GUIDELINE – DISCOVERY AND LEGAL HOLD

Guideline (Definition): OCIO Guidelines derive from Information Management and Protection Policy, TBM 2009-335 approved by Treasury Board on November 19, 2009. Guidelines are recommended actions, general approaches and operational behaviors. They recommend actions and are not compulsory, as they take into consideration the varying nature of the information management programs. Guidelines are generally a description that clarifies what should be done and how to achieve the objectives set out in policies and directives (source: ISO/IEC 17799:2005).

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<th>Issuing Department</th>
<th>Office of the Chief Information Officer</th>
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<td>Issuing Branch</td>
<td>Application and Information Management Services</td>
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Table of Contents

1.0 Overview .................................................................................................................. 3
2.0 Scope ......................................................................................................................... 4
3.0 Recommended Approach ............................................................................................ 5
   3.1 Introduction .............................................................................................................. 5
   3.2 Managing Electronic Records Discovery ................................................................. 6
   3.3 The Legal Hold Process .......................................................................................... 6
      3.3.1 Approach .......................................................................................................... 6
   3.3.2 The Major Steps of a Legal Hold Process ........................................................... 7
   3.4 Roles and Responsibilities ..................................................................................... 9
4.0 Glossary and Acronyms ........................................................................................... 11
   4.1 Glossary .................................................................................................................. 11
   4.2 Acronyms ............................................................................................................... 11
5.0 References ............................................................................................................... 12
6.0 Revision History ....................................................................................................... 13
Appendices ..................................................................................................................... 14
   Appendix A: Major Steps in the Legal Hold Process .................................................... 15
1.0 Overview

The Discovery and Legal Hold Guideline (hereafter referred to as the Guideline) is an OCIO Guideline on the measures required to support legal hold and the discovery process.

The purpose of the Guideline is:

- to ensure that departments understand and support the discovery process and requirements created by litigation,

- to ensure that departments are aware of their legal hold obligation, which includes the duty to preserve relevant information whenever litigation is reasonably anticipated, threatened or pending, and

- to provide practical guidance on how a department should fulfill obligations with respect to the preservation and production of relevant documents for legal hold.

IM Services (OCIO) uses the definition below when developing IM guidelines for use by public bodies.

Guidelines are recommended actions, general approaches and operational behaviors. They recommend actions and are not compulsory, as they take into consideration the varying nature of the information management programs. Guidelines are generally a description that clarifies what should be done and how to achieve the objectives set out in policies and directives (source: ISO/IEC 17799:2005).
2.0 Scope

The Guideline is targeted to departments of the Government of Newfoundland and Labrador but may be adopted by all public bodies as defined in the Management of Information Act (MOIA), as deemed appropriate. Its audience includes Executive, senior management, legal counsel, and Information Management staff.

The Guideline outlines the steps necessary to effectively manage legal hold and discovery by providing information regarding the discovery and the legal hold processes.

The Appendices outline the major steps in the legal hold process.
3.0 Recommended Approach

3.1 Introduction

Records in all formats may be subject to legal hold and discovery requirements. Electronic records present particular challenges in terms of the potential volume of records, varying formats and ease with which they may be altered. The preservation, retrieval, exchange and production of documents from electronic sources in electronic form are referred to as “e-discovery.”

There is a need to ensure that information is protected, preserved and produced for litigation in the most efficient manner. Any public body that may reasonably expect that it may be the subject of litigation should, first and foremost, pay attention to proactive Information Management. This includes organization of information for ready access to serve on-going business, as well as retention and disposal schedules. In a litigation situation, a solid Information Management program facilitates a quick and uniform response to requests from legal counsel.

