***BEFORE FINALIZING THIS FORM FOR USE, DELETE HEADER EXCEPT FOR PRIVILEGES NOTICE AND ALL FOOTNOTES & FOOTNOTE NUMBERS PASSIM.***

***This memo attempts to induce early active participation by attorneys & client departments in***

***1. Determining scope of legal hold on electronic data & equipment to limit it to what the case really requires and trying to keep the legal hold proportionate to the size & complexity of the case, and the actual material issues in the case. This includes addressing the problem of holds on unsearchable emergency recovery backup tapes; Early meeting & agreement with opposing counsel or court order limiting legal hold scope is essential.***

***2. Formulating useful search terms***

***3. Identifying persons with knowledge***

***Pete***

**ANNOTATED IN FOOTNOTES BY PETE HASKEL AS OF AUGUST 10, 2011**

**NOTICE: THE CONTENTS HEREOF ARE PROTECTED FROM DISCOVERY AND DISCLOSURE UNDER THE ATTORNEY-CLIENT AND ATTORNEY WORK-PRODUCT PRIVILEGES, AND OTHER DOCTRINES**[1]

[CITY LOGO]

DATE

TO[2] ____, Director
_____, Assistant Director
_____, Truck Operator
_____ **Department**
_____, Director

[1] This memo is claimed as privileged, but disclosure at least *in camera* may eventually be required if sufficiency of litigation hold or collection methods are litigated.

[2] After appropriate discussion with City Manager's Office and director(s) involved, choose department director, most involved. First-listed "To" addressee department will be litigation liaison. Include as addressees all known city personnel involved in the transaction giving rise to the law suit or claim. "Copy to" ("CC") addressees should be selected in consultation with your client. I always copy to IT, City Clerk, & City Manager, & 1st Assistant City Manager, plus City Attorney & First Asst. City Attorney to help ensure compliance with the legal hold memo.

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_____ Housing Analyst

**Housing Department]**

COPY _____, Director (XXXXXX@_____)

_____, Assistant Director, CIS (XXXX@_____)

LitigationHold@_____[3]

**Communication and Information Services Department**

_____, City Manager[4]

_____, First Assistant City Manager

**City Manager's Office**

_____, City Attorney

_____, First Assistant City Attorney

**City Attorney's Office**

SUBJECT Lawsuit styled _____ ("XXX"[5]);[6]

**Obligation to Locate and Preserve Information [Litigation Hold] a/k/a Legal Hold] and to identify persons with knowledge of the facts giving rise to the dispute**

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I am one of the attorneys handling the subject case. The opposing party(ies) is/are claiming that _____. I have attached a copy of the petition/complaint for your review. The City's answer is due on _____.

This memo contains several specific requests, but the bottom line, as detailed below, is that we need to locate and preserve all documents and other information in any form that are relevant to this lawsuit. This includes immediately stopping all routine destruction involving such information or documents. This request is sometimes called a "Litigation Hold" or "Legal Hold" on document destruction. In addition, it is vital that we identify all people having knowledge of the underlying dispute, whether or not they ever worked for the City, so that we can determine if they have documents and if they may be witnesses.

## I. Designation of Department Representative

[3] Consider creating an e-mail distribution list on your server that will reach all staff involved in the legal hold project. This can be within your IT/CIS department or city-wide, depending on the purpose for which the distribution list will be used. This is what the "LitigationHold@____" e-mail address is supposed to represent.

[4] City Manager & first Assistant are to be copied on all legal hold memos [this is a management decision, not a legal one, to ensure compliance].

[5] Pick a short name for the case. If a lawsuit has not been filed consider a short term such as "the X claim" or the "X allegations." Once the short term is chosen, use Find & Replace in Word to plug it into the text of this memo, then proof read to ensure that the short term fits grammatically into the text.

[6] If lawsuit not already filed, modify all references to the controversy as appropriate to refer to a claim or threatened claim or lawsuit. Nomenclature such as "opposing party" and "plaintiff" will have to be modified accordingly.

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Due to the subject of the allegations in this suit, the _____ Department will act as the "client" in this matter. Therefore, please designate a representative from the client department to be the City Manager's liaison in this case. The liaison will be responsible for working with other departments on this case, as well as within the "client" department. However, the other departments should each designate a person to work with the client department liaison and with the City Attorney's Office. If a department does not designate a liaison, we will contact the department director or City Manager directly for assistance. Whenever I use the term "department" in this memo, I also intend to include offices and other units of the City's government that are not within a department.

Make these designations in writing by memorandum or e-mail directed to my legal assistant, _____, at _____, copy to me.

