

Public Records Policy

Public Records Retention Policy

Legal Hold Policy

Introduction

The Northeast Ohio Regional Sewer District (District), as a political subdivision of the state and as a public office, is responsible for the retention and disposition of all public records of the District which document the organization, its functions, policies, decisions, procedures, operations, and other activities regardless of the form of the records. These records are key public resources and essential assets that are critical to the business of the District. Public records must be maintained in such a manner that they can be made available for inspection and copying. Upon a request, and within a reasonable period of time, the District or person responsible for public records generally must make copies of requested records available at cost.

The District's Public Records, Public Records Retention, and Legal Hold Policies establish the principles, responsibilities, and requirements for managing the retention and disposition of the District's public records to ensure that the District is in compliance with legal requirements set forth in the Ohio Public Records Act,¹ as well as, other related State and federal laws. These policies provide the framework for implementing the District's public records management program.

These policies apply to all requests for records and documents of the District. They are designed to be interpreted in conformance with the Ohio Public Records Act, related State and federal law, and relevant case law, which shall supersede these policies in the event of a conflict between these policies and the law.

The District's current Records Retention Schedules, along with these policies, have been distributed to District employees who have custody of the District's records. Copies of the current Records Retention Schedules and public records policies are also available for employees and the general public at the following locations:

- The administrative office of the Northeast Ohio Regional Sewer District, George J. McMonagle Administration Building, 3900 Euclid Avenue, Cleveland, OH 44115, a location readily available to the public, as required by §149.43(B)(2) of the Ohio Revised Code
- Environmental & Maintenance Services Center, 4747 East 49th Street, Cuyahoga Hts., OH 44125
- Easterly Wastewater Treatment Plant, 14021 Lakeshore Blvd., Cleveland, OH 44110

¹ R.C. 149.43

- Southerly Wastewater Treatment Center, 6000 Canal Road, Cuyahoga Hts., OH 44125
- Westerly Wastewater Treatment Plant, 5800 Memorial Shoreway, Cleveland OH 44102
- On the District's intranet web site at <http://intranet.neorsd.com/intranet/>
- On the District's internet web site at www.neorsd.org
- In the District's *Employee Handbook*
- Any leased or acquired office space at any other location not listed above and utilized to conduct District business with the public

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PUBLIC RECORDS POLICY

Purpose

Under Ohio law, it is the District management's responsibility to organize and maintain public records and to make those records available to the public for inspection and copying. Consistent with the premise that government at all levels exists first and foremost to serve the interests of the people, it is the mission and intent of the District to fully comply with and abide by both the spirit and the letter of the Ohio Public Records Act.

Defining Public Records

All records kept by the District are public unless they are exempt from disclosure under Ohio law. All public records must be organized and maintained in such a way that they can be made available for inspection and copying.

A District record is defined to include the following: A document in any format that is created, received by, or comes under the jurisdiction of the District that documents the organization, its functions, policies, decisions, procedures, operations or other activities.

The District need maintain only those records necessary for the adequate and proper documentation of the organization, its functions, policies, decisions, procedures, and essential transactions of the District and for the protection of the legal and financial rights of the District and persons directly affected by the District's activities. The records may be kept in various forms other than paper, including electronic data format, compact disc, film, microfilm, magnetic tape, electronic data processing systems, and other forms permitted by law. If records are kept in any of these forms, the District will keep and make readily available to the public the facilities and equipment, except as otherwise restricted herein, necessary to reproduce the records and information in them in a readable form.²

In addition, any other governmental agency, and generally any private nonprofit corporation or association, that contract with the District for the provision of services must keep accurate and complete financial records of any public moneys expended in relation to those services according to generally accepted accounting principles. Those contracts and financial records generally are public records subject to inspection and copying under the Ohio Public Records Act.³

Response Timeframe

Public records are to be available for inspection during regular District business hours. Public records must be made available promptly for inspection. Copies of public records must be made available within a reasonable period of time following receipt of a

² R.C. 9.01

³ R.C. 149.431

request. It is the goal of the District that all requests for public records should be acknowledged in writing, and, if possible, satisfied within 3 business days following receipt of a request. The phrases “made available promptly” and “reasonable period of time” with respect to responses to public records requests take into account the effort and time required to identify requested records; the volume of records requested; the proximity of the location where the records are stored; and the necessity for any legal review and redaction of the records requested.