During the discovery phase of litigation, parties to a dispute must take appropriate, reasonable steps to locate relevant, responsive records in all formats in response to discovery requests.
3.2 Managing Electronic Records Discovery

E-discovery is the legal obligation of organizations to produce electronically stored information that is, or may be relevant to the subject matter of litigation. At a high level, e-discovery involves the following simplified process:

- Notice
- Issue a Legal Hold
- Preserve and Collect Relevant Information
- Enforce Compliance, Modify as Required
- Release Hold

The key to successful e-discovery is the proactive and effective management of information in electronic form across multiple storage media and locations.

**Spoliation**: Spoliation can be defined as unauthorized destruction or alteration of a record. Electronic documents are easily deleted, either accidentally or in the normal course of business. Once litigation has commenced, there is an obligation to preserve documents. It is best practice however, for a party to preserve all potentially relevant documents as soon as it is reasonable to assume that litigation may ensue from an ongoing issue. In this way, the party may avoid the appearance or allegation of spoliation.

3.3 The Legal Hold Process

Organizations have a duty to preserve relevant information whenever litigation is reasonably anticipated, threatened or pending. This duty arises regardless of whether the organization is the initiator or the target of litigation.

3.3.1 Approach

This section outlines a legal hold approach that departments can follow in the event of litigation. During an e-discovery process, all types of data may serve as evidence, such as e-mail, images, calendar files, databases, audio files, spreadsheets, HPRM files, animation, Web sites and computer programs. In general practice, e-mail is usually the most valuable source of evidence in civil litigation.
Once a legal hold is triggered there is a duty to preserve records which are deemed to be relevant to supporting the litigation. The duty to preserve supersedes Information Management policies or records retention and disposal schedules that would otherwise result in the destruction of records (including electronic records). The organization must take the necessary steps to implement the hold and suspend the disposal of all records in all formats which may be deemed to be relevant.

**Legal Hold versus Access to Information (ATIPP) Request Process**

It should be noted that while the legal hold process, like the ATIPP request process, requires the suspension of regular and normal disposal of records, the two processes are completely separate and should be treated as such. Departments are advised to consult their legal counsel if they have questions regarding any details or requirements of the legal hold process which are not outlined in this Guideline.

### 3.3.2 The Major Steps of a Legal Hold Process

**Step 1: Notice**

As a first step, departments need to be aware of the following types of triggers that often instigate the need to implement a legal hold:

- A preservation letter is issued to the department from an opposing counsel or the Department of Justice;

- A claim letter that is likely to lead to litigation or a statement of claim is filed either directly with a department or with the Department of Justice;

- A reasonable threat of litigation exists, for example, when dismissal of an employee is likely to result in a claim of wrongful dismissal.

**Step 2: Issue a Legal Hold**

Upon receipt of a Statement of Claim, and notification of legal counsel, the Department of Justice will issue a legal hold letter to the department. In such instances, the Deputy Minister or designate should issue a legal hold notice to relevant officials within the department, which is an instruction to preserve records and information that could be relevant.

Communicating with the Office of the Chief Information Officer (OCIO) as early as possible in the process is critical. Departments that are party to litigation must
ensure that relevant electronic records are preserved and protected against alteration or destruction.

Implementation of records disposal, including that authorized through records retention and disposal schedules, should be suspended until the legal hold is lifted. It may also be necessary, in collaboration with OCIO, to copy hard drive(s) and removable drives of some staff, as well as e-mail and other relevant electronic records.

**Step 3: Preserve and Collect Relevant Information**

It is best practice for a party to preserve all relevant documents as soon as possible. However, to avoid unnecessary retention of records in contravention of approved records retention and disposal schedules, a legal hold should be limited in scope to only those records deemed through advice from legal counsel to be relevant to the litigation.

Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. In general, production of electronic documents and data should be made only in electronic format, unless the volume of documents to be produced is minimal.

The practice of producing electronically stored information in paper format should be discouraged in most circumstances; paper is not searchable, is more time consuming to print and collate, and increases the cost of reproduction, shipping and storage; whereas multiple electronic copies can be made at a nominal cost.

