA's E-Discovery tools and the E-Discovery platform.
- When designated as Examiners, responsible for using Agency collection software to collect and process Agency data. Responsible for providing technical assistance to designated Examiners to assist with collecting and processing Agency data.
- Accountable for working cooperatively with technical staff to manage storage of a collection on E-Discovery servers and any secondary locations.

#### **Office of Environmental Information, Office of Technology Operations and Planning (OTOP)**

- Accountable for providing necessary information about Agency systems and infrastructure to complete collections, and for providing access and support for access of Agency information technology resources.
- Accountable for managing Secondary Storage.
- Responsible for working cooperatively with technical staff and legal staff to manage storage of a collection on E-Discovery servers and any secondary locations.

#### **Local Servicing Organization (Regions and Program Offices)**

- When designated as Examiners, responsible for using Agency collection software to collect and process Agency data.
- Accountable for providing necessary information about local systems and infrastructure to complete collections, and for providing access and support for access of local information technology resources.
- Accountable for working cooperatively with technical staff to manage storage of a collection on E-Discovery servers and any secondary locations.
- Accountable for providing locally-generated ESI to Home Office's Temporary ESI Storage Area.

#### **All Agency Personnel**

- Responsible for properly managing records generated within the course of Agency business, including ESI records, in order to enable collection and review of Agency information.
- When notified of a litigation hold or preservation notice issued by an Agency attorney, responsible for maintaining information subject to the litigation hold as directed by the Agency attorney.
- Responsible for providing necessary information and cooperation with technical and legal staff.

---

## 8. DEFINITIONS

**Approved Records Management System:** An agency Records Management Application (RMA) approved for storing electronic federal records. This includes applications that are certified as compliant with the DoD 5015.2- STD standard or otherwise meet the NARA's standards for an RMA. EPA examples include Enterprise Content Management System (ECMS), Federal Docket Management Service (FDMS), and FOIAonline.

**Collection:** The act of collecting documents without altering metadata in response to terms using e-Discovery software or the set of documents collected in response to those search parameters and search expressions.

**E-Discovery Servers:** Those servers which have been provided to support collection, processing and review (e.g. EnCase, Relativity and Equivio servers). These servers access ESI through primary or secondary storage depending upon where the ESI is stored. This is the most accessible and most expensive storage.

**Examiners:** Individuals responsible for using Agency collection software to collect and process Agency data.

**Case Managers:** Individuals responsible for managing a case or project using E-Discovery tools. Responsibilities include filling out and approving questionnaires, formulating keywords and index queries, reviewing and approving initial metadata collections, and communicating with the tech and legal team regarding the case.

**Logical Copy / Forensic Copy / Forensic Image:** A bit-by-bit copy of a section of a computer system's hard drive. Retains all metadata and is considered forensically sound for use as evidence in court. A forensic copy is often accompanied by a calculated Hash signature to verify that the copy is an exact duplicate of the original.

**Metadata:** "Data about data" includes information that identifies a file such as creation date, last modified date, creator, file path and location, etc.

**Primary storage:** High performance, on-line disk storage unit that provides real-time access to ESI for purposes of ESI processing.

**Secondary storage:** A system location where ESI related to a case or collection can be stored, retrieved, and loaded into an accessible and readily reviewable format (such as on E-Discovery servers) at the direction of the legal point of contact, normally within 24 hours.

---

## 9. WAIVERS

In the event of circumstances such as a court order to deviate from this procedure, these procedures will not apply. All such departures from this procedure must be documented with justification for the departure.

---

## 10. RELATED POLICIES, STANDARDS, AND GUIDANCE

Related procedures and guidance documents can be found at EPA's E-Discovery intranet site:  
<http://intranet.epa.gov/ediscovery>

---

## 11. MATERIAL SUPERSEDED

None.

---

**12. ADDITIONAL INFORMATION**

For further information, please visit the eDiscovery Intranet site: <http://intranet.epa.gov/ediscovery>

---



---

***Renee P. Wyon, Acting Assistant Administrator  
and Chief Information Officer  
Office of Environmental Information***

---