All records requests must first be reviewed by the District’s staff and legal counsel for determining which records are responsive to the request and to identify any exempt or privileged records. Upon receipt of a public records request, staff and legal counsel will collaborate in evaluating the request to assure that the District provides only records that are responsive to the request and that are legally required to be produced. Some records are prohibited from production because they are subject to a legal exemption under provisions of the Ohio Public Records Act, federal law, court order, or as attorney work product, attorney-client privilege, or other applicable law.

If a document falls under the definition of a record and is not covered by an exception to the definition of public record, the District generally must permit its inspection and copying. If the document falls under an exception, the District must provide the legal basis for the exemption.

Handling Requests

No specific language is required to make a request for public records. However, the requester must identify the records requested with sufficient clarity to allow District staff to identify, retrieve, and review the records. If it is not clear what records are being sought, District staff may contact the requester for clarification and should assist the requester in revising the request by informing the requester of the manner in which the District keeps its public records.

The requester does not have to put a records request in writing and does not have to provide his or her identity or the intended use of the requested public record. It is the District’s policy that this information is not to be requested by District staff. However, the law does permit District staff to ask for a written request, the requester’s identity, and/or the intended use of the information requested, but only (1) if a written request or disclosure of identity or intended use would benefit the requester by enhancing the District’s ability to identify, locate, or deliver the public records that have been requested; and (2) after telling the requester that a written request is not required and that the requester may decline to reveal the requester’s identity or intended use.

In processing the request, the District does not have an obligation to create new records or perform new analysis of existing information. An electronic record is deemed to exist so long as a computer is already programmed to produce the record through simple sorting, filtering, or querying. Although not required by law, the District may accommodate the requester by generating new records when it makes sense and is practical under the circumstances.

Inspection of Public Records

In processing a request for inspection of a public record, a District employee must accompany the requester during inspection to make certain original records are not removed or altered.

Public Records Resources

The Ohio Sunshine Laws Manual is available at the Ohio Attorney General's internet website, or for purposes of keeping the District's employees and the public educated as to the obligations under the Ohio Public Records Act, Open Meetings Act, records retention laws and Personal Information Systems Act, the Manual is available at www.ohioattorneygeneral.gov/YellowBook.

Electronic Records

Public records in electronic format of any kind are to be treated in the same fashion as records in other formats, such as paper or audiotape. Public record content transmitted to or from private accounts or personal devices is subject to disclosure. All employees or representatives of the District are required to retain their District e-mail records and other electronic records in accordance with applicable records retention schedules and make them available for inspection and copying in accordance with the Public Records Act.

Electronic records such as e-mail messages are simply a particular format for the creation and storage of a document. Records in electronic-mail format are only records as defined by the Ohio Revised Code when their content relates to the business of the District. It is, therefore, the content, rather than the format, that defines whether a document is a public record. E-mail messages and e-mail messages that include attachments in any format are to be treated in the same fashion as records in other formats for purposes of retention schedules.

A database is not itself a public record, but is an organized collection of related data which may constitute public records. The District will respond to requests for access to public records stored electronically and in computer databases by extracting information from a database and by providing a copy, disk, or printout. The District will not allow access to a computer terminal or the use of a private terminal connected to the District's computer network systems.

The District is not required to search a database for information and compile or summarize to create new records. However, if a computer program being used by the District can perform the search and produce the compilation or summary described by the requester, that output will be provided to the requester.

Denial or Redaction of Records

If the requester makes an ambiguous or overly broad request, the request may be denied, but the District's denial response must provide the requester an opportunity to

revise the request by informing the requester of the manner in which records are maintained and accessed by the District.

Any denial of public records requested must include an explanation, including the legal authority for the denial. If the initial request was made in writing, the explanation must also be in writing. If portions of a record are public and portions are exempt, the exempt portions may be redacted and the remainder of the record released. When making public records available for public inspection or copying, the District shall notify the requester of any redaction or make the redaction plainly visible. If there are redactions, each redaction must be accompanied by a supporting explanation, including legal authority. Requests for records containing redacted items are subject to legal review prior to release of the requested records.

