

Litigation Hold Notice

POLICIES

Issued: March 30, 2017

Responsible Official: General Counsel

Responsible Office: Office of Legal Affairs

Policy Statement

The University has a legal obligation to preserve evidence and records, including electronic documents that are relevant to a pending or potential claim or action, such as a government audit, administrative proceeding or lawsuit. Upon notice of pending litigation or anticipated, the University must implement a Litigation Hold Notice that requires the retention of certain paper and electronic records for an indefinite period of time due to pending state or federal litigation.

Each employee of the University is responsible for acting in compliance with the Litigation Hold Notice regarding the preservation and maintenance of evidence relevant to pending litigation.

Purpose

This policy is issued to aid Austin Peay State University in the implementation of a Litigation Hold Notice Procedure to comply with the Federal Rules of Civil Procedure provisions regarding preservation of Electronically Stored Information.

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Definitions

Electronically Stored Information ("ESI")	Refers to all forms of electronic data and documents including, but not limited to, metadata, electronic mail, word processing documents, calendars, voice messages, videos, digital photographs, information in personal digital assistants (PDA) in any location where data may be stored.
Litigation Hold Procedure	Is a process whereby the university, when sued in federal court or when reasonably anticipating federal litigation, issues a litigation hold notice communication suspending the normal operation of paper and electronic document destruction policies for particular records that are relevant to the federal litigation.
Litigation Hold Notice Letter	Is the communication that is distributed to preserve information and prevent or suspend destruction of paper documents and electronic data that must be retained during a litigation hold (attached as Exhibit 1).
Records Coordinator	Refers to the individual at the university who has been appointed by the President to serve as the university's Records Coordinator / Official. The Records Coordinator has the authority and responsibility to dispose of paper and electronic documents in accordance with approved records disposition authorizations under APSU Policy 4:017 Disposal of Records. Prior to the destruction of any records, the Records Coordinator must determine if the action should be delayed due to audit or federal litigation hold requirements.
Evidence	Refers to hard copy and electronic / digital recordings, videotapes, writings, material objects, photographs, drawings, diagrams, testimony, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

Procedures

Introduction

- A. Federal law requires parties to a lawsuit pending in federal court to preserve electronic data and documents pertaining to the lawsuit in conformance with the Federal Rules of Civil Procedure. There is a legal duty to preserve evidence (e.g., documents and things), including electronic documents, when the institution has notice that the evidence is relevant to pending federal litigation.
- B. This policy requires the university develop a comprehensive written Federal Litigation Hold Notice Procedure (“Litigation Hold Procedure”) to retain Electronically Stored Evidence (“ESI”) evidence that is relevant to a federal lawsuit as required by the Federal Rules of Civil Procedure.
 - 1. The university’s Litigation Hold Procedure must include the components described in this guideline pursuant to which the university intends to preserve and retain all evidence, including ESI that is relevant to pending federal litigation in order to avoid penalties for non-compliance with the Federal Rules of Civil Procedure.
- C. The penalties for non-compliance with the federal law regarding electronic evidence retention in federal litigation are severe and potentially costly. The consequences for an institution could include, but are not limited to:
 - 1. Monetary sanctions;
 - 2. Payment of the opposing party’s attorneys’ fees and costs;
 - 3. Preclusion of the university’s evidence at trial;
 - 4. Dismissal of the university’s claims and counterclaims; and
 - 5. Default judgments against the university.
- D. The university is solely responsible for payment of any monetary sanctions issued by the court resulting from the institution’s non-compliance with electronic record retention requirements as required by federal law hence the importance of an institutional litigation hold procedure.

Litigation Hold Application

- A. The Litigation Hold Procedure shall apply to any evidence, paper or electronic documents and data or things, maintained by an institution that is relevant to a federal lawsuit.
 - 1. Such evidence shall be preserved and retained by the institution pursuant to the provisions of the Litigation

Hold Notice until the conclusion of both the litigation and the requisite time period after the litigation as outlined in APSU Policy 4:017 Disposal of Records.

2. Notwithstanding the records retention and disposition schedule outlined in APSU Policy 4:017 Disposal of Records, upon issuance of a Litigation Hold Notice, the university must suspend routine purging, overwriting, re-using, deleting, or any other destruction of electronic information relevant to a federal law dispute, including electronic information wherever it is stored.
3. This includes, but is not limited to, electronic information at the university work station, on a laptop, in a personal digital assistant, on a CD-rom, at an employee's home, etc.
4. The retention requirement includes all forms of attorney-client privileged and non-attorney-client privileged electronic documents.
 - a. In the context of federal litigation, although all information must be preserved, no data will be disclosed to the opposing party without first being reviewed to determine legal necessity, relevance, and privilege.
 - b. Privileged documents (e.g., attorney-client communications) will not be disclosed to the opposing party.

