

Preservation of Records for Litigation

University Operations – Administrative

EWU Policy 201-02
Effective November 17, 2017

Authority: EWU Board of Trustees
Proponent: University President

Summary: This policy describes standards and procedures for preservation and retrieval of records and information at Eastern Washington University as required for pending or reasonably anticipated litigation.

History: This policy revises and supersedes the previous version dated December 2, 2008. Revisions to this policy were approved by the Board of Trustees on November 17, 2017.

1. INTRODUCTION

1-1. Background

EWU is required by federal and state law to preserve records and information that could be relevant to pending or reasonably anticipated lawsuits or external investigations and to retrieve and produce such materials in the course of such litigation. Failure to meet these obligations may subject the university and the individuals involved to sanctions and liability.

1-2. Actual or Reasonably Anticipated Litigation

The obligation to preserve potential evidence arises when there is actual or reasonably anticipated litigation. Any university employee who receives notice of a potential lawsuit against the university must contact either the university's risk manager or the university's assistant attorney general.

The risk manager and assistant attorney general will determine whether, based on the information provided, litigation is reasonably anticipated. Determining when facts or circumstances are reasonably likely to lead to litigation requires a case-by-case consideration of the facts based on experience and professional judgment. Factors which can indicate whether litigation is "reasonably foreseeable" or "reasonably likely" include:

- a. Historical Experience – similar situations in the past that led to litigation
- b. Filed Complaints – complaints filed with the university or an enforcement agency
- c. Significant Incidents – events resulting in known and significant injury
- d. Attorney Statements – statements by an attorney regarding a dispute with the university
- e. Employee or Student Statements – statements by employees or students regarding potential litigation
- f. Initiation of Dispute Resolution Procedures – initiation of a dispute resolution clause in a contract

- g. Public Records Requests – public records requests which suggest likely future litigation
- h. Event Reported In the Press – events reported in the press, where history suggests litigation

2. RESPONSIBILITIES

2-1. University Risk Manager

The University Risk Manager is responsible for coordinating and overseeing university activities in response to current or reasonably anticipated litigation. The University Risk Manager shall coordinate information gathering and preservation consistent with applicable laws and university policies.

2-2. Assistant Attorney General

The Assistant Attorney General (AAG) initiates and facilitates preservation efforts for the university.

2-3. University Employees

All university employees have an obligation to immediately notify the university's assistant attorney general when they are aware of somebody filing or threatening to file a lawsuit or a complaint with an external agency.

2-4. University Records Officer

As required by RCW 40.14.040, the University Records Officer manages and oversees university compliance with state and federal laws and regulations relating to the preservation and destruction of electronic and paper information.

3. ELECTRONICALLY STORED INFORMATION (ESI)

3-1. ESI Types / Formats

Electronically Stored Information (ESI) includes all forms of electronic communications and records. Examples of ESI include, but are not limited to:

- Email messages

- Text (SMS) messages
- Word-processing documents
- Documents shared on drives, such as Sharepoint, Dropbox, Google Drive
- Spreadsheets
- Databases
- Digital images
- Video files
- Audio files (including voicemails)
- Web pages
- Blogs
- Calendars
- Internet cookies
- Internet bookmark / favorite addresses

3-2. ESI Locations

The requirements for preservation and retrieval of ESI apply without regard to where the ESI is stored – at a university work station, on a shared or external drive, on a laptop or mobile device, and even at an employee’s home.

While many records are stored on network servers, many other ESI records are stored on individual desktop computers, portable devices, or on shared drives. Email messages, for instance, may be maintained on the university servers or copied in “local folders” on an individual desktop, laptop, mobile device, etc.

ESI may also be available on backup storage media. The university maintains a backup process that periodically copies system data to backup media in order to enable system restoration in the event of an emergency. The backup system recycles storage media on a regular basis. For normal preservation purposes, emergency recovery copies of data are not practically accessible and interrupting their recycling would be impractical and expensive. As a result, such disaster recovery systems will usually be considered outside the scope of a Notice of Records Preservation, unless otherwise directed.