Copying and Mailing Costs

The District will charge only the actual cost of making copies of records, but not the associated labor costs. A requester may be required to pay in advance for costs involved in providing the copy. The requester may choose whether to have the record duplicated upon paper, upon the same medium in which the public record is kept, or upon any other medium on which the District determines that the record can reasonably be duplicated as an integral part of the District's normal operations.

If a requester asks that documents be mailed, he or she may be charged the actual cost of the postage and mailing supplies. There is no charge for documents that are e-mailed to the requester. For more voluminous requests or unusual media types, the District may, in its discretion, utilize commercial copying services. The District may require payment for such service beforehand, or require the requester to accept direct invoicing from the service.

The District does not charge the following groups or persons for public records of readily available documents:

- The District's Board of Trustees, its officers and employees
- Other government officials or organizations or professional associations
- Sanitary sewer and stormwater account customers of the District
- Students requesting documents for a specific class research project

Non-Records

If a document or other item does not meet the definition of a record as defined in this policy and the Ohio Public Records Act, then it is a non-record and is not subject to either the Ohio Public Records Act or records retention requirements. Not every piece of paper or electronic document created by a public office or employee meets the

definition of a record. Therefore, any document, device, or item, regardless of physical form or characteristic, that has been created or received in the course of the District's business that fails to serve as documentation of the organization, its functions, policies, decisions, procedures, operations, or other activities, is a non-record and is not subject to production pursuant to a public records request. Some examples include catalogs, magazines, junk mail/spam, and personal correspondence.

Personal Notes

The personal notes of Board members or District employees generally do not constitute public records. Employee notes have been found not to be public records if they are (a) kept as personal papers, not official records, (b) kept for the employee's own convenience (e.g., to help recall events), and (c) other employees did not use or have access to the notes. Requests for records containing personal notes are subject to legal review prior to release of the requested records.

Drafts

Drafts of documents may also be non-records if they are held solely by one individual, they constitute only the work product of the individual, and they do not yet document the activities of the office. Documents in draft form may also be exempt from production because they are covered by the attorney-client privilege or as an attorney's work product. The District addresses the length of time for which drafts of public records are kept in its records retention schedules. Requests for records containing drafts of items are subject to legal review prior to release of the requested records.

Documents/Information that are not Public Records

State and federal laws establish some public records as being exempt from production under public records laws. The following is a non-exclusive list of records and items of information that should not be produced pursuant to a routine public records request:

- Employee medical records⁴
- Confidential Law Enforcement Investigatory Records⁵
- Records containing confidential "mediation communications" or records of the Ohio Civil Rights Commission made confidential⁶
- Information pertaining to the recreational activities of a person under the age of eighteen⁷
- Social security numbers⁸

⁴ R.C. 149.43(A)(1)(a) applying Public Records Act definition of "medical records" at R.C. 149.43(A)(3).

⁵ R.C. 149.43(A)(2).

⁶ R.C. 149.43(A)(1)(i); R.C. 2710.03(A), R.C. 2710.07, and R.C. 4112.05.

⁷ R.C. 149.43(A)(1)(r); R.C. 149.43(A)(8).

- Information obtained from a financial institution pursuant to an account information access agreement⁹
- Social security and credit information obtained in connection with a driver's license or vehicle registration, with limited exceptions¹⁰
- Home addresses¹¹
- Bank account/credit card numbers¹²
- Beneficiary designations¹³
- Personal calendars and appointment books¹⁴
- Personal notes and superseded drafts (Includes personal notes kept for employees' own convenience and not shared with others, and draft documents not shared with others)¹⁵
- Personal e-mails, voice messages and text messages that do not document public office activities¹⁶
- Supply catalogues, solicitations or similar materials¹⁷
- Proprietary software¹⁸
- Certain privileged communications between an attorney and a client¹⁹
- Trial preparation records²⁰
- Documents constituting attorney work product, such as records prepared under the direction of an attorney relative to a legal claim or potential claim²¹
- Intellectual property records²²
- Junk mail, electronic "spam"²³

⁸ R.C. 149.45(E)(1); *State ex rel. Office of Montgomery County Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 18; Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (5 U.S.C. § 552a (West 2000)).

