



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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SMALL BUSINESS / SELF-EMPLOYED DIVISION

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MEMORANDUM FOR DIRECTOR, ADVISORY AND INSOLVENCY
DIRECTORS, COLLECTION AREA OFFICES

FROM: Scott D. Reisher /s/ **Scott D. Reisher**
Director, Collection Policy

SUBJECT: Reissuance of Guidance for Complying with E-Discovery Rules

The purpose of this memorandum is to reissue the interim guidance memorandum dated September 21, 2010, with control number SBSE-25-0910-047, entitled Guidance for Complying with E-Discovery Rules. This interim guidance memorandum and its attachment provide guidance regarding the procedures established by the Office of Chief Counsel for complying with discovery requests for electronically stored information (ESI). Please ensure that this information is shared with all affected employees within your organization.

The Office of Chief Counsel issued guidelines to IRS attorneys for complying with the amended court rules regarding electronic discovery. See Chief Counsel Notices CC-2009-024 and CC-2010-008. The attachment to this memorandum contains questions and answers regarding the application of these procedures to IRS Collection employees. Because the Office of the Associate Chief Counsel, Procedure and Administration, will be re-evaluating these procedures in light of their experience with the ESI discovery rules, this guidance is subject to change. Accordingly, the affected IRM will not be revised to incorporate these procedures until Counsel has completed their re-evaluation.

If you have any questions, please contact me or Marc Aronin, Program Manager, or a member of your staff may contact Delores Dillmann, Senior Program Analyst. Field employees should raise any concerns through the appropriate management chain.

Attachment

cc: Division Counsel, SB/SE
Associate Chief Counsel (Procedure and Administration)
www.irs.gov

Preserving Electronically Stored Information In Litigation Cases

Background

While electronically stored information (ESI) has always been subject to discovery in litigation, the Federal Rules of Civil Procedure (FRCP) were amended in 2006 to specifically include references to and requirements for the discovery of ESI. In January, 2010, the Tax Court Rules were amended to include essentially similar provisions with regard to ESI. The Office of Chief Counsel issued guidelines to IRS attorneys for complying with the amended rules regarding electronic discovery. See Chief Counsel Notices CC-2009-024 and CC-2010-008. In order to fulfill its obligations to comply with electronic discovery requests, the Internal Revenue Service (IRS) must preserve ESI whenever litigation can be reasonably anticipated. This article provides guidance for Collection employees regarding their responsibilities for preserving ESI.

What is ESI?

ESI includes, but is not limited to, e-mail and other electronic communications, word processing documents, spreadsheets, electronic calendars, telephone logs, Internet usage files, meta-data, voicemail, text messages, and network access information. In the context of a collection case, ESI would include, but is not limited to, ICS histories, results of electronic research, and any other information regarding the case that is either obtained, recorded, or sent electronically.

What ESI is subject to discovery?

All ESI is subject to discovery if it is relevant to the case. For purposes of determining relevancy, the nature of the litigation or anticipated litigation, including the time periods involved, the allegations made by the parties, and the subject matter of the litigation, must be considered. While all potentially relevant ESI must be preserved, this does not mean that the information must be or will be produced in litigation. The ESI may not be responsive to the discovery request of the opposing party. Or, the Government may claim that relevant ESI is privileged information protected from discovery requests the same way it claims paper documents are protected. For example, the Government may claim that an e-mail message sent by a collection advisor to an area counsel attorney regarding the merits of a taxpayer's position in litigation is protected by the attorney-client privilege. It is the attorney assigned to the case who determines whether a privilege applies, not the IRS employee(s) who prepared, obtained, or preserved the ESI. Accordingly, even if you believe that certain ESI is covered by a privilege, the information must nevertheless be preserved and isolated for possible production in litigation.

How do I determine what ESI is relevant and should be preserved?

All ESI relating to a particular taxpayer's case must be preserved when litigation is initiated or can be reasonably anticipated (see below). This eliminates the possibility of losing ESI that is later determined to be relevant to a discovery request. Whether ESI is relevant to the case is a determination to be made by the attorney assigned to the case.

When does the duty to preserve ESI begin?

The duty to preserve ESI arises in suits filed against the Government when the lawsuit is filed or when litigation can be reasonably anticipated. When such litigation can be reasonably anticipated depends upon the facts of the case. In suits brought by the Government, the duty to preserve ESI begins no later than when a decision is made by Chief Counsel to refer a suit to the Department of Justice.

Example A: A taxpayer files an administrative claim for damages for unauthorized collection action and indicates that he will pursue the matter in court if his claim is denied. In this situation, litigation can be reasonably anticipated before the suit is even filed.

Example B: A quiet title action is brought under 28 U.S.C. § 2410 in state court. The duty to preserve ESI generally would not arise until the IRS receives notice of the litigation because it would not be reasonable for the IRS to anticipate litigation in every case in which a Notice of Federal Tax Lien is filed.