- B. The same preservation requirement exists for paper documents such that the university must suspend routine or intentional destruction of paper documents that are relevant evidence in a federal lawsuit as outlined in a Litigation Hold Notice.

Purpose of Litigation Hold Notice

- A. There will be instances in which the university must implement a Litigation Hold Notice that requires the retention of certain paper and electronic records for an indefinite period of time due to pending federal litigation.
- B. A Litigation Hold Procedure is the process whereby the university, when sued in federal court, sends a Litigation Hold Notice suspending the normal operation of document destruction policies for particular records that are relevant to the federal litigation.
- C. Notwithstanding the applicable records retention schedule, documents that are subject to a particular Litigation Hold

Notice must be retained until the hold is removed.

- D. The Records Coordinator, or a designee, at the university is responsible for implementing the Litigation Hold Procedure upon notice of the need for a Litigation Hold Notice to preserve relevant ESI and paper documents.
- E. Identifying instances in which a Litigation Hold Notice is required and its subsequent implementation requires collaboration of multiple individuals at the institution, including the university's attorney.
- F. The Litigation Hold Notice Procedure that results in the issuance of a Litigation Hold Notice Letter is outlined in this section. The implementation of an institutional Litigation Hold Notice requires adherence to the procedure outlined in this guideline or an alternative process established at the university that includes the components of the procedure outlined in this guideline.

**University's Notification of
Federal Litigation**

- A. Responsible Party: All Employees
 - 1. All employees have an affirmative duty to inform the university's Records Coordinator when they receive official notification of federal litigation against the university.
- B. Official Notice Federal Litigation
 - 1. Employees are considered to be in receipt of official notice of federal litigation when they receive a complaint, summons, and/or other official documents related to a federal lawsuit.
- C. Employee's Notification of Federal Litigation to Records Coordinator
 - 1. Responsible Party: All employees
 - a. Based on the factors outlined in Institution's Notification of Federal Litigation Section B. of this policy, employees who have official notice of federal litigation against the university must inform the institution's Records Coordinator, in writing, of the matter within two (2) business days of their receipt of notification
- D. Records Coordinator's Issuance of Litigation Hold Notice Letter
 - 1. Responsible Party: Records Coordinator

- a. In consultation with and under the direction of Legal Counsel, the university's Records Coordinator, or designee, will issue an Official Litigation Hold Notice Letter regarding the matter to the appropriate individuals within five (5) business days of receipt of notification of pending federal litigation.
 - b. The Litigation Hold Notice Letter must state the categories of electronic and paper documents, including ESI, that must be retained until further notice and that electronic information must be preserved in its original electronic form, so that all information contained within it, whether visible or not, is also available for inspection.
 1. It is not sufficient to retain only a paper copy of ESI. A Model Litigation Hold Notice Letter is attached to this policy as Exhibit 1.
 2. University employees must consult with the university attorney prior to issuing a Litigation Hold Notice Letter.
- E. Employees' Compliance with the Litigation Hold Notice Letter
1. Responsible Party: Employee recipients of the litigation hold notice
 - a. In response to an official Litigation Hold Notice Letter issued by the university's Records Coordinator, or designee, all individuals who receive the notice must compile paper and electronic documents and data (including e-mails, voicemails, videos, etc.) as instructed in the notice letter.
 - b. Electronic records must be retained in the original electronic format (e.g., burned to disk / CD, saved in a secure folder on the system server that is not subjected to unannounced deletion, etc.).
 - c. It is not sufficient to print paper copies of electronic records as they must be maintained in their original electronic format.
 - d. It is the responsibility of individuals to whom the litigation hold notice is issued to retain all records that are responsive to the notice until they receive written notification indicating otherwise.

**Assessment of Litigations
Hold Notice**

- A. The Records Coordinator, in conjunction with the appropriate administrators and the university attorney, shall assess the effectiveness of the institution's Litigation Hold Notice Procedure on a periodic basis, as deemed necessary

by the university.

- B. The Records Coordinator shall make certain that necessary revisions to the Litigation Hold Notice Procedure are made at the time of the review to address any changes in the university organization that may affect the implementation and effectiveness of the Procedure.

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**Publication of the Litigation
Hold Notice Procedure**

- A. To promote uniform compliance with the Litigation Hold Procedures by all personnel employed by an institution and to achieve the university’s duty to preserve and retain relevant paper and electronic evidence in federal litigation, institutions shall, at a minimum, display and distribute its Litigation Hold Notice Procedure, or this policy in the absence of an institutional Procedure in accordance with the standard distribution methods.

Links

Litigation Hold Notice

Revision Dates

APSU Policy 1:008 – Issued: March 30, 2017

Subject Areas:

Academic	Finance	General	Human Resources	Information Technology	Student Affairs
		<input checked="" type="checkbox"/>			

Approved

President: signature on file