⁹ R.C. 3121.76.

¹⁰ R. C. 4501.15

¹¹ Not a public record.

¹² Not a public record.

¹³ Not a public record.

¹⁴ Not a public record.

¹⁵ Not a public record.

¹⁶ Not a public record.

¹⁷ Not a public record.

¹⁸ Not a public record.

¹⁹ R.C. 2317.02, R.C. 2317.021, and R.C. 4732.19.

²⁰ R.C. 149.43(A)(4).

²¹ Ohio and Federal Rules of Civil Procedure Rule 26; *Schaefer, Inc. v. Garfield Mitchell Agency, Inc.*, 82 Ohio App.3d 322 (2nd Dist. 1992); *Hickman v. Taylor*, 329 U.S. 495 (1947).

²² Not a public record.

- Certain infrastructure and security records²⁴
- Draft records prepared by an attorney or under the direction of an attorney that have not been finalized or approved for public release²⁵
- Records the release of which is prohibited by state or federal law²⁶

Confidential/Sensitive Records

Confidential records are records that have been designated as exempt from disclosure under O.R.C. §149.43(A)(1) or are deemed to possess legal privilege. Sensitive records are those records that include personal and/or proprietary information about the District or District stakeholders including, but not limited to the Board of Trustees, employees, contractor/consultants, vendor/suppliers, ratepayers, etc. All employees must maintain confidential/sensitive records in a secure manner and must control access to and distribution of confidential/sensitive records. Requests for confidential/sensitive records are subject to legal review prior to release.

Confidential Information in Closed Board Meetings

Confidential information means a communication made in a closed Board meeting session that is specifically related to the stated reason for the Board to meet lawfully in closed session.²⁷ For example, information and records pertaining to discussions in executive session related to (1) pending or imminent court action; (2) purchase or sale of property; (3) negotiations and trial strategies; (4) State audits; (5) collective bargaining matters; (6) certain personnel matters; (7) specific matters required to be kept confidential by law; and (8) security matters are not subject to public disclosure as these are exceptions to the Ohio Public Meetings Act²⁸ and other provisions of law.²⁹

Prohibition from Disclosure

No Board member or District employee shall disclose or use, without appropriate authorization, any confidential or privileged information unless the Board of Trustees, by adoption of a resolution, authorizes the disclosure. Any District employee who willfully discloses confidential information acquired during a closed Board session may be subject to disciplinary action up to and including dismissal.³⁰

Attorney-Client Privileged Communications - Waiver

Attorney-client privileged records and information are prohibited from release by both State and federal law pursuant to the catch-all exception of the Ohio Public Records

²³ Not a public record.

²⁴ R.C. 149.433.

²⁵ Not a public record.

²⁶ R.C. 149.43(A)(1)(v); *State ex rel. Lindsay v. Dwyer*, 108 Ohio App.3d 462 (10th Dist. 1996).

²⁷ R.C. 121.22(G)(1)-(7), (J).

²⁸ R.C. 121.22(D)

²⁹ R.C. 102.03(B)

³⁰ District Code of Ethics 5.3; Board of Trustees Code of Conduct and Decorum Rule 11.

Act.³¹ These records must not be disclosed or made available in response to a public records request without the client's waiver. For purposes of this policy, only the Board of Trustees may exercise the waiver of privilege on behalf of the District. Attorney-client privilege arises whenever legal advice of any kind is sought from a District legal advisor (staff counsel and/or outside counsel) in his or her capacity as such, and the communications relating to that purpose, made in confidence by the client are at the client's instance permanently protected from disclosure by the client or the legal advisor. Records or information within otherwise public records that meet those criteria must be withheld or redacted in order to preserve attorney-client privilege. For example, drafts of proposed documents prepared by an attorney, emails containing legal advice and analysis, and documents and other work product prepared by an attorney are protected by attorney-client privilege and are not subject to disclosure. Requests for records that contain or may contain privileged communications are subject to legal review prior to release.