What is a litigation hold?

Agency counsel is responsible for issuing a litigation hold when litigation is initiated or reasonably anticipated. The litigation hold informs all IRS and Chief Counsel employees involved in a case to preserve all of their paper and electronic files. Depending upon the type of litigation, "agency counsel" may refer to Area Counsel Attorneys, National Office Attorneys, Assistant U.S. Attorneys, or Tax Division Attorneys.

When a litigation hold needs to be established, Area Counsel will send e-mail notification to the Service point of contact. Notification will also be sent to the Area Records Manager to ensure that applicable record retention schedules are suspended.

Who is the Service point of contact?

The Service point of contact will be the person identified by Counsel as the Service employee who is most familiar and involved in the case and who would have knowledge about other Service or Counsel employees who may possess relevant ESI. In suits brought by the United States, the Service point of contact will generally be the Collection Advisor responsible for the litigation case.

What are the responsibilities of the Service point of contact?

The Service point of contact will assist the attorney assigned to the case by identifying and contacting all Service employees who may possess potentially relevant ESI that may be subject to the litigation hold. All Service employees who possess potentially relevant ESI are required to preserve this information.

Example: Collection Advisor Tom Smith has been identified as the Service point of contact in a suit to reduce assessments to judgment and to foreclose the tax lien. Area Counsel issues a litigation hold to Advisor Smith. Advisor Smith knows that two different revenue officers worked on this case, and that Appeals handled a Collection Due Process case involving the taxpayer. Advisor Smith will notify the revenue officers and the Appeals officer of the litigation hold and request that they preserve any ESI relating to the taxpayer's case. Advisor Smith must receive an acknowledgement from each Service employee that the employee received the litigation hold and will comply with it. Advisor Smith also will notify Area Counsel of the contact information of employees who have ESI related to the litigation.

What am I required to do if I receive a litigation hold notification?

First, confirm receipt of the litigation hold notification. If you determine after a search of your records that you were not involved in any way in the case, provide an e-mail response informing the sender that you were not involved in the case or the subject matter involved in the suit. If you were involved in the case, in accordance with the instructions in the e-mail message, provide an e-mail response informing the sender of your involvement.

If you have questions about serving as the Service point of contact, send an e-mail message to the sender.

If you are appropriately identified as the Service point of contact, forward the litigation hold notification to all Service employees that you believe may have ESI relating to the case. In accordance with the instructions in the e-mail message,

provide contact information for these employees to the sender of the litigation hold notification.

What are the procedures for preserving ESI when there is a litigation hold?

In general, the agency must take the following steps to comply with a litigation hold:

- 1) Identify the types of ESI that have been created while working the case.
- 2) Search the types of ESI to which you have access for all information that is potentially relevant to the case.
- 3) Preserve the ESI.
- 4) Isolate the ESI.

Collection employees will only perform the first three steps. Instructions for completing these steps will be provided by Counsel in a second e-mail message that is sent to the Service point of contact. The message must be forwarded by the contact to all IRS employees who have been identified as possessing ESI.

The purpose of this second e-mail message is to identify the types of ESI that may have been created, and to determine whether the ESI is readily accessible. If any IRS employees who are identified as possessing ESI are unable to follow the instructions contained in this second e-mail message, they should contact the Counsel attorney who issued the litigation hold notification.

What types of ESI are created in Collection cases?

In order to identify and search for ESI, IRS employees must be familiar with the types of electronic records kept in cases that may end up in litigation. The second e-mail message requests that you specify the types of ESI that were created while you were working on the case. Some of the more common types of ESI that may be created while working on a collection case include the following:

- E-mail and attachments
- Word processing documents, such as suit narratives or other exhibits prepared for a suit recommendation
- Spreadsheets (e.g., showing CSED calculations)
- Images (e.g. digital pictures of property involved in the litigation)
- Hard drives (desktops and portable thumb drives)
- Internet data
- Backup and archived material

This list is not all-inclusive. In your response to Counsel's second e-mail message, you must identify all of the types of ESI that you created while working on the case.

What is required of Collection employees to “search” for ESI?

Once you have identified the types of ESI that you created while working the case, you should conduct a preliminary search to identify any ESI to which you have access, including on external media such as CDs or flash drives. For example, you should search your Microsoft Office (Word, Excel, etc.) files or Outlook folders to find all ESI that relates to the litigation. The employee should inform the Service point of contact of the results of the search, including the time frame during which the ESI was created and the employee's post of duty at the time the ESI was created. If there are types of ESI to which you do not have access, inform the Service point of contact. The Service point of contact will inform Counsel so that they can notify Modernization and Information Technology Services (MITS) of the existence of this ESI.

What is required to “preserve” and “isolate” ESI?

