



Administrative Policy No. 05.05

Subject: Management of the Litigation Discovery Process

Information Contact: DSHS Discovery Manager
Office of Information Governance,
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Authorizing Source: Rules of Civil Procedure (State and Federal)
[Chapter 40.14 RCW, Preservation & destruction of public records](#)
[Chapter 4.92, RCW, Actions & claims against the state](#)

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Approved By: Original approved by Pearlette J. Ramos
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Purpose

This policy has two purposes:

1. It sets expectations for managing Department of Social and Health Services (DSHS) records when litigation against DSHS or its employees is reasonably anticipated or when a legal matter, such as a lawsuit or tort claim, has been filed against DSHS or its employees.
2. It establishes a function and procedures to manage the discovery of DSHS records when a potential or actual lawsuit or tort claim against DSHS, or its employees exists for certain types of legal proceedings.

All DSHS employees must be familiar with this policy and its procedures, because any DSHS employee may:

- Be involved in litigation.
- Need to assist with the determination of whether an event may lead to litigation, in consultation with the Office of the Attorney General.
- Receive a litigation hold notice.
- Receive a discovery request or deposition notice.
- Receive direction through their chain of command or the Office of the Attorney

General to identify, preserve, collect, or produce DSHS records.

Note: Communications by DSHS with the Washington state Office of the Attorney General (AGO) about potential or actual litigation, including matters relating to discovery of DSHS records, are protected by attorney-client privilege. AGO representatives may ask DSHS for information or assistance, and information developed pursuant to these requests may be protected by the attorney work product doctrine. This policy and procedure are not a waiver of the attorney-client privilege, nor is it intended to interfere with the attorney work product doctrine.

Scope

This policy applies to all DSHS administrations and employees.

The policy describes basic obligations of all DSHS employees in the context of actual or reasonably anticipated lawsuits and tort claims against DSHS or its employees. The detailed procedures in this policy do not normally apply to:

- Fair hearings or administrative hearings conducted within DSHS or before the Office of Administrative Hearings.
- Actions initiated by DSHS.
- Legal, administrative, or other proceedings related to personnel actions.
- Court proceedings relating to child support cases under Title IV-D of the social security act.

Definitions

Administration: For this policy, the term administration includes all programs, offices, or divisions reporting to an assistant secretary, chief executive officer (CEO), senior director, or director.

Administration information technology (IT) staff: For this policy, persons identified by each administration to assist their respective program's discovery coordinator (DC) with technology issues related to electronically stored information (ESI).

Affected individuals: Employees or others who have identified an event in which litigation may be reasonably anticipated, or who have received a litigation hold notice or discovery request from the Attorney General's Office (AGO), the discovery manager (DM), or their discovery coordinator (DC).

AGO representative: Staff from the Attorney General's Office assigned to manage legal matters involving DSHS and the state of Washington. Typically, this is an assistant attorney general (AAG), paralegal, legal assistant, or an investigator.

Deposition notice: A legal notice directed to a DSHS employee to appear at a certain time and place in order to give sworn testimony about DSHS business, in response to questions posed by an attorney.

Discovery coordinator (DC): The person appointed by each administration to coordinate with and assist AGO representatives and the DM when determining whether litigation is reasonably anticipated and when a litigation hold notice or a discovery request is issued that involves their respective program.

Discovery manager (DM): The single, central point of contact in DSHS identified to receive discovery requests or litigation hold notices from the AGO. The DM notifies affected administrations of the discovery requests or litigation hold notices, and assists in coordinating the agency's responses, within and between administrations, where necessary. The DM reports to the agency's office of information governance administrator.

Discovery request: A request from another party to a lawsuit or from an AGO representative for information or DSHS records.

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.

Electronically stored information (ESI): DSHS records stored in an electronic format. Email is one type of ESI. Other types of ESI may include records created using programs such as: Microsoft Word, Excel, Access, Publisher, PowerPoint, SharePoint, Adobe Acrobat, SMS text other instant messaging, and social media, an umbrella term encompassing various activities that integrate technology, social interaction, and content creation. Social media includes blogs, wikis, photo and video sharing, podcasts, social networking, and discussion boards, among other types. Platforms include, but are not limited to, Facebook, LinkedIn, Twitter, Instagram, YouTube, and Flickr. ESI can be located in databases and on network servers, backup tapes, mobile devices, thumb, or flash drives, compact disks (CD), digital video disks (DVD), floppy disks, work computers, cell phones, laptops computers, tablets, or any other electronic storage device used to do DSHS work. ESI also includes any DSHS records that employees store on personally owned electronic devices that were used to do DSHS work, such as home computers, laptops, cell phones, or other mobile devices.

Indexing and search tools: Computer software that can analyze records and store the content of the records in a way that can be searched.

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.

