

## **Litigation Hold Procedures**

### **Definitions**

Electronically Stored Information (ESI) - Any information stored electronically, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

Potentially Discoverable - Any items, including documents, tangible things, or ESI, that may fall within the scope of discovery in a particular lawsuit under the Federal Rules of Civil Procedure or the Texas Rules of Civil Procedure (meaning the items could be responsive to a discovery request determined by the System Office of General Counsel to be reasonably calculated to lead to the discovery of admissible evidence at the trial of the matter).

### **Notice of Litigation:**

When [insert System member name] receives notice that a lawsuit has been filed against [insert System member name] or any of its employees acting in the course and scope of their employment, or when the institution/agency, in consultation with the System Office of General Counsel (OGC), reasonably anticipates litigation against it, [insert System member name] must act to preserve documents, tangible things, and ESI that may relate to the litigation and that is in the institution/agency's possession, custody, or control.

- (1) Notice of actual pending litigation may come from differing events including receipt of a discovery request or the service of citation upon the filing of a complaint or petition.
- (2) Reasonable anticipation of litigation is determined on a case-by-case basis considering the facts and circumstances known to the institution/agency regarding the potential for litigation. The standard, however, requires more than a mere possibility of litigation. The OGC will make the final determination of whether litigation is reasonably anticipated.

[Insert System member name] employees must report to their respective supervisor notice of any pending or potential litigation as soon as is reasonably possible and on the same working day when notice of the pending or potential litigation was received. Supervisors must report notice of pending or potential litigation to the supervisor's department/unit head, who will report the notice to the respective vice president/assistant agency director, the office of the institution/agency's chief executive officer, and the OGC on the same working day on which notice of the pending or potential litigation was received.

The OGC will determine whether to initiate a litigation hold within one (1) day of receiving notice of the pending or potential litigation.

**Litigation Hold Procedures:**

The following procedures will be followed whenever the OGC determines that a litigation hold is necessary.

A. The OGC will communicate to [insert System member name]’s chief executive officer that it intends to issue a litigation hold.

B. [Insert System member name] will establish a Litigation Hold Response Team (“Response Team”) to administer the litigation hold. The team should include representatives from the following areas of the institution/agency: institution/agency administration, the institution/agency’s records officer or designee, the chief information officer or designee (for ESI issues), administrator(s) of division/area of institution/agency from/to which the dispute arises/relates. A representative of the OGC will also be part of the Response Team.

C. The Response Team will assist the OGC in determining the preliminary scope and subject matter for the legal hold notice as follows:

- (1) Identify and list all persons with knowledge of facts that may relate to the pending or potential litigation, including persons who created, edited, communicated, handled, or had custodial responsibility for potentially discoverable documents and tangible things, (NOT including ESI);
- (2) Develop a plan for preserving potentially discoverable documents and tangible things (NOT including ESI) held by persons with knowledge of facts that may relate to the pending or potential litigation.
- (3) Identify and list all persons with knowledge of facts that may relate to the pending or potential litigation, including persons who created, edited, communicated, handled, or had custodial responsibility for potentially discoverable ESI;
- (4) Identify all IT architecture within the preliminary scope and subject matter of the pending or potential litigation;
- (5) Develop an ESI preservation plan, including taking immediate steps to preserve data held by central services (e-mail, calendars, etc.).

D. The OGC will issue the formal litigation hold notice to all involved parties within the institution/agency. The IT support department/division shall be informed of: (1) the litigation hold; (2) identified ESI custodians; (3) relevant dates; and (4) the subject matter

of the litigation, including, to the extent available, the names of parties and witnesses that may control or possess potentially discoverable ESI. The Response Team may:

- (1) Assign roles and delegate responsibilities for implementing the litigation hold; and
- (2) Review the ESI preservation plan and the plan for preserving documents and tangible things (NOT including ESI) to determine if any adjustments are necessary.

E. The Response Team shall establish deadlines for implementation of the litigation hold, identification of sources and custodians of documents and tangible things (NOT including ESI), identification of ESI sources and custodians, preservation of documents and tangible things (NOT including ESI), and preservation of ESI.

