

National Archives and Records Administration

Transmittal Memo

DATE: September 22, 2020

TO: All Staff

SUBJECT: NARA 825, Holds on NARA's Operational Records and Other Related Documentary Materials

Purpose: This policy provides requirements for requesting, issuing, implementing, and removing holds on NARA operational (i.e., corporate) records and other related documentary materials in any media or format.

Significant changes:

- Includes instructions for placing holds on records of current or former employees and specifically mentions impacted records located on mobile devices, local hard drives, file shares, or Google Drive and in email;
- Previously, a NARA Notice was issued to notify staff about issuance and removal of holds. This policy no longer requires NARA-wide notification about issuance and removal of holds;
- Clarifies which offices are authorized to issue and remove holds;
- Adds policy on how the OIG must handle holds for two special situations; and
- Updates the responsibilities paragraph to clarify existing duties.

Available forms: None.

Cancelled forms: None.

Cancelled policy: Interim Guidance 825-1, Holds for Operational Records and Other Related Documentary Materials, dated October 23, 2006.

Effective date: This policy is effective date of signature.

National Archives and Records Administration

Contact information: Please contact Hannah Bergman in NARA's Office of the General Counsel (NGC) at Hannah.bergman@nara.gov for questions on this policy.

DEBRA STEIDEL WALL
Deputy Archivist of the United States

Attachment

National Archives and Records Administration

NARA 825
September 22, 2020

SUBJECT: Holds on Operational Records and Other Related Documentary Materials

825.1 Policy.

- a. Within the context of records management, a “hold” is an agency’s temporary suspension of disposition action(s) because of legal, audit, or investigative needs.
- b. Two offices are authorized to issue and remove holds as follows:
 - (1) **Holds for routine administrative litigation and Freedom of Information Act (FOIA) matters** - NARA’s General Counsel (NGC) issues and removes holds on NARA operational records and other related documentary materials for any of the following reasons:
 - (a) Routine litigation such as when NARA is a party to a lawsuit or when the United States is participating as a plaintiff or defendant and NARA has records that are relevant to the case.
 - (b) Administrative proceedings, such as a case involving an equal employment opportunity (EEO) or Merit Systems Protection Board (MSPB) matter.
 - (c) Responses to FOIA requests for NARA operational records, if a hold is necessary.
 - (d) **Note:** NGC may issue a hold when litigation is filed or reasonably anticipated.
 - (2) **Holds related to OIG audits and investigations** - The Director of Corporate Records Management (CM), as NARA’s Records Officer, issues and removes holds on NARA’s operational records and other related documentary materials when:
 - (a) NARA’s Office of the Inspector General (OIG) or the Government Accountability Office (GAO) conducts audits (see NARA 1201, Audits of NARA Programs and Operations); or
 - (b) The OIG conducts an administrative (non-criminal) or criminal investigation (see NARA 190, Office of the Inspector General – Investigations).

- (3) **For all non-routine matters (i.e., holds affecting an entire office or more than one office)** - NGC and Corporate Records Management will coordinate to issue and remove holds on affected records.
- c. Staff must preserve materials affected by a hold for as long as the hold is in place. Non-compliance with a hold could result in penalties on individual staff (see para. 825.7) or on NARA as an agency (see para. 825.8).
- d. **Special situations involving the OIG**
 - (1) If NARA is a party to litigation that may involve OIG operational records, NGC will work with the Counsel to the IG to ensure appropriate holds are put in place.
 - (2) If the OIG needs to put a hold on records without notifying NGC or CM (for example, if an NGC or CM employee is under investigation and the Department of Justice (DOJ) has not authorized notification of the investigation to the employee), the OIG will directly notify the appropriate document custodian or NARA staff that a hold must be put in place and any such request will be honored.

825.2 Scope and Applicability.

- a. This policy applies to:
 - (1) NARA staff, including all employees, volunteers, and contractors where contractors are creating records within NARA's custody and control, or on NARA's behalf.
 - (2) Relevant NARA operational records, nonrecord materials, and other documentary materials in any media or format that may constitute evidence in a particular lawsuit, administrative proceeding, audit, or investigation, including files and records of staff that have separated from NARA. "Documentary materials" is a collective term for records, nonrecord materials, and personal papers.
 - (a) Operational (corporate) records are created or maintained by NARA staff while conducting NARA business.
 - (b) Nonrecord materials are Government-owned documentary materials that do not meet the statutory definition of "records" (44 U.S.C. 3301) or that have been excluded from coverage by the definition. Nonrecord materials expressly excluded from the statutory definition of records are:

- (i) Library and museum materials made or acquired and preserved solely for reference or exhibition purposes;
 - (ii) Extra copies of documents retained only for convenience of reference; and
 - (iii) Stocks of publications and processed documents.
 - (c) Working files and similar materials, including preliminary drafts, rough notes, worksheets, correspondence and memos, reports, and other similar materials (see 36 CFR 1222.12(c)), fall within the scope of “documentary materials” regardless of whether such materials qualify as NARA operational records.
- b. This policy does not apply to the following records and documentary materials:
- (1) Accessioned records and donated historical materials, including Presidential records and presidential historical materials, in the legal custody of NARA and affiliated archives.
 - (2) Records and materials in the physical custody of NARA as follows:
 - (a) Non-NARA agency records that are stored at Federal Records Centers (FRCs) for which the originator retains legal custody;
 - (b) Records of the U.S. House of Representatives, U.S. Senate, and Supreme Court, for which legal custody resides with the transferring entity; and
 - (c) Records of the incumbent President and Vice President that NARA holds on courtesy storage, but legal custody resides with the incumbent President and Vice President.

825.3 Responsibilities.

In addition to the authorities delegated in NARA 101, NARA Organization and Delegation of Authority, the following responsibilities are assigned in order to effectively implement this policy.

- a. **NGC and Corporate Records Management** identify the need for, issue, and remove holds.
 - (1) NGC coordinates with offices to identify the records related to the matter that is the subject of litigation, administrative proceeding, or FOIA response, and issues a hold on the designated records and related documentary materials.

- (2) CM coordinates with offices to identify the records related to the matter that is the subject of an OIG audit, and issues a hold on the designated records and related documentary materials.
- b. **Information Services**, on request by NGC or Corporate Records Management, searches electronic media and applications of current or former employees for records that are subject to the hold.
- c. **Exit Clearance Officials** report employee, contractor, and volunteer departures to NGC and NARA's Records Officer so that NGC and Corporate Records Management can determine whether or not the separating individual has operational records, nonrecord materials, and other documentary materials in any media or format that are subject to any ongoing hold.
- d. Document custodians are the owners of the documents potentially responsive to litigation, FOIA, or administrative investigations and must comply with all preservation obligations communicated by the office placing the hold on the documents.

825.4 Requesting a hold.

- a. **Scope of hold** – The requesting attorney or other employee decides on the overall scope of the hold. Specifically, the hold should cover only those materials that are responsive to the situation warranting the hold (e.g., litigation, audit, investigation).
- b. **Written request** – The attorney or other employee sends a written request (e-mail, memo, or fax) to the document custodian. The request includes the following information:
 - (1) Justification for the hold (e.g., litigation, audit), including copies of relevant supporting documents (e.g.s, court order, letter from GAO);
 - (2) Disposition action(s) to be suspended;
 - (3) Concise descriptions of series and documentary materials, including information about content (i.e., subject matters and topics), date spans, and volumes;
 - (4) Estimated period of time for the hold or event(s) triggering release of the hold; and
 - (5) Names of contact person and alternate who are knowledgeable and can answer questions about the records and related documentary materials subject to the requested hold.

825.5 Applying holds to operational records and related documentary materials maintained in NARA's Records Management Application, organizational office space, federal records centers, email, mobile devices, local hard drives, file shares, and Google Drive.

- a. Once a hold has been applied, the records must be located and appropriate measures taken to ensure they are preserved until the hold is removed.
- b. If the records are known to be stored in the Records Management Application, NGC and/or CM requests Information Services to conduct a search of the repository. When the records are located, NGC and/or CM and Information Services take the actions necessary to preserve the records and NGC and/or CM produces copies to the requestor.
- c. If significant amounts of records are known to be located in an FRC, CM determines which transfers are responsive to the matter and notifies the FRC Program Office to place a freeze on the appropriate transfers.
- d. If the records are being maintained by an organization(s), NGC and/or CM notifies the organization of the hold and requests that actions be taken to ensure that the records are preserved until the hold is removed.
- e. If a hold applies to records of current or former employees that are located on mobile devices, local hard drives, file shares, or Google Drive, or in email, NGC and/or CM contacts Information Services who will do the following:
 - (1) Make a complete copy of an employee's mobile devices and local hard drive, as well as any information on file shares;
 - (2) Search NARA's email repository and make the results available to place a hold;
 - (3) Search Google Drive content for information that may be placed on hold; and
 - (4) Ensure copies and exports are made in such a manner that no metadata is altered and that materials are accessible only to NGC, NARA's Records Officer, authorized investigators or auditors, and limited Information Services staff.
- f. Once a hold has been applied, staff must:
 - (1) Not destroy or delete any documentary materials, including those temporary records that are eligible for destruction in accordance with the NARA Records Schedule or the GRS.

- (2) Follow the supervisor's or manager's instructions about maintaining records and other documentary materials subject to the hold (e.g., centralizing or retaining the records and materials in place; sending the records and materials to NGC, OIG, etc.).
- (3) Not transfer permanent records to the National Archives of the United States, unless a transfer is permitted in accordance with the hold instructions.
- (4) Not transfer records to an FRC, unless a transfer is permitted in accordance with the hold instructions.
- (5) Not donate to interested individuals or organizations any documentary materials and/or those temporary records that are eligible for destruction.