## II. DUTIES OF DEPARTMENT REPRESENTATIVE

The client department's liaison will be responsible for: (1) providing the City Attorney's Office with all relevant information and documents concerning the matter, (2) aiding in the preparation of the answer, the City's required pretrial disclosures and responses to discovery and motions, and preparation for hearings and trials, and (3) aiding in the formulation of settlement positions, if any, including any settlement amounts that may be recommended to City Council. The client department liaison will have to work closely with the representative designated by every other department involved in this lawsuit, and with the City Attorney's Office.

***A particularly important responsibility of each department, particularly the client department and the liaison for that department — but a responsibility of every single City employee and every single City department — involves locating and preserving paper and electronic documents[7] relating to the lawsuit.*** We will likely be required during this lawsuit to provide the opposing party(ies) with all information relevant to this suit that is not privileged. Each department must preserve all information relating to the suit, including information stored on its computer systems, removable electronic media, and any other media locations. This includes, but is not limited to, email and other electronic communication, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, Internet usage files, social media content, and network access information.

Each department must also identify and temporarily preserve until the City Attorney's Office, the department, and CIS decide what must be preserved for the duration of the litigation, the following systems and platforms in its possession or in the possession of a third party under its

[7] If the controversy involves tangible evidence other than documents, e.g., a motor vehicle, a weapon, modify the memo to include such. If a location is at issue, send photographers and video operators as appropriate to record the scene as soon as possible & consider whether to preserve scene if it is on city property or under city control while offering opposing counsel opportunity to inspect (the offer will avoid a lot of argument later). Of course get copies of anything opposing side creates & have your representative present when opposing party is inspecting.

control (such as an employee or outside vendor under contract):[8] databases, networks, computer systems (including legacy systems - hardware and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges, and other storage media), laptops, personal computers, Internet data, personal digital assistants, handheld wireless devices, mobile telephones, paging devices, and audio systems (including voicemail).

Each department must take every reasonable step to preserve this information until further notice from me or another attorney in the City Attorney's Office. ***Failure to do so could result in severe penalties from the court.***

## III. PRESERVATION OBLIGATIONS

The client department must immediately identify, secure, and preserve all paper and electronic documents relevant to XXX.

[IF APPLICABLE: The incident(s) giving rise to this matter allegedly occurred at:

_____ (location) at approximately _____ (date/time);
_____ (location) at approximately _____ (date/time);
_____ (location) at approximately _____ (date/time);
_____ (location) at approximately _____ (date/time);
_____ (location) at approximately _____ (date/time); and
_____ (location) at approximately _____ (date/time)][9]

Because doing this for electronic documents is complicated and sometimes difficult, the bulk of this memo addresses computer documents. ***But do not neglect identifying and preserving all paper documents too***, including, without limitation all drafts, copies, and final versions of formal and informal memos, correspondence, manuals, photographs, calendars, phone messages and logs, existing print-outs of PowerPoint and other presentations, manuals, directives, meeting minutes, meeting agendas, handouts, files, and training materials.

The laws and rules prohibiting destruction of evidence apply to electronically stored information in the same manner that they apply to other evidence. Due to its format, electronic information

[8] This ignores practical and legal (including possible Fourth Amendment, statutory, contractual & common law impediments to obtaining data under control of others. This will need to be discussed with the client, the memo modified accordingly, and decision made how & whether to make demands for that data. At the least, the facs concerning the existence of data and location of known relevant data will have to be gathered & disclosed if the City cannot obtain it, unless there is a legal excuse for nondisclosure.

[9] For ongoing or long-term transactions, inception dates are sometimes difficult to determine. Do your best. I there is uncertainty, explain. If a petition or complaint is attached, simply refer to or quote the pleading — unless you disagree with the dates in the pleading or, if records with different dates must be preserved for the litigation state those dates & explain why (e.g., preparation started X months before the incident alleged in the petition).

is easily deleted, modified, or corrupted. Accordingly, you must take every reasonable step to preserve this information until the final resolution of this matter. This includes, but is not limited to, an obligation to:

