

For: FSA Employees and Contractors

**Litigation Hold for Documents and Electronically Stored Information (ESI)
for Certain FOIA Requests**

Approved by: Acting Administrator



1 Overview

A Background

The Food, Conservation, and Energy Act of 2008, Section 1619, Pub. L. 110-234, 122 Stat. 93, dated May 22, 2008, (2008 Farm Bill), prohibits the release of certain information that agricultural producers or landowners have provided to USDA for the purpose of participating in USDA programs that provide loans, grants, subsidies, payments, or other benefits. This provision constitutes a statutory exemption from FOIA disclosure when read in conjunction with 5 U.S.C. (b) (3) (Exemption 3).

The 2008 Farm Bill, Section 1619:

- prohibition against disclosure became effective for certain FSA programs on May 22, 2008
- for certain conservation programs, including conservation programs administered by FSA, did not become effective until October 1, 2008, based on Section 2903.

Currently, USDA is involved in ongoing litigation about the validity of Section 1619. Because of ongoing litigation and questions that may arise about FSA conservation programs and their coverage under Section 1619, OGC has ordered a litigation hold on all of the following:

- documents responsive to certain FOIA requests for information about FSA conservation programs under the Food Security Act of 1985, Title XII (16 U.S.C. 3801 et seq.) (1985 Farm Bill)
- material that is potentially relevant to, or has any bearing on, FSA's processing and responding to FOIA requests for information about Title XII conservation programs, because of the transition provision under Section 2903.

Disposal Date

March 1, 2010

4-2-09

Distribution

All FSA Employees and Contractors; State
Offices relay to County Offices

Notice APP-54

1 Overview (Continued)

B Purpose

This notice provides:

- general information about litigation holds and duties to preserve documentary material covered by litigation holds
- information about the litigation hold imposed by OGC for materials relevant to processing certain FOIA requests received by FSA
- FSA-wide guidance and responsibilities for all offices responsible for responding to FOIA requests about carrying out the litigation hold and reporting the actions taken in response to the hold.

C Contacts

For questions about whether documentary material, as described in subparagraph 3 D falls within the scope of the litigation hold and preservation request, or about the preservation of e-mail and other forms of ESI, contact either of the following:

- Robin Wieland, Appeals and Litigation Staff, by either of the following:
 - e-mail to robin.wieland@wdc.usda.gov
 - telephone at 202-690-2814
- Sue Ellen Sloca, FOIA Officer, by either of the following:
 - e-mail to sueellen.sloca@wdc.usda.gov
 - telephone at 202-720-1598.

Questions about preserving e-mails and other forms of ESI will be forwarded to ITSD.

2 General Information About Litigation Holds

A Definition of Litigation Hold

A litigation hold is the procedure for locating, preserving, and retaining all documentary materials that may constitute potentially relevant evidence in pending or reasonably foreseeable litigation. An agency will implement a litigation hold when it **must** suspend normal disposition actions; such as transfer, disposal, recycling, or destruction, related to documentary materials, and must segregate and preserve such materials because of legal, audit, or investigative needs.

2 General Information About Litigation Holds (Continued)

B Definition of Documentary Material

Documentary material means, collectively, operational records, nonrecord material, working files, and personal papers that refer to all media containing recorded information, regardless of the nature of the media or the methods or circumstances of recording.

C Definition of ESI

ESI means any information that is created, received, maintained, or stored on local workstations, laptops, central servers, personal digital assistants, cell phones, or other electronic media.

D Litigation Hold Requirements

The requirements of a litigation hold vary from case-to-case, depending on the nature of the claims that may be asserted by the parties, any agreements ultimately reached by the parties, and any relevant court orders. Whatever the scope of a litigation hold, documentary materials **must** be preserved regardless of whether the documentary materials may ultimately be withheld as privileged or determined to be unreasonably burdensome to produce.

A litigation hold:

- impacts an agency's established management plan for both **records and nonrecords**
- generally requires that documentary materials be retained for longer periods of time than identified in the normal disposition guidance
- is often broader than a "records freeze"; that is, a litigation hold requires preserving materials beyond materials that constitute "records" as defined by the Federal Records Act.

E Failure to Comply With a Litigation Hold

Failure to comply with a litigation hold can result in the following:

- sanctions against the Government
- disadvantaging the Government's position in litigation
- monetary or other contempt sanctions against individuals who failed to take appropriate steps to locate and segregate materials subject to a litigation hold
- in extreme cases, agency performance-based actions or disciplinary sanctions under 5 U.S.C. 4301, et seq, or 5 U.S.C. 7501, et seq.

