

EPA INFORMATION POLICY

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CIO Transmittal No.: 12-009	Review Date: 12/10/2015

*Issued by the EPA Chief Information Officer,
Pursuant to Delegation 1-19, dated July 07, 2005*

Preservation of Separated Personnel's Electronically Stored Information Subject to Litigation Holds

The United States Environmental Protection Agency (EPA) has an obligation to preserve information that may become evidence in a lawsuit.

As set out in this Interim Policy, all electronically stored information (ESI) subject to a litigation hold created or received by EPA personnel who have separated from an employment, contract or grant relationship with EPA must be preserved.

1. PURPOSE

This Interim Policy is designed to ensure the preservation of electronically stored information (ESI), created or received by EPA employees, contractors or grantees with user and email accounts on EPA networks, who have ended their employment, contract or grant with an EPA office, and whose ESI is subject to a litigation hold. In accordance with this policy, procedures will be issued setting out the process to be followed *prior* to an employee's, contractor's or grantee's separation from service with EPA. This Interim Policy also clarifies the requirement of the 2008 Litigation Hold Guidelines (see Section 7, "Related Policies, Standards and Guidance") that "proper arrangements are made for departing employees."

2. SCOPE AND APPLICABILITY

This Policy addresses preservation of separated personnel's ESI subject to litigation holds. It does not address information preservation requirements prescribed by records management requirements, Freedom of Information Act (FOIA) requirements, or other information preservation requirements provided by applicable statutes or regulations.

3. AUDIENCE

All EPA employees, contractors and grantees with user and email accounts on EPA networks.

4. BACKGROUND

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In today's world of technology and electronic communications, government agencies must pay increasing attention to the preservation of evidence that may be relevant to reasonably anticipated or existing litigation. The need to respond both accurately and appropriately to discovery and other information requests is critical to EPA's ability to meet its legal obligations. EPA recognizes these legal obligations, and in a timely manner will preserve separated personnel's ESI when it is subject to a litigation hold.

5. AUTHORITY

Statutes

- **Clinger-Cohen Act of 1996, Pub. L. No. 104-106.** The Act provides EPA's Chief Information Officer (CIO) responsibility for "developing, maintaining, and facilitating the implementation of a sound and integrated information technology architecture for the executive agency" (Sec. 5125(b)(2)) and "promoting the effective and efficient design and operation of all major information resources management processes for the executive agency, including improvements to work processes of the executive agency" (Sec. 5125(b)(3)).
- **Government Paperwork Elimination Act (GPEA) of 1998, Pub. L. No. 105-277.** This Act requires federal agencies to provide electronic reporting options to regulated entities.
- **E-Government Act of 2002, Pub. L. No. 107-347.** This Act is designed to enhance the management and promotion of electronic government services and processes.

Rules

- **Federal Rules of Civil Procedure**
- **Federal Rules of Criminal Procedure**

Guidance

- **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(l)(3)).

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6. POLICY

I – Separated Custodians’ ESI Must be Preserved

- 1) ESI subject to a litigation hold must be preserved, whether the custodian of such ESI is current EPA personnel or has separated from service with EPA.
- 2) The Office of Environmental Information (OEI), each Regional office, Office of Enforcement and Compliance Assurance (OECA), and Office of General Counsel (OGC) will work together to ensure that separated custodians’ ESI is preserved.
- 3) This requirement is effective immediately.

II – Separated Custodians’ ESI Must be Accessible

- 1) Separated custodians’ ESI must be accessible to case attorneys and other appropriate personnel for them to meet their discovery obligations for current or reasonably anticipated litigation.
- 2) This requirement is effective immediately.

III – EPA Will Employ Its Standard Litigation Hold eDiscovery Software Tool to Manage Agency Litigation Holds and Custodians

- 1) EPA will employ its standard ediscovery litigation hold software tool to generate and manage a list of all litigation holds (including those issued prior to this Policy’s issuance) and custodians whose ESI is subject to a litigation hold.
- 2) The list of custodians contained in EPA’s standard ediscovery litigation hold software tool will include separated personnel who are custodians of ESI subject to litigation holds.
- 3) This requirement will become effective upon the completion of the migration of all litigation holds into EPA’s standard ediscovery litigation hold software tool.

IV – EPA Will Employ Its Standard eDiscovery Litigation Hold Software Tool to Identify Separated Custodians

- 1) Using EPA’s standard ediscovery litigation hold software tool, EPA will identify separated personnel who are custodians of ESI subject to litigation holds.
- 2) This requirement will become effective upon the completion of the migration of all litigation holds into EPA’s standard ediscovery litigation hold software tool.