- ☐ Discontinue all data destruction and backup tape recycling[10] policies;
- ☐ Do not change out or replace any mobile smart phone or other mobile telecommunications device without CIS first saving the contents of the SIM card and hard drive data, and after that is done getting approval from the City Attorney's Office. THIS INCLUDES PERSONAL DEVICES THAT HAVE BEEN USED FOR CONDUCTING CITY BUSINESS OR COMMUNICATIONS RELEVANT TO THE SUBJECT OF THIS MEMORANDUM. On a case-by-case basis, the City Attorney's Office can allow exceptions to this requirement for those who establish that their mobile devices have no information relevant to the subject of this memorandum – But that is a decision that the City Attorney's Office will make in consultation with the Department Liaison and Department Director if necessary, and CIS – NOT a decision that individuals or even supervisors can make for themselves.
- ☐ Suspend all routine document retention/destruction policies and procedures;
- ☐ Preserve and not dispose of, or re-assign to other users, relevant hardware;
- ☐ Preserve and not destroy passwords, decryption procedures (and accompanying software), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software; and
- ☐ Maintain all other pertinent information and tools necessary to access, view, and/or reconstruct all requested or potentially relevant electronic data.

Although each department has a strict duty to preserve electronic information, the departments will not have to produce electronically stored information from sources that are not reasonably accessible because of undue burden or cost unless the court so orders. If a department believes

[10] Preservation of backup tapes is a developing area of great uncertainty. The general rules that seem to be developing are that (1)) backup tapes that do not provide substantially the same information as is available on live electronic media need not be preserved (But how can we determine what is on the tapes without reviewing them?) and (2) a party should apply a policy of proportionality: Will expense & collateral consequences of preserving not-readily-accessible media, particularly non-searchable backup tapes, be substantially disproportionate to the importance of the litigation. This consideration must include importance to plaintiff, not just to the City. In criminal matters or when there are court orders, or in particularly significant litigation, proportionality often goes out the window. Each case must be carefully considered on its individual merits. Discuss this with section head & first assistant, as well as with client. If it is decided that not all backups will be preserved, or that not all platforms will be imaged, the decision must be fully justified and documented. THE BEST POLICY IS IF AT ALL POSSIBLE TO REACH AGREEMENT WITH OPPOSING COUNSEL ON SCOPE OF PRESERVATION AT AN EARLY DATE OR TO OBTAIN COURT ORDER ON SCOPE AT EARLY DATE. Unilateral decisions about the importance of a case and proportionality without agreement or court order are highly risky.

that preservation and/or production obligations will be unduly burdensome or costly, please contact me immediately so we can discuss reasonable alternatives. A word of caution — if the opposing party seeks to compel the production of electronic information, it will be the City's burden to prove to the court that the information was/is not reasonably accessible because of undue burden or cost. Moreover, even if a court agrees that requiring the City to produce would be unreasonable, the court could order the City to permit the opposing party to search for and produce the documents at the opposing party's expense.

What equipment/devices need to be imaged by CIS? (Make selection below)

| STANDARD | NON-STANDARD | OTHER (PLEASE LIST) |
|---|---|---|
| ☐ All items listed below<br>☐ Laptop<br>☐ Desktop<br>☐ Flash Drives (USB Drives)<br>☐ Mobile phones, Smart Phones & PDAs<br>☐ Emails | ☐ All items listed below<br>☐ CD/DVD/Diskettes<br>☐ Other<br>**EMAILS**<br>☐ Emails Only | ☒ 311 SERVICE CALLS<br>☒ 911 CALLS<br>☐<br>☐ |

## IV. IDENTIFYING RELEVANT EMPLOYEES, OTHER PERSONS WITH KNOWLEDGE, AND SEARCH TERMS

This "legal hold" is just the first step in the process of identifying relevant employees and other persons with relevant knowledge, and structuring electronic searches for relevant information. Other persons with knowledge relevant to the litigation may include retired or former employees, outside contractors or vendors, or perhaps persons without formal ties to the City. When we have identified all these persons, we need to determine if the City has a right to possess or control their electronic data. If the City has such a right, we need to secure their work media as described above, and simultaneously start to structure a search plan. Almost always, that plan will involve selecting search terms.

### PRELIMINARILY SUGGESTED SEARCH TERMS

***The courts have been very clear that attorneys alone cannot design searches or select search terms. These must be accomplished in cooperation with the people (usually in CIS and the Client Department) who actually know where computer data resides and what words were actually used in a project or transaction that is the subject of the litigation.***

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Both the identification of persons with knowledge (employees and others) and the selection of search terms that will efficiently yield useful information in the litigation (searches should be neither too broad nor too narrow) require the prompt and active cooperation of City Attorney, CIS, and Client Department personnel. [10]

With that understanding, the City Attorney's Office provides the following information from what documents we have seen so far (which necessarily are incomplete) to start these processes:

**PERSONS WITH RELEVANT KNOWLEDGE**

- The City Attorney's Office has already notified the following persons as persons who are believed to have information and documents relevant to this matter and that they will be contacted by CIS for the purpose of securing ESI, OR such persons are getting a copy of this memo for that purpose.

