# Legal Holds and Discovery

The purpose of this section is to provide guidance for the management and preservation of records and documents involved in Litigation and/or potential Litigation.

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## Ask the Expert

If you have questions or need clarification about the content in this chapter, please contact:

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## BACKGROUND

When a Lawsuit or a Tort Claim has been filed or reasonably anticipated, employees who work at the Department are under an obligation to retain all records in its possession which could reasonably be considered relevant to the matter. Along with current records, any related records developed after a Litigation Hold Notice for a Tort Claim should be retained as well. The obligation is ongoing until the Claim has concluded.

Employees must be familiar with [Administrative Policy 5.05](http://one.dshs.wa.lcl/Policies/Administrative/DSHS-AP-05-05.pdf) (Management of the Litigation Discovery Process), and [Administrative Policy 5.07](http://one.dshs.wa.lcl/Policies/Administrative/DSHS-AP-05-07.pdf) (Employee Response to Litigation Related Documents).

**definitions**

**DSHS records:** Any document or recorded information, regardless of physical form or characteristics, created, sent, organized or received by the agency in the course of public business, including paper documents, e-mail, drawings, graphs, charts, audio and video recordings, photographs, phone records, data compilations, planners, calendars, diaries, draft documents, electronically stored information (ESI) and metadata.

**Litigation hold notice:** A written communication that instructs ‘affected individuals’ who are likely to have DSHS records pertaining to a legal issue to take immediate action to identify and preserve the records for future retrieval.

**Preservation:** The process of locating and safeguarding DSHS records from destruction that reasonably and likely relate to a potential or actual lawsuit or tort claim.

**Reasonably anticipated litigation:** A reasonable expectation that an event may lead to the filing of a lawsuit or a tort claim against DSHS or its employees. There is no formal standard to determine whether an event will lead to a lawsuit.

**Tort claim:** A formal written filing with the state office of risk management under RCW 4.92.100 in which the claimant alleges that certain kinds of harm or damages were caused by the state of Washington, its agencies or state employees in which people claim they have been harmed by torts (wrongful acts), including negligence, by government agencies or their employees.

**what to do if you receive a litigation hold notice**

1. Stop what you are currently working on and read the entire Litigation Hold Notice.
2. Suspend all record destruction efforts under any applicable record retention schedule.
3. Distribute the Hold Notice to any staff that may potentially hold related program records.
4. Locate and Identify DSHS records you may have that relate to the Litigation issues.

* You must make a reasonable good faith effort to identify relevant records that are in your possession. This includes:

1. Searching desk files
2. File cabinets
3. Email and other files that may contain information relevant to the Litigation issues.
4. Separate and preserve:
5. Located email or other electronic records.
6. Do not print out hard copies of the electronic records and then turn around and delete the electronic record. You must preserve the original electronic version of located record.
7. Identified hard copies that may be relevant.

* Duplicate records should be reserved.

1. Err on the side of preserving the records:

* If you have questions about whether certain records fall under the directive of the Litigation Hold Notice, you are instructed to err on the side of preserving the records.

**Obligation to preserve records**

Employees are required to preserve potentially relevant records relating to all legal related proceedings until the matter concludes and the records retention policy permits destruction. This includes records in any form including all electronically stored information and metadata.

**Consequences**

Serious penalties could be imposed on the Department if employees fail to take reasonable steps to locate and preserve potentially relevant information. In addition, employees could be subject to disciplinary action for failure to comply.

## Resources

**Contacts**

[Discovery Coordinators](http://one.dshs.wa.lcl/FS/Records/Discovery/Pages/Coordinators.aspx)

### Related RCWs

[RCW 4.92](https://app.leg.wa.gov/RCW/default.aspx?cite=4.92&full=true) Actions and Claims Against State

**Related Administrative Policies**

[Administrative Policy 5.05](http://one.dshs.wa.lcl/Policies/Administrative/DSHS-AP-05-05.pdf) Management of the Litigation Discovery Process

[Administrative Policy 5.07](http://one.dshs.wa.lcl/Policies/Administrative/DSHS-AP-05-07.pdf) Employees Response to Litigation Related Documents

[Discovery Coordinators](http://one.dshs.wa.lcl/FS/Records/Discovery/Pages/Coordinators.aspx) Discovery Coordinators

**What to Do**

[Lawsuits Against the State and Employees - What to Do](http://one.dshs.wa.lcl/FS/Records/Discovery/Resources/Lawsuits%20Against%20the%20State%20and%20State%20Employees%20-%20What%20to%20Do.pdf)