Legal Hold

A legal hold is a process which the District uses to preserve all forms of relevant information when litigation is reasonably anticipated. The legal hold is initiated by a notice or communication from the Director of Law to the organization that suspends the normal disposition or processing of records, such as the normal and routine records retention and destruction schedules, backup tape recycling, archived media and other storage and management of documents and information. A legal hold will be issued as result of current or anticipated litigation, audit, government investigation or other such matter to avoid evidence spoliation. Further information is set forth in the District's Legal Hold Policy and Procedures.

Litigation Discovery Requests

Legal discovery and the Ohio Public Records Act are two different and distinct means by which information may be obtained from the District. Discovery is a device used by a party in litigation in order to obtain information from an entity or an individual (usually an opposing party) relating to the subject matter of a legal case. Discovery requests are generally limited only by traditional standards of relevancy, privilege and burden. Discovery may be sought in written form through interrogatories, or in oral form through depositions, as well as, requests for production of documents.

Under current law, there is no statutory prohibition to the use of public records requests as a discovery tool. This can create a problem for the District if information is being obtained by the opposing party through a public records request without the District's legal counsel's knowledge. District legal counsel (staff counsel and outside counsel) must be made aware of a release of public records under the Public Records Act which might prevent later assertion of privilege. It is extremely important that District staff processing public records requests and District legal counsel carefully coordinate their efforts. All records requests, including discovery requests, must be logged onto the

³¹ R.C. 149.43(A)(1)(v) "catch-all" exception

Public Records Master List. Attorneys will inform records custodians that a related matter is in litigation and the significance of the records to the litigation through a Legal Hold Notice. Records Coordinators then will be able to advise the attorney of what requests have been made and what records or information are being contemplated for release. Records gathered in response to discovery requests are subject to legal review prior to release.

Employee Requests to Inspect their Employee Records

All District employees may review their employee records, upon reasonable notice, within the Human Resources Department offices. Union employees may have specific guidance in their collective bargaining agreement as to procedures for such review. District employees may request copies of employee records in accordance with these policies and the Ohio Public Records Act.

PUBLIC RECORDS RETENTION POLICY

Purpose

The Ohio Public Records Act, along with the Board of Trustees Bylaws, mandate the District establish maintain and direct an active continuing program for the effective management of the District's records, including the designation of records officers responsible for responding to records requests and making District records available to the public in furtherance of the Public Records Act and Ohio law.³² Under the direction of the Deputy Executive Director, the Manager of District Records has been designated as the District's official public records custodian to respond to public records requests not related to legal or employee matters and to be responsible for the general management of the District's Public Records Management Program. In addition, the Executive Director has designated records coordinators in each department who are responsible for overseeing the implementation of records management policies and procedures and for the development of general records management guidelines within their budget centers.

District Records Commission

The District has established a Records Commission to oversee the retention and disposal of its public records. The District's Records Commission is comprised of the President of the Board of Trustees, the Director of Law, and the Director of Finance. The District's Manager of District Records serves as liaison to the District's Records Commission. The District's Records Commission will meet at least once every twelve months and upon the call of the President of the Board of Trustees. The District's Records Commission, as prescribed by Ohio law,³³ is responsible for providing rules for the retention and disposal of records; approving proposed changes to the Records Retention and Disposition Schedule submitted by District staff; ensuring that proper procedures for the retention and disposal of records are followed; and maintaining retention schedules, approvals, and minutes of Commissioners meetings. After approval by the Records Commission, the Executive Director shall seek authorization from the Board of Trustees to submit the Records Retention and Disposition Schedule to the Auditor of State and the Ohio Historical Society for approval.

Role of District Records Custodians

The Secretary of the Board of Trustees is the official custodian of public records of the Board of Trustees and the person designated to certify any action of the Board.³⁴ The Executive Director has designated District staff to perform all duties of the Secretary pursuant to the Board of Trustees Bylaws. The District's Board of Trustees Bylaws further authorize the Executive Director to establish and maintain a program for the effective management of the District's public records and to designate an official public

³² R.C. 149.34 and Board of Trustees Bylaws Article VI B.