V – Preservation Requirements for Separated Personnel’s ESI

- 1) For purposes of litigation holds, only the ESI of separated personnel whose names appear on the current list of custodians must be preserved.
- 2) This Policy does not address information preservation requirements prescribed by records management requirements, FOIA requirements, or other information preservation requirements provided by applicable statutes or regulations, including the need to preserve ESI in conjunction with a criminal proceeding.

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This requirement will become effective upon the completion of the migration of all litigation holds into EPA's standard ediscovery litigation hold software tool.

7. RELATED DOCUMENTS

- None.
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8. ROLES AND RESPONSIBILITIES

Office of Enforcement and Compliance Assurance Principal Deputy Assistant Administrator

- Accountable for populating the EPA's standard ediscovery litigation hold software tool with litigation holds, custodians associated with each litigation hold, identification of separated custodians, and continuous updating of litigation hold database.

Office of Environmental Information

- Accountable for working with Regional offices, the Office of Enforcement and Compliance Assurance (OECA), and the Office of General Counsel (OGC) to ensure that separated custodians' ESI is preserved.

Office of General Counsel Principal Deputy General Counsel

- Accountable for populating EPA's standard ediscovery litigation hold software tool with litigation holds, custodians associated with each litigation hold, identification of separated custodians, and continuous updating of litigation hold database.

Regional Counsels

- Accountable for populating EPA's standard ediscovery litigation hold software tool with litigation holds, custodians associated with each litigation hold, identification of separated custodians, and continuous updating of litigation hold database.
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9. DEFINITIONS

Contractor: A private entity with a formal legally binding agreement, procured for a specific period, to perform duties or to act on behalf of an official agent of the Federal government.

Custodian: EPA personnel who currently or formerly had possession, control or custody of ESI subject to a litigation hold.

Discovery: Pre-trial devices used by one party to obtain facts and information about a case from the other party to assist in preparation for trial.

Employee: EPA management and staff (including temporary staff such as student interns and law clerks) with user and email accounts on EPA networks.

EPA Networks: Computers, servers, external drives and any other electronic information storage devices or systems where ESI can be stored, and which has been purchased or leased by EPA for

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EPA's use.

EPA Personnel: EPA employees (including students such as law clerks and interns), contractors or grantees with user and email accounts on EPA networks.

ESI: Electronically Stored Information, which includes, but is not limited to, email messages, voicemail messages, instant messaging dialogues, conference call transcripts, word processing documents, spreadsheets, personal and shared calendars, information contained in computer databases, digital photographs, and related metadata for all of these types of ESI.

Grantee: Program participant of a cooperative agreement or grant which an organization has with EPA.

Separated Custodian: Separated personnel who had possession, control or custody of ESI subject to a litigation hold.

Separated Personnel: Employees, contractors or grantees with user and email accounts on EPA networks, who no longer are employed by or have a grant relationship with an EPA office, whether by retirement; permanent transfer to another federal agency, public or private organization; or any other situation in which an employment or grant relationship is severed.

Separation: Permanent severing of employment or contractor /grantee relationship, whether by retirement; permanent transfer to another EPA organization; permanent transfer to another federal agency, public or private organization; or any other situation in which an employment or contract/grant relationship is severed.

10. WAIVERS

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

11. RELATED POLICIES, STANDARDS AND GUIDANCE

- EPA Order 3110.5A – Clearance Procedure for Employees Separating or Transferring from EPA
- Memorandum from Associate Attorney General Thomas Perrelli, “Electronic Discovery Follow-up,” March 9, 2012
- Memorandum from Catherine McCabe and Brenda Mallory, “Obligation to Preserve Information That May Be Relevant in Litigation,” July 26, 2010
- Memorandum from Associate Attorney General Thomas Perrelli, “Electronic Discovery,” July 2, 2010
- Memorandum from OECA Principal Deputy Assistant Administrator Catherine McCabe and OGC Principal Deputy General Counsel Patricia Hirsch, “Transmittal of Litigation Hold Guidelines,” December 16, 2008

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- United States Attorneys Bulletin on Electronic Discovery, May 2008, Volume 56, No. 3. (http://www.justice.gov/usao/eousa/foia_reading_room/usab5603.pdf)
- Memorandum from Acting Associate Attorney General, "Electronic Discovery and the Preservation Obligation," July 19, 2007

12. MATERIAL SUPERSEDED

Interim Policy - Preservation of Separated Personnel's Electronically Stored Information Subject to Litigation Holds, CIO Number 2185.0 Dated 10/01/2012.

13. ADDITIONAL INFORMATION

For further information, please contact the Records and Content Management Branch, Collection Strategies Division, Office of Information Collection, Office of Environmental Information.



*Malcolm D. Jackson, Assistant Administrator
and Chief Information Officer
Office of Environmental Information*