

## Standards: Preservation Holds

### 1) Definitions

- a) OGC refers to The Texas A&M University System - Office of General Counsel.
- b) Institution refers to a member institution of The Texas A&M University System.
- c) Documents refers to paper documents.
- d) ESI refers to electronically stored information.
- e) Affiliation status refers to the relationship between a named person and the relevant Institution. Typical values for affiliation status include current employee, former employee, current student, former student, and contractor.
- f) Matter refers to any issue handled by OGC that requires the preservation and potential production of ESI. A matter might be a lawsuit that has been filed, or the reasonable anticipation of litigation
- g) Preservation hold or hold is a notice from OGC to one or more persons (the "named persons") and the Institution for which they work to preserve documents and ESI pursuant to a matter.
- h) Named person refers to any person who has been asked to preserve ESI as part of a preservation hold.
- i) Preservation personnel refers to employees of an Institution whose roles and duties are important to the preservation effort. Preservation personnel typically include employees involved with employee hiring/transfer/termination such as the Human Resources ("HR") Director and the Provost. It also typically includes IT people who are responsible for the automatic purging of accounts and deletion of data, such as email administrators, account administrators, desktop technicians, and the help desk.
- j) Preservation letter is the document that OGC sends to a person to place that person under a preservation hold. The preservation letter describes the documents and ESI to be preserved.
- k) Personal network share is an Institution-provided network storage space meant for use by one person.

### 2) General

- a) The purpose of a preservation hold is to identify and preserve relevant ESI from deletion or modification. The preservation process is a team effort between the named person, OGC and the Preservation personnel.
  - b) The consequences of spoliation (deleting relevant ESI) can be dire to the Institution and may include the following sanctions:
    - i) Adverse inference: the judge instructs the jury to assume that the lost evidence, if available, would have been unfavorable to the spoliator.
    - ii) Spoliator prohibited from introducing expert, or other testimony, regarding either the missing or destroyed evidence. This may result in summary judgment against the spoliator because, without that testimony, the party cannot prove its case.
    - iii) Dismissal and default judgment are the harshest spoliation sanctions (rare).
    - iv) Imposition of monetary sanctions.
- 3) The Chief Executive Officer of each Institution or his or her designee shall:
- a) Designate an employee of the Institution to be the ESI Preservation Coordinator for the Institution, and communicate that designation to OGC. In the absence of a formal designation for an Institution, the presumption shall be that the Information Security Officer of the Institution is the ESI Preservation Coordinator for the Institution.
  - b) The ESI Preservation Coordinator of the Institution shall serve at the discretion of the Chief Executive Officer of the Institution or his or her designee.
- 4) OGC shall:
- a) Notify the relevant ESI Preservation Coordinator(s) about key events and information regarding a preservation hold:
    - i) Imposition of a preservation hold;
    - ii) The named persons involved in the hold and their supervisor as needed;
    - iii) The affiliation status of the named person;
    - iv) The nature of the information to be preserved;
    - v) Any special instructions or considerations regarding the hold;
    - vi) The lifting of a preservation hold.
  - b) At the initial imposition of a hold on a named person, send a Preservation letter to the named person, with a notification to the immediate supervisor of the named person as needed.

- c) At the initial imposition of hold on a named person, administer to the named person an e-discovery questionnaire ("the hold questionnaire") to be filled out by the named person. The hold questionnaire will list examples of the common types of places where relevant ESI might be stored, and will ask the named person to identify where the named person has relevant ESI stored in those types of places.
    - i) Examples of types of places:
      - (1) All Institution devices assigned to the named person, e.g., workstations, smartphones, storage devices.
      - (2) Institution shared resources such as network drives, Syncplicity locations, Google Docs, email accounts, Laserfiche stores, document management systems, etc.
      - (3) Personally-owned devices such as personal computers, tablets and/or smartphones.
      - (4) Personal shared resources such as personal email, personal cloud storage, text messages, social media, and backups.
    - ii) For each type of place that has relevant ESI, the hold questionnaire shall ask the named person to identify uniquely the specific place(s) where relevant ESI is to be found. For example:
      - (1) If the type of place is Institution devices assigned to the named person, the specific place might be "Dell Optiplex 7010 with property tag 151000057867"
      - (2) If the type of place is shared resource, the specific place might be "I:\common\ois network folder"
  - d) Strive to have all hold questionnaires completed by the named persons in a timely fashion.
  - e) Share the completed hold questionnaires with the ESI Preservation Coordinator at the relevant Institution(s) in a timely fashion.
- 5) The ESI Preservation Coordinator of an Institution shall:
- a) Identify Preservation personnel at the Institution.
  - b) Coordinate with Institution Preservation personnel and with OGC as needed to preserve relevant ESI.
    - i) Create and maintain a list of preservation personnel at the Institution.