825.6 Removing a hold.

- a. When the need for the hold has expired, the hold requester sends a written request to the document custodian and NARA's Records Officer to notify them that the hold has been lifted. The reason(s) for removing the hold must be explained in the request.
- b. As applicable, NARA's Records Officer will notify the document custodian and the FRC to immediately implement disposition.

825.7 Consequences to individual NARA staff if they do not preserve operational records and other related documentary materials subject to a hold.

Individual staff could face administrative or criminal penalties imposed by NARA, DOJ, and/or a civil or criminal court for *not* preserving records and documentary materials subject to a hold.

- a. NARA – The NARA Penalty Guide includes disciplinary action for the “knowing and willful misstatement or omission of material facts on, or unlawful concealment, removal, mutilation, or destruction of, official documents, contract files, or administrative records.” If a NARA staff member commits actions listed under this offense, NARA could impose a serious penalty, including an official reprimand, suspension, or removal from NARA employment.
- b. DOJ – Failure to preserve operational records could constitute an unlawful destruction of records that must be referred to the Attorney General under 44 U.S.C. 2905(a) and 3106.
- c. Civil or criminal court – If a NARA staff member fails to comply with a hold that is in place because of a court order, this individual could be individually sanctioned or held in contempt by the court. Additionally, destruction of records under certain circumstances is potentially a criminal violation for which a staff member could be prosecuted under 18 U.S.C. 641, 1519, 2071.

825.8 Consequences to NARA, as an agency, if operational records and other related documentary materials subject to a hold are *not* preserved.

NARA and the U.S. Government could be subject to sanctions if records and other documentary materials, deemed as “evidence,” are missing. For instance, the court could:

- a. Issue an adverse finding (e.g., a court order) against NARA on the merits of the case;
- b. Instruct a jury to draw an “adverse inference” against NARA, meaning that the judge would rule that the content of the missing records and materials would have supported whatever argument that the opposing party has put forward;

Example: In the hypothetical court case, *XYZ Corporation v. NARA*, operational records and documentary materials pertaining to NARA officials’ communications with XYZ Corporation (from 1999 to 2004) have ***not*** been preserved as required by agency policy. The judge then directs the jury to logically conclude (or “infer”) that the content of NARA’s missing records and materials (as “evidence”) would have supported XYZ Corporation’s position against NARA.

- c. Preclude NARA from introducing certain evidence and/or calling certain witnesses;
- d. Hold individual NARA officials and/or NARA in contempt; and/or
- e. Impose monetary sanctions against NARA.

825.9 Authorities.

- a. 5 U.S.C. Appendix § 8G, “Requirements for Federal entities and designated Federal entities” disallows the head of a Federal agency from preventing or prohibiting the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.
- b. 18 U.S.C 641, 1519, and 2071 discuss penalties for unlawful destruction, alteration, defacement, and falsification of records
- c. 44 U.S.C 2905a authorizes the Archivist to establish standards for the retention of records and take action against unlawful destruction of records.
- d. 44 U.S.C. 2909 authorizes the Archivist to empower a Federal agency to retain records for a longer period than that specified in disposal schedules, and authorizes the Archivist to withdraw disposal authorizations covering records listed in disposal schedules.
- e. 44 U.S.C 3106 sets out procedures for the unlawful destruction of records.

- f. 44 U.S.C. Chapter 33 defines “records” and requires agencies to prepare lists and schedules of records proposed for disposal.
- g. 36 CFR 1222.12(c) defines certain “working files and similar materials” as a type of record.
- h. 36 CFR 1226.20 provides the process for how agencies temporarily extend retention periods.
- i. Federal Rules of Civil Procedure
 - (1) Chapter III, Pleadings and Motions, Rule 16, Pre-Trial Conferences; Scheduling; Management provides guidelines for judicial scheduling orders that may impact disclosure, discovery, preservation of electronically stored information, or claims of privilege or of protection as trial-preparation material after information is produced.
 - (2) Chapter V, Disclosures and Discovery, Rule 26(a), Duty to Disclose; General Provisions Governing Discovery: Required Disclosures; Initial Disclosure stipulates that a party in a lawsuit must provide a copy, or a description by category and location, of all documents and electronically stored information in its possession, custody, or control relevant to the lawsuit.

825.10 Public Release.

Unlimited. This policy is approved for public release.

825.11 Records Management.

- a. NGC – Use file nos. 1103-2a(1), 2a(2), or 2b (“Litigation”), as appropriate.
- b. CM – Use General Records Schedule (GRS) 4.1, Item 020.
- c. Offices requesting holds (other than NGC) – For any records created relating to record holds, use GRS 5.1, Item 010, Administrative records maintained in any agency office.