

# BPA Policy 220-3

## Discovery and Legal Hold

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## 1. Purpose & Background

- A. This policy sets requirements and responsibilities for managing information hold and discovery requests anticipated or received by the Bonneville Power Administration.
- B. When litigation is reasonably foreseeable or in progress, Federal law requires parties, and at times non-parties, to preserve potentially relevant information and records. Information and records may also be required to be preserved for enforcement actions, audits, or other regulatory and legal actions.
- C. The purposes of BPA's discovery and information hold program are:
  - 1. Legal compliance; and
  - 2. Preventing loss of information and records that may assist BPA in preserving its legal rights and defending itself against claims.

## 2. Policy Owner

The BPA Executive Vice President and General Counsel is the owner of this policy. The Assistant General Counsel of the General Law section (LG AGC) implements this policy on behalf of the General Counsel. The LG AGC implements this policy in coordination with LG attorneys, BPA's Cyber Forensics & Intelligence team, and the Information Governance and Lifecycle Management (IGLM) team.

## 3. Applicability

This policy is applicable to all BPA personnel and all recorded information, regardless of format or media.

## 4. Terms & Definitions

- A. **Discovery:** The compulsory disclosure of information in litigation.
- B. **Electronically stored information (ESI):** Information created, received, maintained, or stored on local workstations, laptops, central servers, personal digital assistants, cell phones, or other electronic media. ESI includes, but is not limited to, email, calendars, word processing documents and spreadsheets, videos, digital images, audio files, text messages, voicemails, activity logs, and metadata.
- C. **Federal Rules of Civil Procedure (FRCP):** The rules governing civil actions in U.S. district courts, including discovery and information preservation.
- D. **Legal hold:** The process of taking reasonable steps to identify and preserve evidence that may be relevant to any claim or defense in current or anticipated litigation or administrative proceedings. Reasonableness is based on BPA's sophistication as an entity, the extent to which BPA knew of and attempted to protect against risks, and the

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degree of BPA’s control over the information. Legal holds may be put in place even if BPA is not expected to be a party to the anticipated litigation or proceeding.

- E. **Metadata:** Information about any recorded information. This includes but is not limited to the date and time of creation, the authoring individual or organization, descriptions of content, indexing data, information asset profile, the history, tracking or management of the record, and data characteristics including structure, elements, and interrelationships.
- F. **Records:** As defined by FRCP Rule 34, any physical documents or ESI, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data stored in any medium, from which information can be obtained directly or, if necessary, after conversion into a usable form.

## 5. Policy

- A. BPA complies with discovery obligations in accordance with the requirements of the Federal Rules of Civil Procedure (FRCP), other Federal statutes, and judicial orders.
- B. BPA uses legal holds in anticipation of discovery orders and other information preservation needs.
- C. Legal hold notices are issued by the Office of General Counsel (OGC) upon determination that a legal hold trigger event has occurred. A reasonable anticipation of litigation, as informed by the facts and case law, usually triggers a legal hold. In rare cases, Federal law enforcement officials may issue holds directly. External confirmation of litigation, such as a subpoena or complaint, is not required for a legal hold. The duty to preserve records often arises before litigation commences.
- D. The scope of a legal hold, including the type and volume of documents to be preserved, is based on relevance to *any* party’s claim or defense, and it is proportional to the needs of the case. Proportionality is determined by, but not limited to, the importance of the issues at stake in the action, the dollar amount in controversy, the parties’ resources and relevant access to information, the importance of discovery in resolving the issues, and whether the expense of preserving records outweighs its likely benefits.
- E. Legal hold notices contain sufficient direction to reasonably ensure that relevant records will be protected and maintained until the hold has been removed. Legal hold notices inform individuals of their preservation obligations and include instructions on coordinating with OGC and the Cyber Forensics & Intelligence team to find, gather, secure, and transfer the information. OGC provides modifications and reminders of the legal hold as necessary to ensure continued compliance with this policy. Organizations and all BPA personnel must preserve records according to the instructions provided by OGC. Preserving records includes maintaining the records until receipt of official notice that the hold has ended.