- ii) Document the preservation process and notification procedures, e.g., a flowchart for notifications.
- iii) Promptly notify Preservation personnel of key events and information regarding a preservation hold.
  - (1) Example of key events and information include addition of named persons to a hold, removal of named persons from a hold, the departure or transfer of named persons, and the lifting of a hold.
- iv) Decide whether to inform each named person that a hold will be placed on their email account that will prevent the user from permanently deleting any emails, unless there are special circumstances where this is not appropriate.
- c) Ensure that Preservation personnel have documented processes to prevent the unauthorized deletion or modification of relevant ESI. For example, desktop support personnel should have a process to check whether a user is a named person before formatting or the surplus of the named person's workstation.
- d) Establish and maintain a written record (the "hold record") of all preservation holds currently in effect at the Institution that shall include all the named persons involved with those holds, and key events in the administration of those holds.
  - i) For each hold, the hold record shall at a minimum list the name of the matter, the date on which the hold was imposed, and the named persons.
  - ii) For each named person, the hold record shall contain at a minimum:
    - (1) The named person's name;
    - (2) The named person's UIN;
    - (3) The date the hold was imposed on the named person;
    - (4) The named person's supervisor, and;
    - (5) The completed hold questionnaire for that named person.
  - iii) The ESI Preservation Coordinator shall update the hold record to reflect key events:
    - (1) Addition of named persons to the hold;
    - (2) Removal of named persons from the hold;
    - (3) Date on which holds were placed on email accounts;

- (4) Addition of items to evidence, e.g., hard drive taken and put in secure preservation storage or image made of hard drive, backups made of relevant data on network shares, secure storage of backup tapes;
  - (5) Any other event which evidences due diligence in the preservation process;
  - (6) Notice that the hold has been lifted (i.e., the case has been dismissed or the statute of limitations has passed); and
  - (7) The day on which all preserved information may be deleted, according to the applicable retention schedule.
- e) Establish and maintain a secure storage space ("secure preservation storage") where preserved ESI, hard drives, and other devices shall be stored.
- i) The ESI Preservation Coordinator shall document a chain of custody for all physical devices stored in secure preservation storage.
  - ii) The ESI Preservation Coordinator shall maintain an inventory of the physical devices stored in secure preservation storage. That inventory shall include, for each device, the named person and the identifying information for the preservation hold(s) and the date the device was stored.
- f) Upon receiving notice that a person has been placed under a preservation hold:
- i) Ensure that a hold is placed on the named person's Institution email account(s), either by placing the hold themselves or coordinating with the email administrator to place the hold. Such a hold preserves emails even when the user deletes them.
    - (1) If the Institution's email system does not have the hold feature, the ESI Preservation Coordinator shall ensure that a copy is made of the entire email file and securely store that copy in secure preservation storage. The copy shall be added to the inventory of items in the secure preservation storage and the chain of custody shall be documented.
    - (2) Coordinate with OGC to determine the timing of updates to the email copy.
  - ii) Notify OGC if any information supplied by OGC is incorrect, e.g., a named person listed as a current employee and/or student is in fact a former employee and/or student.
  - iii) Notify OGC of the status of the ESI of named persons who are former employees.

