

VA E-DISCOVERY

- 1. REASON FOR ISSUE:** To establish policy concerning the care and handling of documents and electronically stored information (ESI) of the Department of Veterans Affairs (VA) that may be relevant to pending or reasonably anticipated litigation. The directive describes the responsibilities of employees, contractors, volunteers, and other VA personnel to identify, locate, preserve, collect, prepare, review, and produce potentially relevant ESI.
- 2. SUMMARY OF CONTENTS/MAJOR CHANGES:** This directive defines the responsibilities throughout VA for implementing litigation holds to facilitate discovery involving ESI, or electronic discovery (e-discovery), prior to or during litigation.
- 3. RESPONSIBLE OFFICE:** The VA Office of Information and Technology (005), Office of Information Security (005R), Office of Privacy and Records Management (005R1) is responsible for the contents of this directive.
- 4. RELATED HANDBOOK:** None.
- 5. RESCISSIONS:** None.

CERTIFIED BY:

/s/
Roger W. Baker
Assistant Secretary for
Information and Technology

**BY DIRECTION OF THE SECRETARY
OF VETERANS AFFAIRS:**

/s/
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Distribution: Electronic

VA E-DISCOVERY

1. PURPOSE AND SCOPE. This directive establishes the policy and responsibilities for identifying, collecting, preserving, reviewing, processing, and producing electronically stored information (ESI) of the Department of Veterans Affairs (VA) relevant to potential or pending litigation.

2. POLICY

a. It is the policy of VA to comply with its obligations with regard to electronic discovery (e-discovery) arising out of the Federal Rules of Civil Procedure, by identifying, collecting, preserving, reviewing, processing, and producing ESI that may be relevant to pending or reasonably anticipated litigation. ESI includes, but is not limited to: email, word processing documents, spreadsheets, calendars, databases, and other information maintained in electronic form. ESI encompasses both records and non-record materials as defined by the Federal Records Act, 44 U.S.C. § 3301, as well as personal notes relevant to a case or controversy.

b. A litigation hold issued by the Office of General Counsel must be complied with as soon as it is received. Because VA's duty to preserve relevant information is triggered when there is a reasonable anticipation of litigation, a litigation hold will often be in advance of actual litigation.

3. RESPONSIBILITIES

a. **The Secretary of Veterans Affairs** is responsible for the proper execution and administration of all laws administered by the Department and for the control, direction, and management of the Department, including legal matters concerning the Department. 38 U.S.C. § 303. Further, the Secretary has designated the Department's General Counsel and Assistant Secretary for Information and Technology, Chief Information Officer, as the senior agency officials responsible for the agency's compliance with discovery obligations.

b. **The Office of General Counsel (OGC)**, which includes Assistant General Counsels and Regional Counsels, is responsible for:

(1) Determining when VA has a duty to preserve relevant information and issuing litigation holds in pending or reasonably anticipated litigation;

(2) Reviewing, revising, and reissuing previously issued litigation holds as necessary and rescinding holds when the disputed matter is resolved or concluded;

- (3) Notifying agency personnel who might possess relevant information (“Custodians”) of litigation holds and the recipients of litigation holds of any modification or rescission;
- (4) Maintaining a list of active and inactive litigation holds, with relevant details about the hold, for reference by OIT and other agency components, and keeping the list updated;
- (5) Contacting and working with OIT and Custodians to implement litigation holds, including developing a discovery plan and establishing workable goals and timelines;
- (6) Providing legal guidance as to the identification, collection, preservation, review, processing, and production of relevant information;
- (7) For each matter involving e-discovery, identifying one or more attorneys as the point of contact to provide legal guidance and work with the OIT point of contact;
- (8) Developing, in cooperation with OIT, search protocols, including search terms, for identification, collection, and preservation of relevant information;
- (9) Reviewing the information identified and collected for responsiveness, relevance, and privilege;
- (10) Producing to other parties in litigation responsive, relevant, and non-privileged information in accordance with the Federal Rules of Civil Procedure; and
- (11) Where applicable, working with the Department of Justice and other parties to develop litigation strategy and determine the scope of discovery.

c. The Assistant Secretary for Information and Technology, Chief Information Officer (CIO), is responsible for:

- (1) Developing a data map of all VA information systems and other repositories of VA information, including those maintained by contractors and other persons or entities working for or on behalf of VA, and keeping this data map updated;
- (2) Developing and issuing VA policies, directives, handbooks, and other Department-wide records management publications with regard to the technical aspects of litigation holds;

(3) Establishing standards for access to VA information systems by organizations and personnel as necessary; and

(4) Ensuring Department-wide compliance with and execution of any litigation holds.

d. The Deputy Chief Information Officer (DCIO) for Service Delivery and Engineering is responsible for:

(1) Assisting the Associate Deputy Assistant Secretary (ADAS), Office of Information Security, Policy, Privacy and Incident Response to develop a data map for the Department;

(2) Recommending solutions and identifying resources, including estimated costs, associated with compliance with and execution of litigation holds;

(3) Assisting OGC with the determination of the specific format(s) for the ESI to be produced;

(4) Maintaining a list that identifies the Chief Information Officer (CIO) and Information Security Officer (ISO) at each VA component to work with OGC in the implementation of litigation holds, and keeping the list updated;

(5) Ensuring that, for each matter involving e-discovery, the CIO, ISO, and, if necessary, other points of contact in OIT have been identified to work with OGC in the implementation of litigation holds;

(6) Assisting OGC with developing search protocols, including search terms, for identification, collection, and preservation of relevant information;

(7) Providing technical assistance to OGC in identifying, collecting, preserving, reviewing, processing, and producing relevant information; and

(8) Ensuring the suspension of records retention and disposition schedules for relevant information.

e. The Deputy Assistant Secretary (DAS), Office of Information Security is responsible for:

(1) Ensuring VA-wide implementation of requirements for handling information for compliance with litigation holds.