³³ R.C. 149.412

³⁴ Board of Trustees Bylaws Article VI(A)

records custodian for the District, as well as, additional records coordinators, who shall have authority and responsibility of records officers in furtherance of the Ohio Public Records Act and Ohio law.³⁵

Records Management Steering Committee

The Executive Director has appointed a Records Management Steering Committee that is responsible for guiding the District's overall records management program policies and procedures and for making decisions that have cross-departmental impact regarding records management. The Steering Committee is also responsible for ensuring that records retention schedules satisfy operational, historical, legal, audit and regulatory requirements. The Records Management Steering Committee is comprised of one upper- to mid-level staff member from each District department with the Manager of District Records acting as chairperson.

District Employees' Responsibilities for Public Records

With respect to the District's public records, all Board members and District employees have an obligation to:

- Create records for business purposes only
- Inform the budget center Records Coordinator of any new records not listed on the records retention schedules
- Preserve records pursuant to records preservation hold orders and legal holds
- Protect confidential/sensitive records and those vital to the District's continued business operations
- Follow District records management policies, procedures and general guidelines

Records Retention Schedules

The District's Records Retention Schedules account for the management and disposition of records series that are common to the various District budget centers. A records retention schedule is a comprehensive list of record series, indicating for each the length of time the series is to be maintained and its disposition. A record series is a group of related records filed and or used together as a unit and therefore evaluated as a unit for retention and disposition purposes. In addition to general administrative records series, there are records series unique to the operations of a particular budget center, and therefore, have unique retention schedules. All schedules, general and unique, are developed by the Records Steering Committee and budget center records coordinators.

³⁵ Board of Trustees Bylaws Article VI(B)

All District budget center records coordinators must familiarize themselves with the records schedules and have an understanding of what records – paper-based and electronic—they create and/or receive and are required to manage. Budget center records coordinators must conduct regular inventories of their records and map them to the records retention schedules. All unique records series must be approved by the Steering Committee and the District Records Commission.

Destruction of Transient/Transitory Records

Transient records are records which serve to convey information of a temporary nature, and have a very short-lived administrative, legal and/or financial value to the District. Transient records may be destroyed by District personnel once they are no longer of administrative value, according to approved retention schedules. Typically, the retention is not a fixed period of time and is event driven. It may be as short as a few hours and could be as long as several days, weeks, or months. Transient records may include public records that consist of e-mails, text messages, voice mail messages, telephone message slips, post-it notes, notes and superseded drafts.

Unlawful Destruction of Public Records

The District, its Board members and its employees are prohibited from removing, destroying, mutilating, transferring, or otherwise damaging or disposing of its records except as provided by approved Records Retention Schedules, Ohio law or under rules adopted by the State Records Administration or a Records Commission.

Outgoing District officials and employees shall deliver District public records to their successors and shall not otherwise remove, destroy, mutilate, or transfer District records unlawfully.

The consequences for improperly disposing of a public record may be either or both of the following: (1) injunctive relief that orders the public office to comply with the retention law, plus a reasonable attorney's fees award, or (2) a forfeiture in the amount of \$1,000 for each violation, but not to exceed a cumulative total of \$10,000, regardless of the number of violations, and an award of the reasonable attorney's fees incurred by the person in the civil action not to exceed the forfeiture amount recovered.³⁶

³⁶ R.C. 149.351

LEGAL HOLD POLICY

Purpose

There are circumstances where the normal and routine destruction of records under the District's Records Retention Schedules must be suspended pursuant to a "legal hold" in accordance with federal and State requirements. Current and future records that are related to or involved in litigation, or that are reasonably anticipated³⁷ to be related to or involved in foreseeable legal action, must be preserved until the legal hold is released by the Director of Law.³⁸

The purpose of this policy and procedures is to set forth the authority and process for initiating, implementing, monitoring, and releasing legal holds.

Scope

This policy applies to members of the Board of Trustees and all District employees and covers all records, regardless of form, made or received in the transaction of District business.

Authority and Definitions

The authority to place a legal hold is vested in the Director of Law.

