



Communications and Information

## SEARCH PROCEDURES FOR ELECTRONICALLY STORED INFORMATION

### COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

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This instruction establishes policy and procedures to follow in searching for USTRANSCOM's Electronically Stored Information (ESI). This instruction is applicable to all USTRANSCOM personnel, including contractors, who are issued a Non-classified Internet Protocol Router (NIPR) Network and Secret Internet Protocol Router (SIPR) Network account at Scott Air Force Base, Illinois. Refer recommended changes and questions about this publication to the Office of Primary Responsibility using AF Form 847, *Recommendation for Change of Publication*. Ensure that all records created as a result of processes prescribed in this instruction are maintained in accordance with USTRANSCOM Instruction 33-32, *USTRANSCOM Records Management Program*.

**1. References and Supporting Information.** References, related publications, abbreviations, acronyms, and terms used in this instruction are listed at Attachment 1.

**2. Purpose.** USTRANSCOM receives requests for information for a variety of reasons. Some of these are related to legal action or potential legal action. Much of the information USTRANSCOM maintains is electronic. ESI can best be searched using special techniques and procedures. This instruction establishes policies and procedures for responding to search requests involving ESI. Failure to comply with this instruction may result in adverse legal consequences to USTRANSCOM or its employees.

### 3. Responsibilities

#### 3.1. Staff Judge Advocate (TCJA)

**3.1.1.** Draft a litigation hold notification whenever litigation involving ESI is reasonably anticipated or foreseeable, and the duty to preserve potential evidence in the form of ESI arises.

**3.1.2.** When litigation is reasonably anticipated or foreseeable, create a search plan and an evidence preservation plan consistent with each litigation hold notification. Work with USTRANSCOM Command, Control, Communications and Computer Systems Directorate (TCJ6), records custodians, and the requesting party to refine the search plan as needed.

**3.1.3.** Establish search parameters (unique identifiers, search terms, key words, etc.) and identify the potential sources of ESI which may hold potentially relevant content for the litigation.

**3.1.4.** Forward litigation-related search requests to TCJ6 for execution.

**3.1.5.** Review the files collected by the TCJ6 in response to litigation-related search requests for relevance, potential redactions, and applicable privileges, and mark or sort accordingly.

**3.1.6.** With assistance from TCJ6 (who will maintain the original data), prepare a media set for presentation to the litigants or requesting party, as needed.

**3.1.7.** Work closely with the requesting party and TCJ6 to further refine the ESI search terms and parameters in a reasonable attempt to capture potentially relevant data and reduce the review burden for litigants.

**3.1.8.** Take reasonable steps to directly address any individual issues that arise during identification, search or collection and encourage complete compliance with appropriate guidance.

**3.1.9.** Provide for TCJ6 signature, a declaration or affidavit for each litigation-related ESI search addressing search procedures, methodology, and results.

**3.1.10.** Coordinate with TCJ6 to monitor existing litigation hold matters and provide updates to individual ESI custodians, as required. Contact individual ESI records custodians when any litigation hold is terminated.

**3.1.11.** Coordinate with USTRANSCOM Freedom of Information Act (FOIA) Office (TCCS-FO) on final ESI disposition guidance to be communicated to individual records custodians.

**3.1.12.** Notify USTRANSCOM Acquisition Directorate before releasing litigation-related ESI that involves acquisition matters.

## **3.2. TCCS-FO**

**3.2.1.** Determine when to use ESI search procedures in support of non-litigation requests for information.

**3.2.2.** When ESI is likely to contain records responsive to a non-litigation request, create and forward a search plan for use by TCJ6.

**3.2.2.1.** In the search plan, establish search parameters (unique identifiers, search terms, key words, etc.) and identify the potential sources of information which may hold information potentially responsive to any non-litigation request for information.

## **3.3. TCJ6 Operations Division**

**3.3.1.** Conduct enterprise-wide search plans transmitted by TCCS-FO or TCJA.

**3.3.1.1.** Use enterprise electronic discovery software to search all accessible computers pursuant to the search plan.

**3.3.1.2.** Perform a preliminary scan using terms provided by TCJA or TCCS-FO to gauge whether the search plan is feasible and manageable. Using software tools designed for electronic discovery or other means, provide TCJA or TCCS-FO an estimate of the quantity of data likely to be produced and the time needed to execute the search plan.

