

## MEMORANDUM

**FROM:** Gerald G. Boyd, Manager

**TO:** All ORO Federal Employees

**SUBJECT:** Litigation Hold Policy

The Federal Rules of Civil Procedure have been amended to cover electronically stored information (ESI) in the discovery process. Discovery is the pre-trial exchange of information by parties in a case. In July 2007, the Department of Justice provided guidance to Federal Government Attorneys on the discovery of ESI and the document preservation obligation. ORO has revised its Litigation Hold Policy to comply with this guidance. This policy generally applies to all litigation in which DOE has been named as a party, but may be applied in other limited circumstances.

This policy applies to all ORO employees and describes your responsibilities if you receive a Litigation Hold Notice from the Office of Chief Counsel (OCC). This policy also may apply to DOE/ORO contractors who are in physical possession of government-owned records and/or information relevant to the litigation. In litigation, both the client and its attorneys have a role in preserving and producing relevant documents and information. The Federal Rules of Civil Procedure require certain actions whenever litigation is reasonably anticipated, threatened or pending against an organization. Reasonable anticipation of litigation arises when an organization is on notice of a credible threat that it will become involved in litigation or anticipates taking action to initiate litigation. At that point, the organization has a duty to preserve relevant information, including ESI.

There are at least four general categories of ESI:

- 1) Electronic communication and transaction information (e.g., e-mail messages, voicemail messages, etc.);
- 2) Electronically created and stored business documents (e.g., word processing documents, spreadsheets, etc.);
- 3) Computer databases (e.g., technical, scientific, financial, and human resource databases); and
- 4) System and other internal information, commonly referred to as "metadata."

OCC will be responsible for determining whether a reasonable anticipation of litigation exists. If the Chief Counsel or the Chief Counsel's designee determines that a duty to preserve relevant information has arisen, then a Litigation Hold Notice will be issued. Information to be preserved **after receiving** the notice shall include **only those** documents, records, data, correspondence, and other materials that may relate to the claims. This includes ESI.

If you receive a Litigation Hold Notice, you must perform a reasonable search for responsive documents. The nature and circumstances of the litigation may require you to certify that you performed the search and that you have not altered, discarded or destroyed any responsive documents. If such certification becomes necessary, OCC will provide guidance for preparing the certification. If the litigation is prolonged, you may be required to make periodic certifications that the responsive information is being preserved. If you are leaving ORO or transferring to an organization that is not involved in the litigation, you must ensure that your supervisor is informed of the responsive documents in your custody and notify counsel of your departure.

The Litigation Hold Notice will specify the steps each individual and organization must take to document that the hold has been implemented and is being effectively monitored. Documentation is necessary since the process may be subject to scrutiny by the opposing party and review by the court.

If you have any questions with regard to this policy, please contact the Chief Counsel's Office at 576-1200.