Metadata: Data about data. Software programs automatically create metadata about the history, tracking, or use of an electronic record. Different types and elements of metadata are available for different types of records. Metadata may include how, when, and by whom a record was created, received, accessed, and changed, how it is formatted, and where it is located. Examples of metadata include but are not limited to document properties; hidden rows, cells and formulas in Microsoft Excel; track changes, comments, and markups in Microsoft Word; and blind carbon copy (bcc) in e-mail. Some types of metadata are visible, such as file size and date of creation, but many other elements of metadata are not visible or are embedded in the record. Printing an electronic record typically does not reproduce all elements of metadata.

Mobile device: A computing device typically smaller than a notebook, which runs a mobile operating system, such as iOS, Android, or Windows Phone. Includes smart phones and tablets.

Non-DSHS administered IT resources: Computers, devices, or removable media that are not controlled or owned by DSHS, as defined in the [DSHS Information Security Standards Manual](#).

Notebook: A portable computer, as defined in the [DSHS Information Security Standards Manual](#). Examples include laptops, netbooks, and some tablets.

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, and reasonable anticipation of litigation is a fact-specific determination. Some triggers are easily identified, including receipt of a notice of claim, a complaint, or other credible notice of upcoming or pending litigation. Other triggers may be less obvious, including notice of an event historically likely to result in litigation (e.g., an accident, breach of contract, termination) or the existence of a contractual or statutory obligation to preserve.

Records coordinator: The person appointed by administration or division management to assist with records management and retention duties. See [Administrative Policy 5.04](#), Records Retention.

Removable media: Includes any machine readable media that may routinely be stored or moved independently of computing devices, as defined in the [DSHS Information Security Standards Manual](#). Examples include magnetic tapes, optical discs (CDs or DVDs), flash memory (thumb drive) devices, external hard drives, and internal hard drives that have been removed from a computing device.

Spoliation: Destroying, significantly altering, or failing to preserve DSHS records that might contain potential evidence relating to pending or reasonably anticipated litigation.

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.

Policy Requirements

A. All DSHS employees have basic responsibilities when they know or reasonably should know if a person or business has a potential or actual lawsuit pending against DSHS or its employees. For example, an employee must notify their supervisor when there is any indication of reasonable anticipation of litigation against DSHS or its employees. Employees must also assist with the accurate identification, preservation, collection, and production of DSHS records for any potential or actual litigation against DSHS or its employees. An employee's failure to understand these responsibilities could:

- Spoliate potential evidence.
- Compromise the proper management of DSHS-related litigation.
- Expose DSHS to court-ordered sanctions.
- Subject the employee to departmental disciplinary action or to sanctions imposed by a court.

B. When they receive a litigation hold notice, DSHS employees must take immediate actions to preserve, protect, and manage all DSHS records they hold, or for which they are otherwise responsible, that could relate to a potential or actual lawsuit against DSHS or its employees.

These requirements apply to records in any form, including all electronically stored information (ESI) and metadata.

C. To assure coordination of, and timely, proper response to legal matters within the scope of the procedures established in this policy, a discovery manager function is created within the DSHS office of information governance (OIG).

D. All DSHS employees and administrations must work with their discovery coordinator (DC), the discovery manager (DM), and the Attorney General's Office (AGO), and must follow the procedures of this policy for any legal matter within the scope of those procedures.

E. Records created, sent, used, retained, or received by employees in the course of

doing business are considered to be records of the department. Department employees have no expectation of privacy in any records stored on DSHS administered IT resources nor in DSHS records stored on non-DSHS administered IT resources. To satisfy the identification, preservation, collection, or production requirements under this policy, these records may be indexed, searched, accessed, collected, and distributed without notice to the employee or employees who created, contributed to, or otherwise used the records, unless notice is required by law or contract.

F. The duty to preserve records exists for all types of lawsuits and legal matters; however, for legal matters not within the scope of the procedures of this policy, all DSHS employees and administrations must follow procedures and protocols established within the department and their administration, in consultation with the AGO. Typically, those matters where other procedures and protocols apply include:

- Fair hearings or administrative hearings conducted within DSHS or before the Office of Administrative Hearings.
- Actions initiated by DSHS.
- Legal, administrative, or other proceedings related to personnel actions.
- Court proceedings relating to child support cases under Title IV-D of the social security act.

Procedures:

A. Discovery manager (DM)

For matters of potential or actual litigation within the scope of these procedures, the DM:

1. Notifies and consults with the AGO representative about reasonably anticipated litigation.
2. Receives litigation hold notices or discovery requests from the AGO.
3. Forwards litigation hold notices and discovery requests to affected administrations, discovery coordinators (DC), the DSHS Records Officer, and, when necessary, the affected individuals.
4. Coordinates agency actions with the DC and the AGO representative. This includes the use of indexing and search tools to perform searches, including searches for all email items, following protocols and procedures established for the use of these tools.
5. When necessary, the DM is responsible for coordinating searches for records by identifying persons, locations, and formats of requested records. After consulting with the AGO representative, the DM may use or direct the use of indexing and search tools to perform searches following protocols and procedures established for the use of these tools.
6. Receives administration response status information from the DC.
7. Notifies the DSHS records officer and the DC when the legal matter covered by these

procedures has been resolved and the administration can resume normal records retention procedures under [Administrative Policy 5.04](#).