F USDA Regulations on Litigation Retention Policy

For further information about the USDA-wide litigation hold policy, see DR 3090-001 available at <http://www.ocio.usda.gov/directives/doc/DR3090-001.pdf>.

Notice APP-54

3 Litigation Hold for Materials Relevant to FSA's Processing of Certain FOIA Requests

A Authorization and Scope of Hold

On March 4, 2009, OGC ordered a litigation hold on **all** of the following:

- documents responsive to FOIA requests for information about FSA conservation programs under 1985 Farm Bill, Title XII that were pending between May 22, 2008, and October 1, 2008
- material created or obtained by FSA that is potentially relevant to, or has any bearing on, processing and responding to requests for information about FSA's Title XII conservation programs, based on Section 2903.

Notes: Pending means a FOIA request that was received by FSA before or after May 22, 2008, but **not** processed, including releasing responsive documents, by October 1, 2008. Even if a FOIA request that was pending on October 1, 2008, has since been processed, the FOIA request is still covered under the litigation hold. These FOIA requests are referred to as "covered FOIA requests".

Title XII conservation programs that may be the subjects of covered FOIA requests include CRP, Conservation Reserve Enhancement Program, Farmable Wetlands Program, Grasslands Reserve Program, Grassroots Source Water Protection Program, EQIP, and HELC/WC determinations. This litigation hold does not apply to programs that are not covered by Title XII. If there is a question about whether a program is a Title XII program, consult with regional OGC office.

B To Whom Does the Litigation Hold Apply

The litigation hold applies to all employees and contractors (in counties, States, Kansas City, and Washington, DC) where contracts specify which documentary deliverables or other ESI belong to the Government to the extent that the employees or contractors have documentary materials subject to the hold.

The litigation hold extends to documentary materials stored or maintained in FSA property, and to FSA materials created on or stored in computers owned by FSA employees and contractors.

C Formats and Media of Documentary Material Covered by the Hold

"Formats" and "media" refer to the physical characteristics of documentary materials. The duty to preserve documentary materials does **not** depend on the type of medium on which the information exists. Records covered by the litigation hold may exist in various forms, including but **not** limited to, paper records, handwritten notes, memoranda documenting telephone calls, e-mail, and other electronic communication, word processing documents (including drafts), spreadsheets, databases, calendars (including electronic calendars), electronic address books, personal data assistants (such as Palm Pilots and BlackBerrys), Internet usage files, system manuals, network access information, and metadata.

Notice APP-54

3 **Litigation Hold for Materials Relevant to FSA's Processing of Certain FOIA Requests (Continued)**

C Formats and Media of Documentary Material Covered by the Hold (Continued)

All ESI **must** be preserved in an **unaltered form** (originally created or "native" format).

Important: For example, although printing an archival copy of an e-mail or Word document may comply with the established record schedule, a litigation hold requiring the preservation of ESI requires that the relevant e-mail or Word document be saved in its original electronic format.

D Documentary Material Subject to the Litigation Hold

The following types of information compiled and maintained for each individual covered FOIA request **must** be preserved and retained in whatever format or media this administrative material is generated, collected, and maintained:

- original written request
- copy of the record holding office's response
- depending on the individual FOIA request, all supporting documentation compiled during the processing of the request
- originals and all copies of all records responsive to a covered FOIA request.

Note: See 1-APP, paragraph 153 for more information about the type of materials that may be compiled for individual FOIA requests.

In addition to documentary material about a particular covered FOIA request, all information, created or obtained by FSA that is potentially relevant to, or has any bearing on, processing requests for information about FSA's Title XII conservation programs based on Sections 1619 and 2903 **must** be preserved and retained in whatever format or media this type of material is generated, collected, or maintained. This includes materials that may be duplicative or stored elsewhere. This type of administrative material may include, but **not** be limited to:

- correspondence; such as e-mails, letters, and internal memoranda
- training files
- video files and audio files
- handwritten notes, rough notes, working files, preliminary drafts.

Notice APP-54

3 **Litigation Hold for Materials Relevant to FSA's Processing of Certain FOIA Requests (Continued)**

E Deleting or Destroying Documentary Materials Subject to the Litigation Hold

Until further notice, offices and contractors shall **not** delete or destroy any documentary materials, whether records or nonrecords that are potentially relevant to the subject of the litigation hold. Routine data destruction and back-up tape recycling policies **must** also be discontinued until further notice.

If an office is uncertain whether documentary materials fall within the scope of the litigation hold, **preserve** the information. Offices should contact Robin Wieland, Appeals and Litigation Staff, or Sue Ellen Sloca, FOIA Officer, to discuss the particular type of materials in question. County Offices shall request guidance through the State Office FOIA Coordinator.

