

Administrative Policy No. 05.05

Subject:	Management of the Litigation Discovery Process
Information Contact:	DSHS Discovery Manager Office of Information Governance, MS: 45010, (360) 902-7839
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:	<u>Original signed by Lori Melchiori</u> Senior Director, Office of Policy and Rules

Purpose

This policy has two purposes:

1. It sets expectations for managing Department of Social and Health Services (DSHS) records when litigation is reasonably anticipated or when 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 exists for certain types of legal-related proceedings.

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

- Be involved in litigation.
- Need to determine if an event may lead to litigation.
- 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 is 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 any legal-related matter. However, the procedures section of this policy is limited to the management of Litigation Hold Notices and Discovery Requests related to actual or reasonably anticipated lawsuits and tort claims. 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 when litigation is reasonably anticipated, or 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 web-based social media including but not limited to, blogs and micro-blogs (such as Twitter), social networks (such as Facebook), and video sharing (such as YouTube). 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, Windows Phone, or BlackBerry OS. Includes smart phones and some 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.

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 (spoilage): 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, a person or business has a potential or actual lawsuit pending against DSHS or its employees. These responsibilities include identifying reasonably anticipated litigation and the accurate identification, preservation, collection and production of DSHS records for any potential or actual litigation. An employee's failure to understand these responsibilities could:

- Spoil 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. The obligation to preserve records exists for all legal related proceedings, including: potential or actual lawsuits against DSHS or its employees, administrative reviews, juvenile court proceedings, grievances, or legal actions initiated by DSHS. Therefore, 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.

For legal proceedings that do not involve a potential or actual lawsuit against DSHS or its employees it is not necessary for an assistant attorney general (AAG), discovery manager (DM), or discovery coordinator (DC) to be involved or to issue a litigation hold notice.

- C. 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. This also includes an administrative hearing, juvenile court proceeding, grievance, action initiated by DSHS or any other legal proceeding.

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

- D. To assure coordination of, and timely, proper response to litigation-related 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).
- E. 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-related matter within the scope of those procedures.
- F. 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.
- G. For legal-related 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 cooperation 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 vaulted 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. Notify and consult with the DM and the AGO representative about reasonably anticipated litigation.
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, collected, preserved and are ready for production.
10. Notify the records coordinators and affected individuals 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 10 Operating System, Office 2016, 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 are any questions or concerns about whether an event may lead to litigation against DSHS or its employees. If there is reasonable belief that litigation may occur, the supervisor, through appropriate chain of command, notifies the administration's DC.
2. Identify and preserve all records held in your possession, that are reasonably related to actual or anticipated litigation, tort claim, or other legal related matters within the scope of this policy, regardless of whether or not a litigation hold notice has been issued. 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 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 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.