(2) Maintaining a list of systems with ESI and the type of information retained.

f. **The Office of Privacy and Records Management** is responsible for:

(1) Serving as the lead office to coordinate with OGC and providing OGC with the support to coordinate with OIT resources; and

(2) Maintaining a registry of active/inactive cases which includes definition of relevant documents, affected systems, and retention requirements of primary and secondary responsible offices (e.g., VA Business Office / OIT Supporting Office).

g. **The Director of Enterprise Records Service** is responsible for:

(1) Working with records officers to ensure the suspension of records retention and disposition schedules for potentially relevant information; and

(2) Providing advice, assistance, and recommendations to the Office of Information Security (OIS), and assisting in developing and issuing procedures relating to compliance with litigation holds.

h. **Under Secretaries, Assistant Secretaries, and Other Key Officials** are responsible for:

(1) Ensuring that all VA employees, contractors, volunteers, and other personnel under their jurisdictions comply with litigation holds and with the Department's policies and procedures concerning e-discovery; and

(2) Seeking legal guidance from OGC and technical guidance from OIT for the identification, collection, and preservation of relevant information.

i. **Administration and Staff Office Records Officers** are responsible for:

(1) Developing and implementing staff office procedures to comply with this policy; and

(2) Collaborating with the CIO and the ISO at the facility to ensure proper collection and preservation of files and records.

j. **VA Employees, Contractors, Volunteers, and Others with Access to VA Records** are responsible for:

(1) Acknowledging receipt of a litigation hold by signing the Certification of Receipt of and Compliance with Litigation Hold and returning it to the attorney;

(2) Identifying and preserving potentially relevant information subject to a litigation hold;

(3) Preventing the destruction, alteration, or removal of any relevant information as soon as a litigation hold is issued; and

(4) Seeking legal guidance from OGC and technical guidance from OIT regarding the implementation of the litigation hold.

4. DEFINITIONS

a. **Data map.** A document capturing where an organization's ESI is stored, physically and virtually, in what format it is stored, backup procedures in place, how the ESI moves and is used throughout the organization, information about accessibility of the ESI, retention and lifecycle management practices and policies, and identity of records custodians.

b. **Discovery.** The process of identifying, locating, preserving, collecting, preparing, reviewing, and producing information that may be relevant to a matter or may lead to the discovery of information relevant to a matter for utilization in the legal process. Some common ways to conduct discovery are interrogatories, requests for production of documents, and depositions.

c. **Electronic Discovery (E-Discovery).** The process of identifying, preserving, collecting, preparing, reviewing, and producing ESI in the context of the legal process. See Discovery.

d. **Electronic Mail (Email).** An electronic means for sending, receiving, and managing communications via a multitude of different structured data applications (email client software), such as Outlook or Lotus Notes, or those often known as "webmail," such as Google Gmail or Yahoo Mail.

e. **Electronically Stored Information (ESI).** Information that is stored electronically, regardless of the media or whether it is in the original format in which it was created, as opposed to stored in hard copy (i.e., on paper).

f. **Federal Rules of Civil Procedure (FRCP).** The rules governing the procedure in all civil actions and proceedings in the United States District Courts. In pertinent part, the rules provide the requirements that parties must follow while engaging in discovery.

g. **Litigation Hold.** A written or verbal instruction issued as a result of a legal obligation to preserve information in connection with pending or reasonably anticipated litigation. A litigation hold, also known as a legal hold, directs custodians of potentially relevant agency information, IT personnel, and records management personnel to preserve the document and information in their possession, custody, or control. Further, it suspends the normal disposition of records that may be destroyed, deleted, or otherwise disposed of pursuant to established records schedules or ordinary retention practices.

h. **Non-record Materials.** Federally owned informational materials that do not meet or has been excluded from the legal definition of records, such as information that does not document the organization, functions, policies, decisions, procedures, operations, or other activities of the U.S. Government. Includes extra copies of documents kept only for reference, stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit. See Records.

i. **Records.** All books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government, including contractors, under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Note that information subject to discovery is not limited to that which meets this definition of "record." See Non-record Materials.

j. **Records Management.** The planning, controlling, directing, organizing, training, promoting, and other activities involving the life-cycle of VA information, including creation, maintenance (use, storage, retrieval), and disposition, regardless of media.

5. REFERENCES

- a. 44 U.S.C. Ch. 31, Records Management by Federal Agencies
- b. 44 U.S.C. Ch. 33, Disposal of Records
- c. 36 C.F.R. Part 1236, Electronic Records Management.
- d. Federal Rules of Civil Procedure
- e. VA Directive and Handbook 6102, Internet/Intranet Services
- f. VA Directive 6300, Records and Information Management
- g. VA Directive 6301, Electronic Mail Records
- h. VA Handbook 6300.1, Records Management Procedures
- i. VA Handbook 6301, Procedures for Handling Electronic Mail Records