F. At the direction of the Response Team, the IT support department/division head shall assign an IT support employee to serve as the Legal Hold Data Manager (“Data Manager”) for the case. The Data Manager will ensure secure storage areas for potentially discoverable ESI for the case. To this end, the Data Manager must:

- (1) Plan and build a case folder structure;
- (2) Establish voicemail and e-mail hold areas; and
- (3) Develop instructions on how to use these areas for the individuals involved in the case.

G. In consultation with the Response Team, the IT support department/division for ESI, and, in the case of actual pending litigation, the trial attorney assigned to represent the institution/agency, the OGC may modify the scope of the litigation hold, the documents, tangible things, and ESI within the litigation hold, and the means of preserving and producing documents, tangible things, and ESI.

H. The Response Team will monitor implementation of the litigation hold and will:

- (1) Inform individuals involved in the case of the instructions for using the electronic record storage area for ESI;
- (2) Provide an overview of the steps in the litigation hold process;
- (3) Provide the name of the designated Data Manager; and
- (4) Monitor and review the determination of the OGC and trial counsel whether there are documents, tangible things, or ESI subject to any privilege, for which necessary actions will be taken to segregate such documents or tangible

things (NOT including ESI), or for which a separate folder in the storage area will be set up by the Data Manager for ESI.

I. The Response Team and the Data Manager shall review the instructions for use of the ESI storage area(s) to establish a consensus on the structure of the storage area(s) and the procedures for use by data custodians. The Response Team shall submit such instructions and procedures to the OGC and trial counsel for approval.

J. The Data Manager must conduct ESI data collection interviews with all data custodians as soon as possible, using questionnaires to document responses. The Data Manager should inform the interviewee of how the information will be used, and attempt to answer the interviewee's questions, as appropriate.

K. The Response Team or designee must conduct collection interviews with all custodians of documents and/or tangible things (NOT including ESI) as soon as possible, using questionnaires to document responses. The Response Team or designee should inform the interviewee of how the information will be used, and attempt to answer the interviewee's questions, as appropriate.

L. The Data Manager must develop an ESI data collection plan, which is subject to approval by the Response Team, the OGC, and trial counsel. Information gleaned from the data collection interviews should be utilized by the Data Manager when developing the plan and by the Response Team and trial counsel when reviewing the plan for approval.

M. The Response Team or designee must develop a collection plan for documents and tangible things (NOT including ESI), which is subject to approval by the OGC and trial counsel. Information gleaned from the collection interviews should be utilized by the Response Team or designee when developing the plan and by the OGC and trial counsel when reviewing the plan for approval.

N. Pursuant to an approved ESI data collection plan, the Data Manager shall begin to collect ESI. The Data Manager should mirror all files in the data custodian's devices identified in the plan. The Data Manager should inform the Response Team and trial counsel when the data collection is complete.

O. Pursuant to an approved collection plan for documents and tangible things (NOT including ESI), the Response Team or designee shall begin to collect the documents or tangible things. The Response Team should inform the OGC and trial counsel when the collection is complete.

P. The Data Manager must develop an ongoing ESI data collection plan, which is subject to approval by the Response Team, the OGC and trial counsel. Once approved, the Data Manager, the Response Team, the OGC and trial counsel shall monitor ongoing data collection efforts by data custodians.

Q. The Response Team or designee must develop an ongoing collection plan for documents and tangible things (NOT including ESI), which is subject to approval by the OGC and trial counsel. Once approved, the OGC and trial counsel shall monitor ongoing collection efforts by the Response Team or designee.

R. Upon the conclusion of the anticipated or pending litigation, as determined by the OGC and trial counsel, the OGC will issue a notice to the chief executive officer, Response Team, and all involved parties within the institution/agency, lifting the formal litigation hold. The OGC will also provide instructions to the institution/agency's chief executive officer and Response Team regarding the disposal or destruction of all documents, tangible things, or ESI preserved and/or collected during the anticipated or pending litigation.