"Affected District personnel" means Board members and all District employees who are in possession or control of documents, which may be subject to a legal hold.

A "legal hold" is an order to cease destruction and to preserve all records, regardless of form, related to the nature or subject of the legal hold.

"Documents" for the purpose of this policy and procedures includes all records, whether in electronic or paper form, created, received, or maintained in the transaction of District business, whether conducted at home, at work, or elsewhere. Such documents may include, but is not limited to, paper records and electronic records stored on servers, desktop or laptop hard drives, tapes, flash drives, memory sticks, or CD-ROMs.

"Electronic records" includes all forms of electronic communications, including, but not limited to, e-mail, word processing documents, calendars, spreadsheets, videos, photographs, and text messages.

"District personnel" includes members of the Board of Trustees, all District employees, whether permanent, temporary, full-time or part-time, and student employees.

³⁷ *Hynix Semiconductor Inc. v. Rambus, Inc.*, 2006 U.S. Dist. LEXIS 30690 (N.D. Cal. 2006) defines "probable" litigation with respect to the preservation duty.

³⁸ *Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. LEXIS 18771 (S.D.N.Y. 2003) spells out the specific duty to preserve.

Procedures

Any District personnel who become aware of any litigation, threat of litigation, other legal action, or an investigation by any administrative, civil or criminal authority, through the receipt of notification or other information identifying the possibility of legal action or upon service of summons and complaint, must immediately notify the Director of Law. The Director of Law will determine whether to initiate a legal hold and identify District personnel subject to the hold.

The Director of Law will notify³⁹ affected District personnel that a legal hold has been initiated. The notice will inform affected personnel of their obligation to identify and preserve all documents that may be relevant to the legal hold.

Upon notice of a legal hold, affected District personnel must do the following:

- a. Immediately suspend deletion, overriding, or any other destruction of electronic records relevant to the legal hold that are under their control. This includes electronic records wherever stored, including, but not limited to, on hard drives of District work station desktops, laptops, or computers at their home, on flash drives, CD-ROMs, memory sticks, tapes, zip disks, or diskettes. Electronic information must be preserved so that it can be retrieved at a later time and the information must be preserved in its original electronic form. It is not sufficient to make a hard copy. Affected District personnel are encouraged to contact the Department of Information Technology with any questions concerning suggested methods for preserving electronic records.
- b. Preserve any new electronic information that is generated after receipt of the legal hold notice that is relevant to the subject of the notice. This should be done by creating separate mailboxes and files and segregating all future electronically stored information in these separate mailboxes and files.
- c. Preserve hard copies of documents under their control. Steps should be taken to identify all relevant paper files and to ensure the retention of such files. Affected District personnel may make hard copies of electronically stored information; however, as outlined above, the information must be preserved in its original electronic form.

Acknowledgment of Receipt of Legal Hold

District personnel subject to a legal hold must acknowledge receipt, understanding, and compliance with a legal hold without undue delay by e-mail and memorandum to Director of Law. Any District personnel subject to a legal hold should consult the Department of Information Technology for assistance in securing and preserving their records.

³⁹ *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557-558 (N.D. Cal. 1987) indicates that the party in question must not only identify, locate, and maintain information but also communicate those obligation to employees in possession of such materials.

The Director of Law will notify the Department of Information Technology of a legal hold and provide the following information including, but not limited to:

- a. Official notification of the legal hold;
- b. Identify all affected District personnel whose electronic accounts must be preserved, including user names, if known;
- c. Identify each person's status as an employee, if known; and
- d. Provide department affiliation for each person, if known.

The Department of Information Technology must acknowledge receipt, understanding and compliance with the legal hold without undue delay by e-mail and memorandum to the Director of Law.

If affected District personnel separate from employment during the course of a legal hold, Department heads or Directors must take possession of any and all documents under the control of the separated personnel and notify the Director of Law.

Once notice of a legal hold has been issued, the Director of Law will continue to monitor compliance with this policy and any notice.

Violations

Violations of this policy and procedures are subject to disciplinary action up to and including dismissal.

Release of a Legal Hold

The Director of Law will determine and communicate to affected District personnel when a legal hold may be lifted and documents no longer preserved.