Once located, ESI must be preserved and isolated. Preservation of ESI means that it should not be altered or destroyed and must be maintained in its native format throughout the duration of the litigation. Accordingly, all applicable record retention schedules are suspended until such time as the ESI is isolated. ESI is isolated when a mirror image of the ESI in its native format (i.e., electronic format as opposed to paper format) is created and moved to a separate server for storage for the duration of the litigation. Collection employees need not isolate the ESI. The isolation and creation of a mirror image of the ESI in its native format is done by MITS personnel.

Whose responsibility is it to isolate ESI?

Counsel will coordinate with MITS personnel to isolate and preserve the ESI you identified. Do not alter or destroy the ESI until you have confirmed that the ESI has been isolated and preserved by MITS and that it is no longer necessary for you to isolate and preserve the ESI.

Is ESI isolated in every case?

The decision whether to isolate the ESI in each case will be made by Agency Counsel. The isolation will be done by MITS personnel. Once a Collection employee receives a litigation hold, however, the employee must preserve all ESI relevant to the litigation until notified otherwise.

How do these requirements apply to e-mail messages in particular?

The general rules for retaining e-mail messages as records are found in IRM 1.15.57-1, General Records Schedule 20, Item No. 14. The general rule is that the basic requirements applicable to all records apply to e-mail records as well. If they are not in an approved electronic recordkeeping system, e-mail messages identified as records must be printed out and placed in the appropriate record system.

Accordingly, when a litigation hold is not in place or litigation is not reasonably anticipated, e-mail messages that are records should be printed, including

attachments and transmission information, and placed in the case file or other appropriate official filing system. After the e-mail message is printed and filed, it should be deleted unless it is needed for reference purposes. Saving an e-mail message in an Outlook folder does not eliminate the requirements to print a hardcopy and file it because an e-mail folder is not considered to be part of an official filing system. See Exhibit 1.15.6-1, *Common Questions about E-Mail*. See also *Managing Electronic Mail*, Document 12073 (03-2009), Catalog Number 36978N.

To the extent that e-mail messages potentially relevant to the case have not been printed and deleted in accordance with applicable retention schedules, they must be preserved once litigation is initiated or is reasonably anticipated. This means that the e-mail messages may not be deleted. Once a litigation hold is in place, MITS personnel will isolate the messages and preserve them in their original format. However, before any e-mail messages would be produced in litigation, a determination would be made as to whether they are in fact relevant to the case and whether they contain any privileged information. Remember, it is up to Counsel, and/or the court, to make this determination.

Example: Collection Advisor Jim Anson reviewed the suit package prepared by Revenue Officer (RO) Ann Graves and requested additional information from RO Graves to fill in some gaps in the suit narrative. RO Graves e-mailed the information to Advisor Anson. RO Graves saves the sent e-mail message in a personal outlook folder created for this case. Months later, Advisor Anson receives a litigation hold notification from Counsel requesting that ESI be preserved. Because the e-mail message contains information that is potentially relevant to the case, RO Graves must ensure that this e-mail message, and similar e-mail messages sent in this case, are not deleted.

What should I do if I receive a litigation hold directly from the Tax Division or local U.S. Attorney's Office?

The same procedures, as set forth above, should be followed. If the litigation hold requests that you take any actions that are inconsistent with these procedures, contact your local Area Counsel office and request assistance.

When does the obligation to preserve ESI end?

As a practical matter, the litigation hold is in effect until you are notified in writing by Counsel that the litigation hold has been lifted. The obligation to preserve ESI remains in effect for as long as the IRS can reasonably anticipate litigation in a case and for the duration of the litigation and any subsequent appeals.

What are the potential consequences of not preserving ESI?

Failure to preserve documents and ESI could result in unfavorable discovery orders, sanctions against the Government, disadvantage to the Government's position in litigation, or preclusion of any and all evidence in favor of the Government's position. Also, individuals who fail to take appropriate steps to locate and segregate information subject to a litigation hold could be subject to monetary or contempt sanctions.

What if relevant ESI was inadvertently destroyed or cannot be located either before or after the litigation hold notification was received?

There is no consequence if any ESI is destroyed prior to the issuance of the litigation hold and before litigation was reasonably anticipated. If an employee cannot locate ESI, the employee should describe the missing ESI in sufficient detail. MITS personnel then will conduct a search for the missing ESI. Reasonable steps must be taken to ensure ESI is not destroyed after a litigation hold notification is received. Even inadvertent destruction after receipt of a hold notice could have negative consequences for the Government, although inadvertence may weigh against the court imposing sanctions.

References:

Document 12073 (03-2009), Catalog Number 36978N, *Managing Electronic Mail*
IRM 1.10.3, *Standards for Using E-Mail*
IRM 1.15.6, *Managing Electronic Records*
IRM 1.15.6.9, *Retention and Disposition of Electronic Records*
IRM 1.15.7, *Files Management*
IRM 1.15.28, *Records Management – Records Control Schedule for Collection*