

## MEMORANDUM No. 143C

**TO:** All Employees, Agencies, and Departments Under the Mayor

**FROM:** Michael B. Hancock , Mayor

**DATE:** April 9, 2021

**SUBJECT:** City and County of Denver Litigation Hold Policy

This Memorandum attachment to Executive Order No. 143, “Information Governance,” details the City's Litigation Hold policy and process. This Memorandum supersedes Memorandum No. 64-A, dated January 22, 2008.

### DECLARATION OF POLICY

The City is frequently involved in litigation. Under federal and state law, the City must preserve documents potentially related to pending litigation or to claims which could reasonably be anticipated to lead to litigation. This obligation arises as soon as the City becomes aware of such claims or litigation, and exists until the litigation or potential for litigation has ended. It is the City’s policy to comply with its legal duty to hold and preserve Litigation Records fully, in an efficient and effective manner that does not disproportionately burden City Agencies, Departments, and resources.

### TERMS AND DEFINITIONS

For the purposes of this Memorandum, consistent with Executive Order 143 and 143-B (“City and County of Denver Records Management Program”), the following definitions will apply.

- I. Agency Records Coordinator:** The employee(s) within each Department or Agency responsible for managing Litigation Holds for that Department or Agency. The Agency Records Coordinator role is distinct from that of the Department or Agency’s official custodian of records (although in some cases the same employee(s) may be responsible for the duties of both roles).
- II. Documents:** any document, data, information, item or evidence in the possession of the City (including its employees, agents, and contractors) which is related or may be potentially related to the facts, circumstances, or people involved in the claim or litigation. “Documents” include, but are not limited to: documents, writings, notes, log sheets, transcripts, charts, graphs, drawings, videos, photographs, sound recordings, reports, correspondence, memoranda, test results, objects, and other data or data compilations, stored in any medium. “Documents” also includes Electronically Stored Information (“ESI”) such as: email, voicemail, text messages, instant messages, electronic documents (including word processing documents and presentations, draft as well as final versions), spreadsheets, databases, calendars, digital images,

audio, video, external drives, computer system activity logs, internet usage files, and network access information.

- III. **Custodian:** Any City and County of Denver employee who creates, stores, or maintains Documents. Each employee is the Custodian of Documents the employee individually creates or maintains, including (but not limited to) desk and office files, email, and the contents of the employee's desktop, laptop, and/or mobile device. Some employees – for example, Agency Records Coordinators, official custodians of records, or department administrators – are also Custodians of other Documents or collections of Documents, such as shared directories, group folders, agency files or archives, or databases. Such employees are Custodians of both their own Documents and those for which they have administrative responsibility.
- IV. **Litigation Hold Notice:** A notice from the City Attorney's Office instructing the recipients that litigation has been filed or is anticipated and that Litigation Records must be preserved.
- V. **Litigation Hold:** The actions taken by the City to suspend Records Retention Schedules and order the preservation of all Litigation Records.
- VI. **Litigation Records:** Any and all Documents potentially related to pending litigation, or to specific claims which the City anticipates may lead to litigation.

### LITIGATION HOLD PROCEDURE

A Litigation Hold requires the suspension of the Data Retention Schedule for Litigation Records and requests the affected City Departments and Agencies (including Technology Services) to preserve all Litigation Records for possible production. The duty to preserve such Records does not end until the City Attorney's Office sends a notice releasing the Litigation Hold. Until the Hold is released, all newly-created and newly-located Litigation Records must also be preserved.

A Litigation Hold will be instituted by the City Attorney's Office following the process detailed below.