8. Provides appropriate training and guidance to the DC and DSHS staff regarding this policy and the procedures for managing litigation hold notices and discovery requests.
9. Provides consultation and technical assistance to the DC and DSHS staff on responding to litigation hold notices and discovery requests.

B. Administration executive manager

Appoints an administration employee as the DC and notifies the agency's DM and the AGO in writing of any change to that appointment.

C. Discovery coordinators (DC)

For matters of potential or actual litigation within the scope of these procedures, the DCs:

1. When notified by an administration employee regarding potential reasonably anticipated litigation, the DC must notify and consult with the DM and the AGO representative to obtain further direction.
2. Receive litigation hold notices, discovery requests, and related material from the DM or from the AGO representative.
3. Notify affected individuals and program management, including records coordinators, of litigation hold notices and discovery requests.
4. Direct all affected individuals to stop records destruction activities for identified records and begin preservation.
5. Coordinate the administration's response to litigation hold notices and discovery requests.
6. Consult with the DM and the AGO representative to determine the scope of searches, including the use of indexing and search tools. After consulting with the DM and the AGO Representative, the DC may use or direct the use of indexing and search tools to perform searches following protocols and procedures established for the use of these tools.
7. Notify appropriate administration management, the DM and AGO representative of significant issues that could delay or compromise the administration's response.
8. Provide consultation, coordination, and technical assistance to administration staff on responding to litigation hold notices or discovery requests.
9. Notify the DM and the AGO representative when the litigation hold notice has been implemented or when documents responsive to a discovery request have been identified, preserved, collected, and are ready for production to the AGO.
10. Notify the records coordinators and affected individuals in writing when the AGO has notified the DM and DC the legal matters covered by these procedures have been resolved and the administration can resume normal records retention procedures under [Administrative Policy 5.04](#).

D. Administration information technology (IT) Staff

1. Create and maintain a detailed written description of the administration's electronically stored information (ESI) and IT portfolio, including data sets (e.g., databases), computer hardware (e.g., servers, workstations, and laptops), library of deployed software (e.g., Windows 11 Operating System, Microsoft 365, Adobe Acrobat), and network switching equipment (e.g., component switches).
2. As required, assist the DM and the DC in identifying, preserving, collecting, or producing required ESI. This includes the use of indexing and search tools to perform searches following protocols and procedures established for the use of these tools.
3. As required, assist affected individuals in identifying, preserving, collecting, or producing administration ESI.
4. Assist the DM and the DC in responding to litigation hold notices or discovery requests that include ESI.
5. Assist supervisors in preserving ESI managed or held by employees who have left or are leaving positions in the administration.

E. Employees

1. Notify their supervisor whenever there is any indication that an event may lead to litigation against DSHS or its employees, or whether there are any questions or concerns about whether an event may lead to litigation against DSHS or its employees. The supervisor, through appropriate chain of command, notifies the administration's DC who then notifies the DM and an AGO representative.
2. Upon confirmation of a duty to preserve with the DC, DM, and an AGO representative, identify and preserve all records held in the employee's possession, custody, or control that are reasonably related to actual or reasonably anticipated litigation and tort claims against DSHS or its employees. This responsibility includes preserving records created, sent, organized, received, or stored on both DSHS and non-DSHS administered IT resources and includes those kept on or off DSHS property.
3. Preserve records in their existing (i.e., "native") hard-copy or electronic format. For ESI, this means keeping records in their current electronic form with metadata intact, even if a hard copy of the record has been printed. Records that have been preserved should not be redacted or altered in any way by the employee.
4. Follow the DM, DC, or AGO representative's guidance regarding the identification, preservation, collection, or verification of DSHS records under this policy.
5. Provide records, or access to records, as directed by the DM, DC, or AGO representative. In some situations, this responsibility may include providing access to notebooks, removable media, mobile devices, or non-DSHS administered IT resources so that indexing and search tools can be used.
6. Continue to identify, preserve, and produce all related records until the legal matter or proceeding is fully resolved.

7. Retain all identified DSHS records relevant to a litigation hold notice or discovery request until notified in writing that preservation is no longer necessary, even if copies of those records have been provided under this policy.
8. Keep all records (paper and electronic) identified and collected pursuant to a litigation hold notice or discovery request separated from regular work files for possible production and to prevent the possibility of spoliation.
9. Contact the administration's DC with any questions about the identification, preservation, collection, or production of DSHS records under this policy.

DSHS Official