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- F. OGC may authorize the Cyber Forensics & Intelligence team to conduct searches of agency-owned servers, devices, or other electronic storage. An authorized search may include any electronic storage owned by BPA.
- G. The LG attorney in charge of discovery makes final decisions on which records to preserve. The attorney managing the relevant litigation makes final decisions on which records to produce in discovery, if any. The only exception to this rule is for litigation before the Merit Systems Protection Board (MSBP). For MSBP cases, both preservation and production decisions are made by the attorney managing the particular MSPB litigation.
- H. Electronically Stored Information (ESI) must be preserved in its native format unless directed otherwise by OGC.
- I. A legal hold suspends any records retention period or other agency policy that would otherwise provide for the disposal of the record. Records under legal hold must not be disposed of by transfer, deletion, or destruction.
- J. Records may sometimes be subject to more than one legal hold. Once all legal holds are released, the retention time for the records reverts to the normal retention schedule.
- K. Upon conclusion of the relevant matter, legal holds are lifted at the discretion and direction of the LG attorney in charge of discovery.
- L. Legal hold decisions, including date of application and lift, case information, and records preserved, are documented by OGC paralegals and legal assistants.

## 6. Policy Exceptions

There are no exceptions to this policy.

## 7. Responsibilities

- A. **Administrator:** Has ultimate responsibility for compliance with this policy. The Administrator assigns functional responsibility to OGC for ensuring that BPA's discovery and legal hold program is in compliance with statutes and regulations.
- B. **Executives, Managers, and Supervisors:** Ensure that organizations appropriately manage, maintain, and dispose of records in compliance with BPA policies; coordinate with OGC to identify, preserve, and transfer records under legal holds; and lead by example by promoting cooperation with legal hold notices.
- C. **Office of General Counsel (OGC):** Issue and lift legal holds; oversee all aspects of discovery related to a legal or regulatory action.
- D. **OGC, General Law Section (LG) Discovery Attorney:** Execute the litigation hold checklist in section 8.B, implement legal holds, and lift legal holds. The LG discovery attorney

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makes final decisions on which records to preserve in all litigation except litigation before the MSPB.

- E. **OGC, Attorney:** The attorneys managing litigation relevant to a legal hold determine what to produce in discovery, if anything, and execute production. Attorneys managing MSPB litigation make both preservation and production decisions.
- F. **OGC, Paralegals and Legal Assistants:** Track litigation hold decisions.
- G. **Office of Cybersecurity (Cyber):** Support legal holds and related discovery activities; search and secure systems and IT equipment that may store potentially relevant ESI.
- H. **Information Governance and Lifecycle Management (IGLM):** Support legal holds and related discovery activities; offer guidance to organizations in managing and maintaining their records and information in compliance with statutes and regulations; and facilitate the identification, preservation, sequestration, and transfer of potentially relevant records when required.
- I. **BPA personnel:** Maintain records in compliance with BPA policies, and cooperates with OGC by responding in a timely fashion to legal hold notices.
- J. **Records Custodians:** An individual is a records custodian if they possess or have access to records or information under a legal hold. This includes the possession or access to secondary copies of records or information under a legal hold, as these copies must also be preserved. Records custodians are responsible for responding to legal hold notices and search requests in a timely manner; coordinating with OGC to ensure hold and search parameters will adequately protect against unauthorized destruction or alteration; transfer of records; and/or maintaining records until the legal hold is lifted.

## 8. Standards & Procedures

This policy is implemented according to the standard discovery procedures outlined here.

### A. Preservation and discovery reference model

1. Identification of legal hold trigger
2. Preservation and collection if necessary
3. Processing, review, analysis
4. Production if necessary

### B. Litigation hold checklist

1. Identify litigation hold parameters or scope.
2. Identify potentially relevant information.
3. Identify records custodians.

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4. Identify preservation methods, including labeling or segregating paper files, protecting ESI from automatic deletion or alteration, preserving ESI data in place or collecting it, and securing tangible items.
5. Issue and track written legal hold to records custodians and obtain certifications.
6. Issue legal hold reminders.
7. Supervise implementation of the legal hold.
8. Document all preservation steps and key preservation determinations.
9. Negotiate scope of litigation hold with opposing counsel.
10. Revise litigation hold instructions as appropriate.
11. Lift litigation hold once preservation obligation ends by notifying Cyber Security and records custodians.

## 9. Performance & Monitoring

Performance is measured by a court’s evaluation of BPA’s search and preservation methods during litigation. A court may find that the methods used by BPA were reasonable and suited to the controversy, or it may sanction BPA for failing to fulfill its preservation and discovery obligations.

## 10. Authorities & References

- A. Federal Records Act, 44 U.S.C. § 3101 et seq.
- B. Federal Rules of Civil Procedure
- C. DOJ guidance interpreting the FRCP for federal agencies

## 11. Revision History

Version Number	Issue Date	Brief Description of Change or Review
1	19 April 2017	New Policy

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