1. Upon becoming aware of pending or anticipated litigation, the City Attorney's Office shall prepare a Litigation Hold Notice. The Litigation Hold Notice shall include:
  - a. A description of the circumstances and events giving rise to the claim, or other information to assist employees in identifying Litigation Records;
  - b. A summary of the legal obligation to preserve Litigation Records; and
  - c. Instructions for complying with the Litigation Hold.
  - d. The Litigation Hold Notice may also include a request for additional information to assist the City Attorney's Office in identifying and locating Records (for example, a questionnaire or interview).
2. The Litigation Hold Notice shall be sent to:
  - a. The Agency Records Coordinators for all relevant Departments and Agencies;

- b. Current employees individually named in the claim or complaint;
  - c. Custodians whom the City Attorney's Office believes may have information relevant to the claim or complaint;
  - d. The designated Litigation Hold contact for Technology Services; and
  - e. Other responsible officials, as appropriate.
3. Upon receiving a Litigation Hold Notice, an Agency Records Coordinator shall:
- a. Immediately suspend any Data Retention Schedule that applies to Litigation Records described in the Notice;
  - b. Assist the employees of the Department or Agency in complying with the Litigation Hold;
  - c. Acknowledge the Notice and assist the City Attorney's Office, as necessary, in identifying and collecting the Litigation Records;
  - d. Assist the City Attorney's Office, as necessary, in identifying those employees of the Department or Agency who should receive the Notice.
4. Upon receiving a Litigation Hold Notice, the designated Litigation Hold contact for Technology Services shall:
- a. Immediately suspend any Records Retention Schedule that applies to Litigation Records described in the Notice, specifically including any automated deletion, backup, or archiving program which would make the Records inaccessible or unavailable in their native format;
  - b. Assist Agency Records Coordinators and individual employees of the Department or Agency in complying with the Litigation Hold, as requested;
  - c. Acknowledge the Notice and assist the City Attorney's Office, as necessary, in identifying and collecting the Litigation Records.
5. Upon receiving a Litigation Hold Notice, an individual employee or Custodian shall:
- a. Take immediate steps to preserve any Litigation Records, whether in hardcopy format (e.g., written communications, handwritten notes, paper files) or electronically stored (e.g., on desktop, laptop, or network drives, in voicemail, chats, text messages, or email). Custodians/employees should disable any email functions which automatically delete messages.
  - b. Take immediate steps to preserve any Litigation Records which might exist on non-City-owned computers or personal electronic devices.
  - c. Acknowledge the Notice and assist the City Attorney's Office, as necessary, in identifying and collecting the Litigation Records;
  - d. Assist the City Attorney's Office, as necessary and if appropriate, in identifying other employees of their Department or Agency who should receive the Notice.
6. If any recipient of a Litigation Hold Notice fails to respond to that Notice, the City Attorney's Office is responsible for following up with that recipient, and if necessary with the recipient's supervisor(s), to obtain the required acknowledgment and information.

7. The City Attorney's Office is responsible for periodic reminders to affected Agencies and employees regarding pending Litigation Holds and determining when and how updates or changes to a Litigation Hold are instituted and communicated.
8. The City Attorney's Office will advise and coordinate directly with Technology Services concerning a Litigation Hold, in order to identify, secure, and retrieve Litigation Records by electronic means, and to keep Technology Services informed if the scope of the Litigation Hold is altered or amended.
9. Agency Records Coordinators and others who retrieve Records requested by a Litigation Hold Notice must provide those Records to the City Attorney's Office as instructed. As a general rule, ESI should be preserved in its original (native) format to preserve metadata to the fullest possible extent.
10. When the City Attorney's Office determines that Litigation Records no longer need to be preserved, the City Attorney's Office will release the Litigation Hold and issue instructions to all affected employees and Custodians to return to standard Record Retention Schedules. The duty to preserve does not end until the City Attorney's Office has officially released the Litigation Hold.
11. Failure to abide by the requirements of a Litigation Hold can form the basis of additional legal claims and potentially result in a loss of the affected litigation or other extreme penalties against the City and/or individual employees. **Alteration or deletion of Litigation Records subject to an ongoing Litigation Hold is forbidden. Any person who intentionally alters, deletes, or attempts to alter or delete Records subject to an ongoing Litigation Hold will face sanctions, which may result in discipline, up to and including dismissal.**