**Step 4: Enforce Compliance, Modify as Required**

A department should always retain a copy of any legal hold notice(s) that have been issued, and a distribution list for the notice(s). Throughout the legal hold process, there should be continuous enforcement to ensure that parties are in compliance with the terms of the legal hold notice. The legal hold should be reviewed periodically, and modified if required.

**Step 5: Release Hold**

When the legal hold is no longer required, it should be released and Information Management processes, including authorized disposal of records, should return to normal. This should be adequately communicated at that time.
### 3.4 Roles and Responsibilities

#### Legal Counsel Responsibilities

- Determine if circumstances merit the need for a legal hold
- Determine the scope of the hold to be issued
- Issue a legal hold notice to the Deputy Minister of the department
- Identify the scope and collection method of all records subject to the hold
- Work with the department and OCIO to retrieve electronic records so that they can be reviewed by legal counsel to determine if they are useful as evidence
- Identify and segregate privileged information
- Monitor the hold and modify it if required
- Release the hold

#### Departmental Responsibilities – Deputy Minister or Designate(s)

- Ensure that records that are subject to legal hold are protected from unauthorized access and/or alteration at all times during the hold
- Review the hold, and acknowledge its receipt
- Notify departmental Information Management to ensure all information sources are identified and disposal of potentially relevant records is suspended
- Comply with any instructions accompanying the hold
- Advise all relevant staff to suspend all destruction of electronic records related to the hold (e.g., deletion of e-mails, drafts of documents, etc.)
- Contact legal counsel when needing access to a document or file containing electronically stored information that may be relevant to the hold
- Request that relevant staff identify the location of all potentially responsive information
- Provide relevant computers / devices (including personally-owned computers and mobile devices if requested)
### Departmental Responsibilities - Information Management

- Suspend any retention policy or records retention and disposal schedule affected by the hold
- Identify any potential sources of relevant information in all formats
- Assist in departmental compliance
- Resume records retention policy or authorized disposal of records upon release of the hold

### OCIO Responsibilities

- Work with the department and legal counsel to identify the scope of electronic records that must be preserved, the identification methods, collection processes, and searches
- Collect and preserve electronic records, if possible to do so without changing the nature of the information
- Collect and make the electronic records available in appropriate formats
4.0 Glossary and Acronyms

4.1 Glossary

A complete listing of terms can be found on the OCIO website - Information Management (IM) and Information Protection (IP) Glossary of Terms.

4.2 Acronyms

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<th>Abbreviation</th>
<th>Description</th>
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<td>ATIPP</td>
<td>Access to Information and Protection of Privacy</td>
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<td>IM</td>
<td>Information Management</td>
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<td>MOIA</td>
<td>Management of Information Act</td>
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<td>ESI</td>
<td>Electronically stored information</td>
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<td>HPRM</td>
<td>Hewlett Packard Records Manager (previously TRIM)</td>
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5.0 References

Below is a listing of references included with this document; hyperlinked to the published internet location.

Information Management and Protection Policy, TBM 2009-335

Management of Information Act
### 6.0 Revision History

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### Appendices

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<td>Major Steps in the Legal Hold Process</td>
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Appendix A: Major Steps in the Legal Hold Process

1. Triggering event is identified or verified by counsel
   - If the legal opinion is that no triggering event exists, retain the letter as documentation that there was no reasonable expectation of litigation at the time.

2. Issue a legal hold as of the date the preservation letter is received or the complaint is filed.
   - If there is no preservation letter or complaint, issue a legal hold when litigation may be reasonably expected.

3. Take steps to preserve potentially relevant electronically stored information (ESI) of all employees or witnesses, including departing ones.

4. Take steps to suspend routine processing systems and retention / recycling programs that would destroy or alter potentially relevant electronically stored information (ESI).

5. Enforce and examine compliance with the legal hold

6. Modify the legal hold as necessary. Periodically reissue the hold to remind employees and witnesses and to make new employees aware

7. Release the legal hold when it is no longer required