- There probably will be additional persons whose identities will be discovered as this case is prepared, and they and CIS will be notified promptly that CIS needs their electronic documents and the City Attorney needs their paper documents to be copied and provided to the department liaison.

- Legal hold cannot be delayed in starting until all persons with relevant information are discovered, and CIS and the client department must start implementing legal hold based on information obtained thus far, who are (if information is missing, the City Attorney's Office does not have it and the named department should provide the information to CIS and to the City Attorney:

| So-Far Identified Custodian Name and Title | Department | Employment Status Active, Retired, Terminated or Other. Provide Explanation for Other) | Image Hard Drive (unless "No" is entered in tins column). |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |

**INFORMATION (IF ANY) ABOUT SPECIAL COMPUTER OR DATA LOCATIONS**

**[*This will never be filled out by us, unless we know of a specific location of computers, etc.]***

**INITIALLY SUGGESTED SEARCH TERMS**

**PERTINENT TIME FRAME:**

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## V. DESCRIPTION OF DATA AND HARDWARE SOUGHT

**Electronic Files.** The client department has an obligation to preserve all relevant digital or analog electronic files in electronic format, regardless of whether hard copies of the information exist. ***N.B. PRESERVING DOES NOT MEAN COPYING, IT MEANS KEEPING AS IS. COPYING ELECTRONIC DATA BY NON-EXPERTS RISKS ALTERING KEY COMPONENTS OF DATA FILES (OFTEN CALLED "METADATA") THAT OFTEN INCLUDES SIGNIFICANT INFORMATION. CIS OR OTHER DESIGNATED TECH PERSONNEL WILL PROPERLY IMAGE THE PRESERVED DATA. IF DEPARTMENTAL REQUIREMENTS PRECLUDE PRESERVING DATA WITHOUT ALTERATION UNTIL, IT HAS BEEN PROPERLY IMAGED, CONTACT CIS (LITIGATIONHOLD@_____ _____), COPY TO ME AND TO MY LEGAL ASSISTANT, IMMEDIATELY.***

**Electronic data and related software and instructions that must be preserved include:**

- ☐ Email and instant messaging – preserve all potentially relevant internal and external email that were sent or received. CIS must also preserve any relevant metadata, including message contents, header information, and email system logs;
- ☐ Active data (i.e., data immediately and easily accessible on systems today);
- ☐ Archived, stored, and backed up data (i.e., data residing on backup tapes, backup servers, backup disks, inactive hard drives, floppies, Jaz cartridges, CD-ROMs, or flash drives) and the software necessary to reconstruct the data contained on the media;
- ☐ Deleted data (i.e., data that has been deleted from a computer hard drive, network, or other computer media (e.g., disk, flash drive, or tape) but is recoverable through computer forensic techniques);
- ☐ Word-processed files, including drafts and revisions;
- ☐ Spreadsheets and tables, including drafts and revisions;
- ☐ Databases (*e.g.*, Access, Oracle, & server data) (these need to be preserved as of the date of this request so that their data content, fields, relationships, and other properties can be determined as of this date; this process can often be difficult. Usually, this data should be imaged quickly to minimize downtime for in-use databases);
- ☐ Presentation data or slide shows produced by presentation software (*e.g.*, Microsoft PowerPoint);
- ☐ Project management software and application data (e.g., Microsoft Project);
- ☐ Contact and relationship data generated by calendaring, task management, and personal information management (PIM) software (*e.g.*, Microsoft Outlook or Lotus Notes);

- ☐ Data created with the use of personal data assistants (e.g.., Blackberry, PalmPilot, iPhone, or Pocket PC devices);
- ☐ Image and facsimile files (*e.g.*, PDF, TIFF, JPG, GIF files) and sound recordings (*e.g.*, WAV and MP3 files);
- ☐ Data created with the use of paper and electronic mail logging and routing software;
- ☐ Data on magnetic, optical, or other Web-based storage media, including the hard drives or floppy disks used by your computers, flash drives, removable disks, external drives, and cloud data;
- ☐ Internet and Web-browser generated history files, caches and "cookie" files stored on backup media or generated;
- ☐ Codebooks, keys and data dictionaries, diagrams and handbooks;
- ☐ Other supporting documents that aid in reading or interpreting database, media, email, hardware, software, or activity log information; and
- ☐ Archived media (retain a mirror image copy of any media no longer in service).

