

Evidence Preservation

POLICY

Washington State University (WSU or University) makes good faith efforts to identify and preserve potential evidence when litigation to which WSU is a party has been filed or is reasonably foreseeable.

Explanation

When litigation has been filed or is reasonably foreseeable, parties must preserve potential evidence. Failure to take reasonable steps to preserve potential evidence could lead to significant sanctions by the courts. This policy provides guidance and procedures for meeting these legal obligations.

Scope

This policy establishes evidence preservation procedures applicable in the event of litigation or potential litigation to which the University is a party. It also applies if University employees acting within the scope of their employment are parties. The policy applies to all documents and other potential evidence owned or under the control of the University or University employees. It requires preservation of potential evidence, including but not limited to electronically stored information (ESI) in its original (native) format, regardless of format or medium, when litigation has been filed or is reasonably foreseeable.

Definitions

Electronically Stored Information (ESI)

ESI is computer data or electronic recorded media of any kind that is stored in an electronic form that can be retrieved and examined. ESI may include a broad and complex range of digital data and metadata and may be stored in a number of locations and on different types of work or personal devices.

Examples of ESI include e-mail, Outlook, Word, Excel, Access, Publisher, PowerPoint, Adobe Acrobat, SQL databases, Web pages, voice mail systems, digital imaging systems, text messages, social media, or any other software or electronic communication programs or databases.

ESI may be located on network servers, backup tapes, PDAs, flash drives, CDs, DVDs, floppy disks, work computers, telephone systems, cloud storage, cellular telephones, laptops, or any other electronic device or medium used to do University work.

If individuals use personal electronic devices, including privately-owned devices (e.g., home computers, laptops, tablets, cellular telephone phones, etc.) to conduct WSU business, the search for ESI must include those devices and any remote (cloud) servers.

Evidence Preservation

Litigation to Which the University is a Party

As used in this policy, "litigation to which the University is a party" includes filed or reasonably foreseeable litigation to which the University, or to which one or more University employees acting within the scope of their employment, is or could become a party. In some instances, as determined by the WSU Division of the Attorney General's Office (AGO), this policy may apply when the state of Washington, or an entity with which the University is affiliated, is a party to litigation and the University maintains potential evidence.

Legal Hold Notice

A Legal Hold Notice is a formal, written notice that litigation to which the University is a party has been filed or is reasonably foreseeable. The Legal Hold Notice requires recipients to preserve potential evidence in their possession or in the possession of their subordinates. It also suspends any destruction or disposal of potential evidence in the matter and requires recipients to identify the nature and extent of potential evidence they possess.

Examples of circumstances that may require a Legal Hold Notice include:

- Similar circumstances in the past have resulted in litigation.
- An event that occurred resulted in significant injury or property damage.
- A written complaint was filed or served.
- A complaint was made to an external or internal investigatory agency or unit.
- A notice of claim or potential claim was received.
- An individual or their lawyer made credible threats of suit.
- WSU staff familiar with the facts and circumstances believe litigation may occur.
- A claimant has initiated formal dispute resolution procedures.
- The University received a public records request indicative of litigation.
- Reliable press or media reports suggest litigation is likely.

Accompanying Form

The AGO routes a Potential Evidence Checklist/Verification form with each Legal Hold Notice.

Evidence Preservation

Potential Evidence Any record or tangible item of evidence that may reasonably be expected to be requested in discovery, or to be used in, or related to litigation to which the University is a party.

Record Any document or recorded information regardless of physical form or characteristics created, sent, organized, received, or otherwise possessed by the University in the course of its business. Records may include, but are not limited to, paper documents, drawings, graphs, charts, videotapes, digital images (still or moving), recordings, photographs, audio recordings, telephone records, data compilations, daily planners, calendars, diaries, notes, policies, manuals, and draft documents. The term *record* includes all forms of ESI and voicemail or other recordings of telephone conversations.

Tangible Item of Evidence Physical or tangible evidence may include a wide variety of items. Examples include, but are not limited to, hard copies of records or documents, physical evidence related to an accident (debris, damaged property, equipment, or vehicles), or test results.

RESPONSIBILITIES TO PRESERVE

AGO Responsibilities

When litigation has been filed or the AGO receives information that litigation is reasonably foreseeable in a matter, it evaluates whether a Legal Hold Notice should be issued. If so, the AGO sends a Legal Hold Notice and a Potential Evidence Checklist and Verification form to each employee and/or unit likely to have potential evidence.

The responsibilities and authority of the AGO include the following:

- Identifying faculty, staff, and/or units likely to have potential evidence.
- Issuing Legal Hold Notices and Potential Evidence Checklist and Verification Forms to University employees.
- Collecting Potential Evidence Checklist and Verification Forms from employees with potential evidence.
- Identifying the need to engage internal ITS personnel or external consultants to preserve ESI.
- Answering employee questions and coordinating the evidence preservation process.

Evidence Preservation

AGO Responsibilities (cont.)

- Sending reminder notices on an annual basis.
- Sending removal notices when evidence preservation is no longer required.

Employee Responsibilities

All WSU employees have the obligation to preserve potential evidence when litigation to which the University is a party has been filed or is reasonably foreseeable. **This obligation exists regardless of whether the employee has received a Legal Hold Notice.** Employees who believe that litigation may be reasonably foreseeable are to immediately notify their direct supervisor. Upon notification, supervisors and/or appointing authorities should then immediately notify the AGO.

Upon receipt of a Legal Hold Notice and Potential Evidence Checklist and Verification form, a University employee must promptly:

- Identify and preserve all potential evidence in their possession or control;
- Confirm receipt by completing and returning the form, indicating whether they have potential evidence and, if so, that they have identified its form(s) and location(s) and have taken steps to preserve it;
- Provide a copy of the Legal Hold Notice and form to subordinates or other employees in their unit who may have potential evidence and then notify the AGO in writing who received the form; and
- Identify another University employee who has access to, and is responsible for, preserving the evidence in the event the recipient becomes unavailable or leaves the University.

WHAT MUST BE PRESERVED

All reasonably identifiable potential evidence must be preserved when litigation to which the University is a party has been filed or is reasonably foreseeable. When in doubt, employees should err on the side of preserving potential evidence.

All evidence is to be preserved in as close to its original form as possible. Tangible evidence may not be altered or destroyed when litigation is pending or reasonably anticipated. ESI must be preserved in its original (native) form.

Reminders and Removals

For ongoing legal holds, the AGO sends reminder Legal Hold Notices on an annual basis.

Legal Hold Notices remain in effect until the AGO issues written notification that the legal hold is no longer required.

Evidence Preservation

RELATED POLICIES

Records Retention Policy

In the absence of litigation or reasonably foreseeable litigation, University public records are preserved, retained, destroyed, or disposed in a manner consistent with *BPPM* 90.01 and 90.03, and relevant state and federal law.

Upon receipt of a Legal Hold Notice, or when litigation is filed or reasonably foreseeable, employees must immediately suspend destruction or disposal of records, tangible items, and other potential evidence regarding the matter. This policy supersedes any provision in *BPPM* 90.01 or 90.03, or other University, college, department, or unit practice that would otherwise authorize destruction or disposal of such potential evidence.

Public Disclosure Policy

Nothing in this policy modifies the policies and procedures for processing public records requests under *BPPM* 90.05 or other records requests, such as those made under *BPPM* 90.06 for student education records or *BPPM* 90.07 for personnel records.