



**Policy Type:** Board

**Category:** Legal

**Policy Name:** Litigation Hold Policy - Board Policy 3.56

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## **3.56 LITIGATION HOLD POLICY (Adopted 2-28-12)**

### **3.56.1 Purpose**

The County is required to preserve existing and future records that are in any way related to pending or reasonably-anticipated lawsuits. This preservation requirement is commonly referred to as a “Litigation Hold” obligation. The purpose of this policy is to set forth the procedures for initiating, implementing, and releasing Litigation Holds.

### **3.56.2 Background**

The law requires that as soon as the County is notified or becomes aware of the filing of a lawsuit or facts that suggest the potential for a lawsuit, it is obligated to preserve all records that it knows or reasonably should know may be relevant to the lawsuit. The County's Litigation Hold obligation includes suspending routine destruction of records pursuant to any existing County and departmental records retention and destruction schedules and practices.

Courts have broad discretion in penalizing parties who breach their retention obligations. Those penalties could include monetary sanctions or a court order precluding the County from introducing evidence related to the destroyed documents.



### **3.56.3 Scope**

This policy applies to all County departments and employees, and to all documents and records as defined below.

### **3.56.4 Definitions**

#### (A) Documents/Records

Any writing containing information related to the conduct of the public's business prepared, produced, owned, used, retained, or received by the County, its departments, or employees, regardless of physical form or characteristics, including but not limited to: calendars, charts, databases, diagrams, electronically-stored information such as emails and text messages, exhibits, graphs, invoices, letters, logs, magnetic or paper tapes, maps, memoranda, microfilm, minutes, notes, papers, photographic films and prints, photographs, reports, spreadsheets, video and audio recordings, and voicemails.

#### (B) Electronically-Stored Information

Electronically-stored information (ESI) includes, but is not limited to: charts, drawings, graphs, images, photographs, sound recordings, writings, and other data or data compilations stored in any electronic medium (e.g., databases, diagrams, digital images, documents, e-mail, instant messages, records, spreadsheets, text messages, voicemail, and other digital forms requiring the use of computer hardware or software) from which information can be obtained, translated if necessary, into a reasonably usable form that is within the possession, custody, or control of the County and includes embedded data and metadata.



(C) Litigation Hold

A "Litigation Hold" is a legal directive to cease destruction processes and preserve all "Official Records" and "Unofficial Records," regardless of form, related to the nature or subject of pending or reasonably-anticipated litigation involving the County, its departments, or employees.

(D) Litigation-Hold Liaison

The "Litigation-Hold Liaison" is a person designated by departments to coordinate with the Office of County Counsel (County Counsel), information-technology personnel, ESA Risk Management, and Litigation-Hold Liaisons from other County departments to preserve documents/records.

(E) Official Records

Records are official records of the County's business activities when there is a legal duty to create and/or retain those records, or when they are created during the discharge of the County's official duties. Official records include those that relate to, document, or provide evidence of business activities of employees, departments, or the County as a whole; record decisions, decision-making processes, advice and/or direction; or support the institutional memory of employees, departments, and/or the County as a whole.

(F) Unofficial Records

Unofficial records do not have a role in explaining the functions or activities carried out by employees, departments, or the County. Unofficial records include personal working files that are not ordinarily kept in the course of business; publications, references,



duplicates, preliminary drafts, notes, or memoranda that are not ordinarily kept in the course of business.

(G) Records Retention and Destruction Schedule

A Records Retention and Destruction Schedule is a written statement of retention or destruction actions to be taken regarding Official Records produced or maintained by the County. The schedule specifies the length of time that Official Records must be maintained before they are scheduled for destruction or archived.

**3.56.5 Policy**

- (A) The County, its departments, and employees have a legal duty to preserve all documents that they know or reasonably should know may be relevant to pending or reasonably-anticipated litigation, as soon as the County, through its Board of Supervisors, departments, or employees, (1) is notified of litigation or facts suggesting potential litigation, or (2) reasonably anticipates litigation.
  
- (B) The duty to preserve documents/records is not limited to the actual commencement of litigation. In other words, if the County, its departments, or employees receive information that would reasonably suggest that litigation is possible, the duty to preserve is triggered. Triggering events include, but are not limited to, the presentation of a claim, receipt of Notice of Intent to Sue letters, notice that a personnel matter has been filed with the Equal Employment Opportunity Commission (EEOC) or Department of Fair Employment and Housing (DFEH), or receipt of any correspondence that suggests litigation is reasonably foreseeable. The duty to preserve documents/records can, however, be triggered before an employee files a complaint if the County became aware of the possibility of litigation before such a complaint was filed.



- (C) When a County department or employee learns facts that reasonably suggest that litigation is possible, the department and employee are obligated to inform County Counsel of the potential litigation. As soon as a department or an employee is aware of potential litigation, the department and the employee are obligated to preserve all records that might relate to the anticipated litigation, including ESI, and suspend the destruction of documents/records related to the litigation.
- (D) Similarly, as soon as County Counsel or ESA Risk Management advises a department or an employee of the threat of litigation or reasonably-anticipated litigation, the department and its employees are obligated to preserve all documents/records that might relate to the anticipated litigation, including ESI, and suspend the destruction of documents/records related to the litigation.
- (E) When a department or an employee learns of pending or reasonably-anticipated litigation, or when County Counsel requests a department or an employee to institute a Litigation Hold, the department and the employee must promptly contact and coordinate with department personnel, including information-technology staff, to implement the Litigation Hold.
- (F) If a department or an employee is uncertain whether documents must be preserved, they must consult with County Counsel, who will provide the department or employee with direction regarding the nature and scope of records to be preserved pursuant to a Litigation Hold.
- (G) Each department must designate a Litigation-Hold Liaison to coordinate with County Counsel, information-technology personnel,



ESA Risk Management, and Litigation Hold Liaisons from other County departments to accomplish Litigation Holds.

- (H) Litigation-Hold Liaisons are responsible for the following:
- (1) Identifying all records, both Official and Unofficial, that might be subject to the Litigation Hold.
  - (2) Assisting County Counsel to identify records, both Official and Unofficial, that might be subject to the Litigation Hold.
  - (3) Providing sufficient information regarding the subject of the pending or reasonably-anticipated litigation to allow employees to conduct a reasonable search for information related to the lawsuit.
  - (4) Taking immediate steps to preserve all records that are identified as related to the pending or reasonably-anticipated litigation until the conclusion of the litigation.
  - (5) Taking immediate steps to suspend the application of document-destruction policies to documents/records that are related to the pending or reasonably-anticipated litigation until the conclusion of the litigation.
  - (6) Coordinating with information-technology personnel to place a Litigation Hold on ESI that is related to the pending or reasonably-anticipated litigation.
  - (7) Coordinating with Litigation-Hold Liaisons from other departments, if any, involved in the pending or reasonably-anticipated litigation.



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- (l) Only County Counsel can release Litigation Holds once implemented.

### Related Policies

None.

### Related Forms and Information

None.

### History

Date	Changes Made
1/31/2014	Policy Uploaded. (John Myers)
2/28/2012	Policy Adopted. <a href="#">View legislative file.</a>