**Hardware.** Departments also have an obligation to preserve all electronic processing systems, even if they are replaced. Departments may not modify, delete or otherwise alter or dispose (i.e., by data compression, disk de-fragmentation, or optimization routines) any electronic data unless a computer forensic expert makes a mirror image of the electronic file, follows proper preservation protocols for assuring the accuracy of the file (i.e., chain of custody), and makes the file available for litigation. The expert must make a mirror image of active files, restored versions of deleted files, and restored versions of deleted file fragments, hidden files, and directory listings. This includes, but is not limited to, preserving electronic data (stored on online, direct access or offline storage devices) that came from the following hardware:

| | | | | | |
|---|---|---|---|---|---|
| ☐ | Network (servers and workstations) | ☐ | Backup, archival or disaster recovery systems | ☐ | PDAs or smart phone type devices |
| ☐ | Computers (desktop and laptop) | ☐ | Tapes | ☐ | Portable storage device (flash drives, DVD, CD, disks) |
| ☐ | Hard drives | ☐ | Audio systems (including voicemail) | ☐ | Other electronic processing devices |
| ☐ | Optical tapes and cartridges | ☐ | Laptops | ☐ | All other storage media included Web-based storage |

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**Data Storage Device Replacement.** If a department replaces any electronic data storage devices that might contain data relating to this lawsuit, the department may not dispose of the storage devices. I hope that this broad list of hardware and data can quickly be narrowed as we examine where relevant information is likely to be located and CIS collects it. We will try to remove legal holds and release equipment and data collections for operational use as quickly as possible. Please contact me and CIS to discuss immediate operational concerns.

**Information for Relevant Employee(s).** Departments should preserve all data that contains the information described below for all relevant employees:

- ☐ All files related to each relevant employee;
- ☐ Basic employee information including name, date of birth, social security number, employee identification number, race, date hired (or re-hired), and educational background;
- ☐ Employment performance evaluations or reviews;
- ☐ All information, including W-2 forms, relating to compensation (including salary, bonuses, merit increases, stock options and/or other forms of compensation);
- ☐ For each position held by the employee, list the job title/position, salary level, function or description, location, division, department, subsidiary, time in position, and job status (covered or not covered), and whether the employee was full-time, part-time or temporary;
- ☐ Any disciplinary action or employment rule violations; and
- ☐ If the individual is a former employee, list the date of departure and reason for leaving.

## VI. PRESERVATION COMPLIANCE

**Activity Log**. In order to show preservation compliance, the client department liaison and any designees from other departments, as well as CIS, must maintain a log, documenting all alterations or deletions made to any electronic data storage device or any electronic data processing system. The log should include changes and deletions made by supervisors, employees, contractors, vendors, or any other third parties.

**Electronic Data Created after this Memo.** For any electronic data created after this letter or for any electronic processing systems used after the date on this letter, you must take the proper steps to avoid destroying potentially relevant evidence. This includes following the above preservation protocols. ***Note that data created after this memo may also be relevant to XXX, in which case it also must be preserved.*** The work-product doctrine may shield much of that data from production to the opposition in XXX, but we have to preserve and account for the data regardless — if it is reasonably likely to lead to the discovery of admissible evidence. This

requires a legal determination on which the City Attorney's Office should be consulted before any document related to XXX is destroyed.

## VII. DISTRIBUTION OF THIS MEMORANDUM

This memorandum must be distributed to any individual involved in the underlying facts of the case to ensure he or she is aware of his or her obligations to retain information. Furthermore, this memorandum must be distributed to all individuals responsible for implementing or administering the above policies, procedures, and/or systems. ***However, this memorandum should NOT be given to anyone who is not a City officer or employee. Contact me immediately if paper or electronic records in the custody of outside contractors, former employees, or other outsiders need to be preserved.***

## VIII. CIS RESPONSIBILITIES

CIS will assist the client department in: (1) identifying computer devices used by identified persons, (2) ensuring cessation of all routine overwriting and deletions of their electronic data, and (3) identifying, securing, imaging or otherwise preserving electronic data described by this memo. To fulfill these responsibilities, however, CIS depends on each department involved and the City Attorney's Office to make further inquiries to identify all the relevant persons and to clarify and/or expand the requests made to CIS.

Thank you in advance for your help and cooperation. If you have any questions, please contact me or Assistant City Attorney _____. I can be reached at telephone _____ or by e-mail at ____.____@_____, ACA _____ can be reached at telephone _____ or by email at ____._____@____.

_____
Assistant City Attorney

Attachment(s) (Complaint/Petition)