

For: FAS and FSA Employees and Contractors

Litigation Hold Questions and Answers (Q&A's)

Approved by: Acting Deputy Administrator, Management



1 Litigation Hold Guidance

A Background

Notice AS-2226 provided guidance about FSA's legal obligation to preserve all records and nonrecord documentary materials because of pending or possible litigation lawsuits.

Note: The National Office has received numerous requests for additional guidance.

B Purpose

This notice provides additional guidance and Q&A's about the litigation hold.

C Contact

FSA County Offices shall contact the FSA State Office with any questions. National and FSA State Offices shall contact either of the following:

- Keith Holden, Agency Records Officer (FAS and FSA), by either of the following:
 - e-mail at **keith.holden@wdc.usda.gov**
 - telephone at 202-690-1560
- Angela Payton by either of the following:
 - e-mail at **angela.payton@wdc.usda.gov**
 - telephone at 202-720-0482.

D Action

All FAS and FSA employees and contractors shall:

- continue adhering to the policies and requirements established in Notice AS-2226
- review Q&A's in Exhibit 1.

Disposal Date	Distribution
June 1, 2013	All FAS and FSA employees and contractors; State Offices relay to County Offices

Questions and Answers

- Q1.** To whom does the requirement to preserve all records and nonrecord documentary material apply?
- A1.** The requirement to preserve all records and nonrecord documentary material applies to **all** employees at all locations, as well as FSA contractors.
- Q2.** Can routine e-mails be deleted, such as “I need to leave today at 3 p.m. for an appointment” or “let’s have lunch”?
- A2.** Yes, however, like anything else, there has to be some common sense applied. If the 3 p.m. appointment or the lunch had anything to do with an applicant’s/borrower’s situation or an employment dispute about an FSA employee, then it should **not** be deleted or destroyed.
- Q3.** Can we save only sent e-mails?
- A3.** No. Sometimes it is necessary to know who (or which employee) received a given message that was sent, so simply saving the outgoing message sent by the originator may not be sufficient in a court case.
- Q4.** How are “copies” of official records to be held? Can duplicate records be disposed of as long as the official, original record is available?
- A4.** As a general rule, retention of duplicate records should be 1 copy per person per location. Any copies of official records that are printed should be saved as part of that individual’s official records or part of that office’s records. There is no duty for an individual to save blank duplicates of other official records. However, if a copy of an official record is annotated with an employee’s notes or remarks, that copy should be preserved.
- Q5.** Can information sent by FSA Public Affair Specialists, Fed Weekly, etc., that are generic in nature and mass e-mailed to groups of people be deleted?
- A5.** Yes, copies of mass e-mail mailings may be deleted if the recipient has not altered the original message in any manner.
- Q6.** Is there a way to identify which office is designated as a “records holding office” so some materials, such as notices and memorandums, may be disposed of?
- A6.** FSA’s record retention policies already outlines that the originator of the communication is the “records holding office”; however, once the notice, memorandum, etc. becomes paper, it will need to be saved as part of that employee’s or office’s official records. See Q4.

Questions and Answers (Continued)

Q7. For FSA Only. Some States are being required to keep all backup tapes. These tapes contain all of the information on computers, including e-mails. Would these backup tapes be sufficient for e-mail retention instead of each individual employee maintaining all e-mails?

A7. No. Network backup tapes are not the same as e-mail archiving, as they have different purposes and have different methods of retrieving information. The goal is for individuals to keep their own e-mails so that individuals may be able to search and retrieve potentially responsive records if required; that is, a less onerous task than restoring full network backup tapes, and then searching everything for potentially responsive records.

Q8. What impact does this notice have on personnel-type records; for example, copies of records that exist in either OPF or electronic formats; T&A's, or travel records of employees that have reached their retention dates?

For FSA Only. If the FSA employee is retaining a copy, must the FSA State or County Office retain copies as well?

A8. Any personnel records that reach the end of their retention dates must be preserved. FSA State and County Offices still must maintain official records.

Q9. What about old administrative files? Can those be destroyed?

A9. No, administrative files must be preserved unless prior approval for destruction has been requested and received from the Agency Records Officer and OGC.

Q10. For FSA Only. The pages discarded from handbooks when new amendments arrive, are we supposed to keep those deleted pages now?

A10. No, these pages may be discarded if the original has not been altered in any manner. If your State implements a supplement to a handbook and/or amendment, then yes, that State will have to maintain the original handbook, amendment and supplement.

Questions and Answers (Continued)

Q11. With respect to electronically stored information (ESI), define “original native format”.

A11. To be in its “original native format”, ESI must be saved or retained in the original software program that was used to create the document. For example, a “.doc” file would be a document created in MS Word. The original format may include meta data from the creation of the document or file, but it is not required to create additional meta data if it was not created by the original software.

Note: Metadata is background information that describes the content, quality, condition, and other appropriate characteristics of the data. Where electronic documents are concerned (e-mail, Word document, Excel file, etc.), metadata is a small unseen data file that accompanies every electronic document. Contained in the metadata is an embedded record that describes information about that electronic document, such as when the electronic document was created, who created the electronic document, and a record of any modifications/changes made to the electronic document. Metadata is essentially an embedded historical record of the electronic document.

Q12. Define “reasonably foreseeable” litigation. The current implication is that we must “save everything”, whether or not the record or nonrecord is related to a matter under (or potentially under) litigation. Are there plans to allow the destruction of documentary material that is clearly not related to a “reasonably foreseeable” litigation?

A12. The current ruling by the Department of Justice and OGC is that everything has the potential to be included in either pending or future litigation and, therefore, must be saved.

Q13. Concerning the guidance “Whatever the scope of a litigation hold”, how far does this extend? The field is constantly receiving subpoenas and other litigation-related correspondence typically from the State court level. Does the litigation hold guidance extend to the current or “reasonably foreseeable” litigation coming from at and below the State court level?

A13. Yes.