



OP 06.05: ELECTRONICALLY STORED INFORMATION (ESI) AND COMPLIANCE WITH FEDERAL COURT RULES IN FEDERAL LAWSUITS

PURPOSE

Common law and various court rules have always required parties to a lawsuit to preserve, maintain and produce “evidence” related to a lawsuit. Prior to the electronic age in which we now operate, the common understanding was that one was not to destroy or tamper with paper documents or with evidence which existed in an intrinsically physical form.

Now, Federal Rules of Civil Procedure 26(a)(1)(B), 26(b)(1), and companion federal court rules require parties (and in some cases non-parties) in a federal lawsuit to preserve, maintain and disclose all “electronically stored information” (ESI) that is relevant to a claim or defense in a lawsuit once a party has received notice of the suit or has received sufficient information to realize that a lawsuit is to be filed.

The purpose of this policy is to acknowledge the requirements of the law and to ensure that University officials and employees understand the requirements and understand that the University as an entity, as well as its officials and employees in their official capacities, must comply with the preservation, maintenance and disclosure requirements pertaining to ESI.

POLICY

The University recognizes that federal law now requires that the University, upon notice of a federal lawsuit or upon receipt of sufficient information to evidence that a federal lawsuit against the University is about to be filed, must preserve, maintain without modification, and, subject to and not without the receipt of the advice of its legal counsel, disclose any and all ESI held by the University that is relevant to a claim or defense in a federal lawsuit.

The University understands that there are some exceptions under the law to its obligations, and subject to receipt of the advice of its legal counsel in each case, University officials may determine that certain ESI may not be subject to the requirements of preservation and maintenance, such as those maintained by the University for disaster recovery purposes.

The University has determined that the ESI maintained for disaster recovery purposes need not be preserved or maintained for purposes of the court rules unless advice to the contrary is provided by the University’s legal counsel on a case by case basis. Consolidated Aluminum Corporation v. Alcoa, Inc., 2006 WL 2583308 (M.D. La. 2006). However, no other ESI may be considered not subject to preservation, maintenance and disclosure without receipt of advice from the University’s legal counsel pertaining to that particular ESI.

PROCEDURE

To ensure compliance with the law, the following procedures are hereby adopted by the University:

1. Procedure for Preservation and Maintenance of ESI
 - a. The General Counsel, or his designee, receives notification of pending federal litigation that requires MSU to preserve ESI.
 - b. The General Counsel, or his designee, shall notify the Head of Information Technology Services (ITS) and will consult with the Head of ITS, or his designee, to identify non-ITS IT support personnel that should also be notified.
 - c. The General Counsel, or his designee, will send a preservation notice to all relevant University parties notifying them of their legal obligation to preserve and not delete, destroy, alter or modify information (ESI and other traditionally preserved evidence) pertinent to the case. Upon receipt of the preservation notice, immediate review and retention of all files then held by or maintained by a University employee, including, but not limited to ESI, is required by law.
 - d. Upon receipt of a preservation notice, ITS, and any other identified IT support personnel, will take a snapshot of pertinent information stored on server/mainframe systems over which they have administrative responsibility. These snapshots will be labeled and preserved until notice is given by General Counsel that they are no longer needed.
 - e. Each University employee's responsibility for preservation and maintenance of records includes not only individual printed work files, but electronic information found on a computer work station (as examples, desktop and laptop computers), peripheral devices, PDAs, Blackberry, External Hard Drive, and other electronic media storage devices (e.g., CD ROMS). Information may be located in college files, department files, individual files of faculty or staff members, student employee files, staff files, and electronic files regarding matters relevant to claims or defenses in the particular lawsuit.
 - i. The following are examples of the type of materials or ESI that may potentially be relevant to a lawsuit:

E-mails, memoranda, reports, reviews, correspondence, assessments, opinions, word processing files, spreadsheets, power point presentations, calendars, contact information, databases, evaluations, peer reviews, payroll records, and any other documents or information generated, received, or reviewed in connection with claims or defenses in the lawsuit.

- ii. Items used outside of the office (laptops, personal home computers, and materials in any home or secondary office) must be reviewed by the employee for materials pertaining to the University which may have been placed on those mediums. **CAUTION:** Employees must keep in mind that the placement of University-related data into a privately owned piece of equipment automatically makes that privately owned equipment (because of the University-related data placed therein) subject to the preservation, maintenance and disclosure requirements of the law and this policy.
- iii. At the discretion of the individual employee or that employee's supervisor, a copy of pertinent information may be made for preservation and maintenance. Copies may be selective, targeting only those files, directories and folders that may contain information relevant to the case. Those who need assistance in making a copy of information on their university-owned desktop or laptop computer should contact their IT support unit.
- iv. Until instructed to do so, employees shall not destroy, delete, or alter any printed or electronic files containing information relevant to the claims or defenses in the lawsuit. Further, electronic data created after receipt of the preservation notice must also be preserved and maintained if relevant to the case. Each employee will be required to sign a sworn statement stating that he/she has not destroyed, deleted, or altered any such evidence subsequent to the receipt of the preservation notice.
- f. Each employee is obligated, upon retirement, transfer, reassignment, departure from employment with the University, or at any other time when no longer assigned duties pertaining to the files subject to the preservation notice to ensure that the preserved electronically stored information is placed under the control of his/her successor or another authorized University official who shall assume the preservation obligation for that electronically stored information.
- g. University employees preserving ESI or other evidence relevant to a lawsuit should contact the Office of General Counsel annually, on or about July 1, to determine if preservation is still necessary.

2. Procedure for Disclosure of Electronically Stored Information

- a. Since disclosure of the ESI must be in accordance with the application of the rules of court in each given case, no ESI shall be disclosed except upon receipt of the advice of the University's legal counsel to disclose.
- b. The format of disclosure (electronic, electronic version or code, hardcopy, or otherwise) is only decided, again in each given case, once the rules of the court are applied to the case.

REVIEW

The Office of General Counsel is responsible for review of this policy every four years (or whenever circumstances require immediate review). Questions regarding this policy and the procedures contained therein, or the implementation thereof, should be directed to the Mississippi State University General Counsel.

AUTHORITY

Should there be or should there occur at any time a conflict between this policy and a document of a higher authority (e.g., federal law, state law, policies/by-laws of the Board of Trustees), the document of higher authority will prevail.

REVIEWED:

/s/ Joan Lucas
General Counsel

11/29/2017
Date

/s/ Timothy N. Chamblee
Assistant Vice President and Director
Institutional Research and Effectiveness

12/01/2017
Date

APPROVED:

/s/ Mark Keenum
President

12/06/2017
Date