- (1) ESI of named persons may include data stored on backup media (e.g., backup tapes, disk-to-disk copies).
  - iv) Contact OGC with any issues or special circumstances that occur.
  - g) Notify OGC of any scheduled server changes, change of email applications or other significant hardware or software change that may impact the preservation of relevant ESI.
  - h) Upon receiving notice that a named person is transferring within the Institution, notify and coordinate with OGC.
  - i) Be responsible for ensuring the ongoing preservation of relevant ESI belonging to a named person who has left the Institution.
    - i) Upon receiving notice that a named person has left or will be leaving the Institution:
      - (1) Consult with the named person and update the hold questionnaire (if possible);
      - (2) Consult with the supervisor of the named person re relevant ESI (e.g., to help ensure that devices and relevant ESI are maintained);
      - (3) Preserve any relevant ESI identified in the hold questionnaire, excluding relevant ESI located on personally-owned devices;
        - (a) If there is relevant ESI on personally-owned devices, contact OGC for further guidance.
      - (4) Preserve the data of any Institution-owned devices assigned to the named person;
      - (5) Preserve the named person's personal Institution assigned network share(s);
      - (6) Notify OGC and coordinate with OGC re any additional actions.
  - j) Determine when preserved ESI may be deleted and inform the relevant Institution personnel (e.g., named persons, preservation personnel) that they may/ought to delete the ESI. Note that even after a hold has been lifted, records retention rules may require that preserved ESI be kept for an additional time period.
    - i) The email hold on the mailbox of a named person may be lifted on the day a preservation hold is lifted by OGC if the named person is not named in another preservation hold.
    - ii) Any other preserved ESI shall be retained according to applicable retention schedules.
- 6) Preservation personnel shall:
- a) Follow the instruction of the ESI Preservation Coordinator with regards to relevant ESI;
  - b) Take no action that will cause the deletion or modification of relevant ESI.

## RECOMMENDED PRACTICES

The purpose of a preservation hold is to identify relevant ESI and preserve relevant ESI from deletion or modification. Therefore, a preservation hold breaks down into two phases: identifying relevant ESI and then protecting that ESI from deletion.

### *Identifying Named Persons and Relevant ESI*

Identifying relevant ESI begins with OGC identifying the named persons and crafting a broad definition of which ESI is to be considered relevant. OGC then notifies the named persons and gives them the definition of relevant ESI. The ESI Preservation Coordinator at each relevant Institution receives copies of these notifications, and has a duty to inform OGC if the information regarding the named persons is incorrect, e.g., a departed employee is listed as a current employee.

The named persons then fill out questionnaires administered by OGC indicating where they believe relevant ESI might be found. According to this standard, OGC will make questionnaire results available to the ESI Preservation Coordinator.

### *The Hold Record*

The ESI Preservation Coordinator is charged with maintaining an up-to-date, written record (“the hold record”) of current matters at the Institution and the named persons involved with those matters. The ESI Preservation Coordinator must update the hold record with any updates from OGC. The hold record should include key events in the preservation process (e.g., collecting evidence) and any event which evidences due diligence. The hold record can be in any form – Word doc, Excel spreadsheet, database, etc.

It is important that the hold record reflect whether a named person is involved in multiple matters, e.g., person X is named in both matter Y and matter Z. A problem can occur when matter Y is dismissed and all of X’s relevant ESI (e.g., disk images, preserved mailbox) is deleted: matter Z is still ongoing which means that relevant ESI may have been inadvertently destroyed. Keeping track of which people are named in multiple, active matters helps avoid this problem.

An example of a hold record is listed as Appendix B.

### *Preventing Deletion of Relevant ESI*

The second phase is protecting relevant ESI from deletion. Preventing deletion would be simple if 1) the named person was the only person who could delete or modify their relevant ESI, and 2) named persons never left the Institution, but neither of those things is true. Email administrators, network administrators, desktop support specialists – all of them have the power to delete or alter relevant ESI, and named persons routinely move to other departments or leave the Institution altogether. Here are some common deletion scenarios:

- 1) Deletion by Named Person. Accidental and not so accidental. For example, it is not uncommon for departing employees to format their hard drives and other data locations.