When requesting guidance under this litigation hold, offices should provide detailed descriptions of materials in question to the appropriate contact person. The designated contacts will consult with OGC and provide offices with guidance on preserving and retaining materials.

Note: See subparagraph 1 C for complete contact information.

F Time Period for Preservation and Retention

All documentary material covered by the litigation hold **must** be identified for preservation and retained **until further notice**.

Note: This litigation hold applies **prospectively**; continue to preserve **all** relevant documentary materials created until further notice. For example, hold **all** documentary materials about a covered FOIA request that is pending as of the date of this notice and subsequently processed.

4 **Determining if a FOIA Request and Other Administrative Information are Covered by the Litigation Hold**

A Covered FOIA Requests

Only FOIA requests that were **not** processed, including releasing responsive records, on October 1, 2008, have the potential to be covered by the litigation hold.

Note: All FOIA requests received in FY 2008 were **required** to be entered in the automated tracking system, FOIA-Capture (FOIA-CAP). FOIA-CAP provides a valuable tool to quickly identify FOIA requests that were pending on October 1, 2008, and carried over into FY 2009. These requests will show "SLOCA" as the system user.

Notice APP-54

4 Determining if a FOIA Request and Other Administrative Information are Covered by the Litigation Hold (Continued)

A Covered FOIA Requests (Continued)

For each FOIA request that was pending on October 1, 2008, further review of the individual FOIA request file will be necessary to determine if the requester was seeking records about the conservation programs under the 1985 Farm Bill, Title XII. If the pending FOIA request includes a request for records about **any** Title XII conservation programs, it is covered by the litigation hold.

B Other General Information About Interpreting and Implementing Sections 1619 and 2903

Information about FOIA general administration can be maintained in general FOIA administration files or be in the possession of key employees or contractors who created the information. FOIA administrative files and records maintained by individual employees and contractors in each office **must** be reviewed to identify material covered by the litigation hold. If material is identified, in any format or media, that has any bearing on FSA's administration of Sections 1619 and 2903, either in general terms or specific to a particular request, the material is covered by the litigation hold.

5 Actions

A Preserving and Retaining Documentary Materials Covered by the Litigation Hold

Effective immediately, employees and contractors in offices that are responsible for responding to FOIA requests shall do the following until further notice:

- **not** destroy or dispose of relevant materials in **any** format or media
- retain electronically created and/or stored documents in their native format.

Example: All e-mails received **must** be either auto-archived or archived into personal folders.

Supervisors and managers must take steps to ensure that the hold is carried out by employees under their supervision and to preserve the relevant documentary materials and ESI of departing employees. The litigation hold **requires** that information technology staff ensure that e-mails or other relevant ESI of departing employees that exists on FSA servers is preserved.

Notice APP-54

5 Actions (Continued)

B All FSA Offices Responsible for Responding to FOIA Requests

PAS, FOIA offices located in KCAO and KCCO, and all State and County Offices shall review FOIA-CAP, individual FOIA request files, general FOIA administrative files, and FOIA information maintained by key individuals and contractors, as necessary, to locate and identify covered FOIA requests and other relevant documentary material, as described in paragraph 4, and report the results of the review using Exhibit 1, according to subparagraph C.

The office that is responsible for responding to the request shall:

- flag for preservation and retention **all** documentary materials about each covered FOIA request identified
- immediately notify each office that performed the search for responsive records of the requirement to flag for preservation **all** original versions of records responsive to the covered request; this will be required if original copies of responsive records are located and maintained in a different FSA office
- Segregate, preserve, and retain **all** other materials that are relevant to processing FOIA requests for information about FSA's Title XII conservation programs based on Sections 1619 and 2903, including relevant ESI.

C Information to Report on Exhibit 1

One FSA employee from PAS, KCAO, KCCO, and each State and County Office shall be selected to act as the contact point for the litigation hold. The following contact information shall be included in Exhibit 1:

- office name and address
- name and title of contact employee
- telephone number for contact employee
- e-mail address for contact employee.

Note: CED's in County Offices and the State FOIA Coordinator in State Offices shall act as the contact employee in those offices.

Notice APP-54

5 Actions (Continued)

C Information to Report on Exhibit 1 (Continued)

For covered FOIA requests indentified, record the:

- individual control number assigned by FOIA-CAP, formatted as “SS-CCC-YYYY-XXXXXX”
- date the responding FSA office notified the FSA offices that performed the search for responsive records of the requirement to flag for preservation all records responsive to the covered request, if applicable
- total number of covered FOIA requests identified.