4. PRESERVATION PROCESS

4-1. General

When a lawsuit is filed – or reasonably anticipated – the university must take special precautions to prevent the loss or destruction of potentially-relevant information. The procedures described in this section serve as a guide for responding to potential litigation.

4-2. Information Preservation Plan

When a lawsuit is commenced against the university – or information is received such that a lawsuit is reasonably anticipated – the Risk Manager, in consultation with the

Assistant Attorney General, shall assess the issue and its risks and determine the university’s immediate preservation response.

The university’s response efforts will typically include:

1. Identifying the departments, units, and individuals who might possess potentially relevant information and notifying them of their responsibilities to preserve potentially relevant information;
2. Assessing what electronic records might need preserving and developing a plan for gathering and preserving such records;
3. Designating a specific person to coordinate and serve as a contact;
4. Establishing a method for following up, which may include sending out reminders, conducting preservation compliance checks, and addressing new questions or issues from agency employees with potential evidence;
5. Under certain circumstances, the university will consider additional preservation efforts such as imaging or sequestering of computers, imaging certain types of ESI, or other technological solutions to supplement the regular preservation efforts.

4-3. Litigation Hold

In most cases, key players who may have records relevant to pending or reasonably anticipated litigation will receive a Litigation Hold Notice. A Litigation Hold Notice will typically include:

- a. A definition of what constitutes a “record” of potentially relevant information.
- b. Direction to protect potentially-relevant records from destruction or modification.
- c. General information on how to protect records. This may include directing the administrator(s) of relevant system(s) to avoid any centralized or automatic destruction or alteration of such records.
- d. Identification of the categories of information to be preserved.
- e. Contact information for the Assistant Attorney General and/or the University Risk Manager.

The Assistant Attorney General will usually send out the Litigation Hold Notice; however, the University Risk Manager or other university official may also issue a litigation hold.

The AAG and/or Risk Manager may also notify/direct the University’s Office of Information Technology to preserve available records that are housed on the university’s servers or in a hosted environment.

4-4. Litigation Hold Response

Receipt of a Litigation Hold does not necessarily mean the recipient is directly involved in the matter. Rather, it means the potential evidence which the university must preserve may be in the person's possession or scope of responsibility and that the person, as an employee of the university, must immediately take reasonable steps to preserve such information. In particular, the person must:

- a. Acknowledge receipt of the Litigation Hold by signing and returning the Litigation Hold Notice Acknowledgment if one was included in the Litigation Hold Notice.
- b. Suspend any university or departmental policies or procedures that might call for the routine destruction of records under the recipient's control.
- c. Discontinue personal practices regarding the deletion of electronic records. For example, the deletion of possibly-relevant emails, voice mails, drafts of documents, and the like must also be suspended.
- d. Disable any "janitorial" functions, such as the automatic deletion of emails or other electronic records. The designated computer support person should be immediately contacted if assistance is required to disable such functions.
- e. Protect and preserve all potentially relevant records in their original form. For example, electronic records must be preserved, regardless of whether they have also been reduced to a hard-copy or whether a hard-copy already exists.
- f. Protect and preserve any new documents that are generated or received that may be relevant to the litigation after receipt of a Litigation Hold.
- g. Advise the Assistant Attorney General and/or Risk Manager of any personal information that may potentially be affected by the Litigation Hold.
- h. Follow all other specific instructions in the Litigation Hold.
- i. Consult with the AAG and/or Risk Manager regarding any questions involving records.

4-5. Follow-Up

The AAG and Risk Manager shall, as needed, follow up on active litigation holds. They shall also coordinate with the Associate Vice President for Human Resources and other university personnel on preservation of records for outgoing personnel.

4-6. Ending Preservation Requirements

When the litigation or threat of litigation that prompted the Litigation Hold has ended or litigation is no longer

reasonably anticipated, the AAG or Risk Manager or their designees will inform those who received the notice that they are no longer under any special obligations to preserve the identified categories of materials. At that point, only the university's normal retention schedules will apply to the documents.