- 2) Automated purging/archiving. Scripts or other processes can automatically modify/delete data. For example, an Institution might automatically delete a user's mailbox and personal network drive 30 days after their account is disabled. Users might set up auto archiving that moves relevant ESI to another location.
- 3) Deletion/Modification by IT Personnel.
  - a) Workstation add/move/change. IT moves workstations and other computers from user to user, and data can get modified/lost in the transfer. Many Institutions shred or format hard drives from computers that are being decommissioned.
  - b) Remediation of malware. Institutions might format machines that have become infected.

### Identify Preservation Personnel

Therefore, a first key duty of the ESI Preservation Coordinator is to identify all *Preservation personnel* at the Institution. Preservation personnel includes all people other than the named persons who are involved, directly or indirectly, with the alteration or deletion of relevant ESI. Preservation personnel typically includes:

- 1) Systems administrators – email administrators, network administrators, application administrators.
- 2) Desktop support personnel – the people who prep and move workstations.
- 3) Helpdesk personnel. While typically not involved directly with modifying data, helpdesk personnel can be critical to preservation efforts. Most actions performed by administrators and desktop support personnel are driven by work tickets issued by the Helpdesk. The Helpdesk can flag tickets associated with named persons, thus alerting other personnel.
- 4) HR and EEO personnel typically do not have the ability to delete data, but they may know in advance that a named person is leaving the Institution. The ESI Preservation Coordinator can use this information to alert other preservation personnel and thus prevent accidental deletion.
- 5) Personnel involved in the surplus of Institution owned devices.

### Communicating with Preservation Personnel

Once the ESI Preservation Coordinator has identified all Preservation personnel, the next step is to put in place a tool for communicating effectively with the Preservation personnel. One possible tool is a mailing list or listserv. The ESI Preservation Coordinator can use the mailing list to relay important updates from OGC, notify Preservation personnel about significant events (e.g., lifting of the hold), and to send periodic education and awareness items.

### Preservation Processes

The next step is for the ESI Preservation Coordinator and the Preservation personnel to come up with processes for preserving relevant ESI.

- 1) Helpdesk. Coordinate with helpdesk personnel and have them put in place a process to flag work tickets associated with named persons.



- 2) Automatic processes/scripts. Coordinate with systems administrators to identify such scripts, if any. Have the script owners modify or suspend the scripts with regards to relevant ESI.
- 3) Workstation Changes. Identify personnel (“desktop support”) involved with moving/adding/changing/surplus of desktop computers and add them to Preservation personnel.
  - a) Named person gets a new computer. Transferring data from one computer to another can alter metadata. Explain to them that they must copy relevant ESI to the new system using tools that do not change metadata such as file dates. The old drive does not need to be preserved as long as all user data is copied to the new system with the original unchanged metadata.
  - b) Named person’s computer gets reassigned to another person. When reassigning a computer from user A to user B, check the hold record to determine whether user A is a named person. If so, then either image the computer’s drive(s) or remove them. If you remove the drives, label them with the name of the named person and the litigation hold number(s), place it in the vault with chain of custody and add the appropriate information to the inventory. The data may be copied to another system prior to providing to the vault, again use tools that do not change or modify the data.
- 4) Computer belonging to named person or otherwise containing relevant ESI is decommissioned/retired. Either image the drives with e.g. FTK imager or pull the hard drives, label, **create chain of custody** and put in secure storage.
- 5) Deletion of Email. Coordinate with mail administrators. If the email system permits it, place a hold on the email accounts of all named persons. In Microsoft Office 365 this is known as an “in-place” hold. If the email system does not have a hold feature, make a full backup of the mail account at that time and store it securely.
- 6) Deletion of Personal Share Drive data. Prior to removing or deleting an individual’s personal drive data, check to see if they are a named person. If they are, do not delete.
- 7) Department Share Data. Relevant ESI might reside in a department share, commingled with other data. In such cases, the ESI preservation should notify departmental management and OGC.
- 8) HR Changes. The ESI Preservation Coordinator should work with HR, EEO, and other personnel involved with employment issues to develop processes that inform the ESI Preservation Coordinator of personnel changes in a timely manner. It is not uncommon for IT personnel to learn that a named person has departed the Institution after the fact, significantly complicating the Institution’s ability to locate and preserve ESI.
- 9) Information System Data. Sometimes a system like Banner or Laserfiche may be identified as containing relevant ESI being on preservation hold. The ESI Preservation Coordinator, the

functional business owner<sup>1</sup> of the system, and the administrator of the system will have a discussion with OGC regarding how to proceed.