In addition to information about specific covered FOIA requests, record:

- whether other documentary material about processing FOIA requests for Title XII conservation program information based on Sections 1619 and 2903 was located
- a brief description of the type of material located, if applicable.

The head of each office authorized to make determinations on FOIA requests shall sign and date Exhibit 1, verifying:

- that the review of FOIA-CAP and FOIA files was completed
- all documentary materials for the identified covered FOIA requests and other administrative materials have been flagged for preservation and retention, if applicable
- other record-holding FSA offices have been notified, if necessary
- that the results of the review are accurately documented.

D Submitting Exhibit 1

County Offices shall submit Exhibit 1, to arrive in the State Office by **COB, April 24, 2009**.

PAS, KCAO, and KCCO shall submit Exhibit 1 directly to ALS, attention Robin Wieland, to be received by COB, May 15, 2009. Exhibit 1 may be e-mailed to Robin Wieland at **robin.wieland@wdc.usda.gov** or FAXed to 202-690-3003.

Note: Negative reports are **required**. A negative report is a report where no covered FOIA requests are identified and no other materials that may be subject to the litigation hold are located.

5 Actions (Continued)

E State Office Action

State Office FOIA coordinators shall be responsible for providing oversight to ensure that the litigation hold is properly carried out at the State and County Office levels.

State Offices shall:

- review each Exhibit 1 submitted by County Offices for completeness
- complete Exhibit 2 according to subparagraph F.

F Information to Report on Exhibit 2

Exhibit 2 shall include information about the State Office and all County Offices that identified a covered FOIA request or other documentary material relevant to the litigation hold. Exhibit 2 shall include the following State Office contact information:

- office name and address
- name and title of contact employee
- telephone number for contact employee
- e-mail address for contact employee.

The results of reviews completed in all offices in the State shall be included. Report the:

- total number of copies of Exhibit 1 provided as attachments, if applicable; attach a copy of Exhibit 1 from **all** County Offices and the State Office that identified covered request and/or located other general FOIA administrative materials

Note: Do **not** attach Exhibit 1 from offices that submitted a negative report.

- total number of covered requested identified on each attached Exhibit 1.

State FOIA Coordinators shall sign and date Exhibit 2, verifying that the:

- review of FOIA-CAP and FOIA files was completed for all offices
- results of the reviews completed in all offices are accurately documented.

Note: If Exhibit 1 is a negative report for all County Offices and the State Office, Exhibit 2 shall be submitted as a negative report.

Notice APP-54

5 Actions (Continued)

G Submitting Exhibit 2

State Offices shall submit Exhibit 2 and all attachments, or a negative report, if applicable, to ALS, attention Robin Wieland, to be received by **COB, May 15, 2009**. Exhibit 2 and all attachments may be e-mailed to Robin Wieland at **robin.wieland@wdc.usda.gov** or FAXed to 202-690-3003.

H Filing Exhibits 1 and 2

All offices that are required to complete Exhibit 1 and/or Exhibit 2 shall maintain copies according to 25-AS, Exhibit 45, until further notice.

I ALS Action

ALS will forward, by e-mail, Word versions of Exhibits 1 and 2 to each State FOIA Coordinator and FOIA officers in PAS, KCAO, and KCCO. State Offices shall forward Exhibit 1 to all CED's. Offices shall complete Exhibits 1 and 2 as outlined in this notice.

Implementing March 4, 2009, FOIA Litigation Hold

Employee Contact Information and Results of FOIA File Reviews

To be completed by all State Offices.

1. STATE OFFICE CONTACT INFORMATION

FSA State Office Name and Address: _____

Contact Employee Name: _____ Title: _____
Contact Employee telephone number (with area code): _____
Contact Employee e-mail address: _____

2. RESULTS OF REVIEW FOR ALL FSA OFFICES IN THE STATE

A total of _____ completed and signed copies of Exhibit 1 are attached for all FSA offices in the State that identified covered FOIA requests and/or other documentary material relevant to the litigation hold.

Note: If there are no attachments, enter “zero” in item 2, “none” in item 3, and go to item 4.
(This will be considered a negative report)

3. TOTAL NUMBER OF COVERED FOIA REQUESTS IN THE STATE AS IDENTIFIED ON ALL ATTACHED EXHIBIT 1's: _____.

4. Signature of State FOIA Coordinator, verifying that the review of FOIA-CAP and FOIA files was completed for all FSA offices and the results of the reviews and other actions taken are accurately documented.

(Signature)