### Secure Preservation Storage

If the ESI Preservation Coordinator must take possession of relevant ESI, that ESI must be stored securely and properly tracked.

If the ESI is physical objects such as whole PCs, disk drives, USB sticks, CDs, etc., then these objects should be thoroughly labeled and stored in a secure physical location. If the ESI is data stored on general network storage, that ESI must be protected appropriately. For example, limiting permissions to that network storage, making sure the data ESI is backed up, perhaps even encrypting the ESI.

All ESI in the possession of the ESI Preservation Coordinator must be properly tracked and documented. Tracking includes chain of custody information: when did the ESI Preservation Coordinator receive the ESI, from whom, etc. Again, the particular tool is not important. What is important is that the tool clearly shows what items should be in secure preservation storage, with what matters they are associated, etc.

### *Departing and Departed Named Persons*

Another responsibility of the ESI Preservation Coordinator is to “step into the shoes” of departing or departed named persons.

It is not uncommon for OGC to name a person who has already departed the Institution. Thus, the named person is unavailable to fill out OGC’s questionnaire or otherwise identify relevant ESI. In this case, the ESI Preservation Coordinator steps in to identify and preserve relevant ESI. Typically, this means working with OGC, the departed named person’s supervisors, and others to identify relevant ESI. The good news is that because the named person has departed, there will be no additions to the relevant ESI. Therefore, once the relevant ESI has been identified, the ESI Preservation Coordinator only needs make secure copies of that data, **create a chain of custody**, and put those copies in secure preservation storage.

The procedure for departing named persons is similar, with the added step of consulting with the departing person.

### *Other Important Notes*

Legal matters are confidential - Please do not discuss or provide any information regarding preservation holds to anyone that does not have business need without discussing with the ESI

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<sup>1</sup> The Institution department whose business operations are supported by the system. For example, the functional business owner of Banner might be the Admissions and Enrollment department.

Preservation Coordinator. IT does not need to know the reason for litigation, IT is only responsible for the preserving of custodian data.

*Appendix A – Example Chain of Custody.*

A good practice is to include the serial number and the employee that owned the original media in the description area.



*Appendix B – Example of a Hold Record*

*HOLD DIARY*

<i>CASE NAME</i>	<i>DATE</i>	<i>NAMED PERSON</i>	<i>EVENT</i>
<i>Gambino</i>	<i>2016-01-01</i>	<i>John Adams</i>	<i>Lcassin imaged hd on wkstn 151100051597 and placed in secure preservation storage</i>
<i>Florestan</i>	<i>2015-12-24</i>	<i>N/A</i>	<i>Case dismissed per OGC letter. Notification relayed to preservation personnel via listserv. Email holds lifted on Tinker, Evers, and Chance.</i>
<i>Gambino</i>	<i>2015-11-03</i>	<i>John Adams</i>	<i>John Adams added as named person per OGC email. Email relayed to preservation personnel via listserv.</i>
<i>Gambino</i>	<i>2015-06-07</i>	<i>N/A</i>	<i>Case created per OGC email. Named person</i>

*CASE/NAME LISTING*

<i>CASE</i>	<i>NAMED PERSONS</i>	<i>CURRENT STATUS</i>
<i>Gambino</i>	<i>Capone, Moran, Schulz, Hoffa, Tinker</i>	<i>Active</i>
<i>Florestan</i>	<i>Tinker, Evers, Chance, Schulz, Hoffa</i>	<i>Dismissed on 2015-12-24</i>

*CASE/NAME CROSSTAB*

<i>Name</i>	<i>Gambino</i>	<i>Florestan</i>
<i>Capone</i>	<i>X</i>	
<i>Chance</i>		<i>X</i>
<i>Evers</i>		<i>X</i>

<i>Hoffa</i>	<i>X</i>	<i>X</i>
<i>Moran</i>	<i>X</i>	
<i>Schulz</i>	<i>X</i>	<i>X</i>