**3.3.1.3.** Execute the search plan and collect and preserve the resulting data in a forensically sound manner.

**3.3.1.3.1.** Maintain a record of the systems searched, search methodology, search parameters, and search results.

**3.3.1.3.2.** Maintain a copy of the results of each search conducted.

**3.3.2.** Provide copies of search results to TCCS-FO or TCJA in a format accessible to the litigants or party requesting the information (e.g., a load file processed by certain electronic discovery software used by litigants in court proceedings).

**3.3.3.** Ensure search technicians sign any search-related declarations or affidavits provided by TCJA.

#### **3.4. Individual Records Custodians**

**3.4.1.** Comply with the directions in all search requests and hold notifications.

**3.4.2.** Notify TCJA of any change in position affecting custodial duties of information subject to a hold notification.

**3.4.3.** Identify any responsive information (ESI and hard copies or real evidence) and contact TCJA or TCCS-FO, as appropriate. USTRANSCOM personnel are directed to preserve potential evidence when litigation is reasonably anticipated or foreseeable.

**3.4.4.** Report any direct request for information received to TCCS-FO or TCJA for action and response. Do not respond directly to any outside requester.

GREGORY J. TOUHILL  
Brigadier General, USAF  
Director, Command, Control, Communications  
and Computer Systems

## Attachment 1

### GLOSSARY OF REFERENCES, ABBREVIATIONS, ACRONYMS, AND TERMS

#### Section A – References

5 USC §552, *Freedom of Information Act*  
 5 USC §552a, *Privacy Act*  
 28 USC §1733, *Government Records and Papers*  
 44 USC §3506, *Federal Information Policy*  
 44 USC §3301 et seq., *Disposal of Records*  
 Military Commissions Act of 2006  
 DODI 5030.7, *Coordination of Significant Litigation and Other Matters Involving the Department of Justice*  
 DODD 5400.07, *DOD Freedom of Information Act (FOIA) Program*  
 DODD 5405.02, *Release of Official Information in Litigation and Testimony by DOD Personnel as Witnesses*  
 DOD 5400.11-R, *DOD Privacy Program*  
 DODD 5500.17, *Cooperation with the United States Office of the Special Counsel*  
 DOD 6025.18-R, *DOD Health Information Privacy Regulation*

#### Section B - Abbreviations and Acronyms

DOD – Department of Defense  
 ESI – Electronically Stored Information  
 FOIA – Freedom of Information Act  
 PSR – Prudential Search Request  
 TCCS-FO – USTRANSCOM Freedom of Information Act (FOIA) Officer  
 TCJ6 - USTRANSCOM Command, Control, Communications and Computer Systems Directorate  
 USTRANSCOM – United States Transportation Command

#### Section C - Authorities

1. Armed Services Board of Contract Appeals. The Procedural Rules for the Armed Services Board of Contracting Appeals apply to litigation before this administrative body. Specifically, Rules 4, 12, 14, 15, and 22 address evidentiary requirements and discovery parameters.
2. Federal Rules of Civil Procedure. In appeals before the Armed Services Board of Contract Appeals, these Rules have precedential value. In litigation before any Federal Court, the Federal Rules of Civil Procedure govern interactions between the parties and the Court. With respect to ESI discovery, Federal Rules of Civil Procedure 26, 33, 34, and 37 set forth evidentiary rules and electronic discovery parameters.
3. Authority for FOIA and PSR ESI searches. Authorities for ESI searches in support of the FOIA are Section 552 of title 5, United States Code, *The Electronic Freedom of Information Act Amendments of 1996*, Public Law 110-175, *Open Government Act*, and DOD Regulation 5400.7,

*DOD FOIA Program.* Authorities for PSR ESI searches are Military Commissions Act of 2006 and Secretary of Defense Memo, 21 August 2008, OSD-10522-08.

**4. Consent for Use of DOD Computers.** DOD Chief Information Officer Memorandum, "Policy on Use of Department of Defense (DOD) Information Systems—Standard Consent Banner and User Agreement," May 9, 2008 requires the standard use of a consent banner on all DOD systems. The banner is used for desktops, laptops, and other devices accommodating banners of 1300 characters. The banner is implemented as a click-through banner at logon, meaning it prevents further activity on the information system unless and until the user executes a positive action to manifest agreement by clicking on a box indicating "OK." The consent banner reads as follows:

You are accessing a U.S. Government (USG) Information System (IS) that is provided for USG-authorized use only. By using this IS (which includes any device attached to this IS), you consent to the following conditions:

- The USG routinely intercepts and monitors communications on this IS for purposes including, but not limited to, penetration testing, COMSEC monitoring, network operations and defense, personnel misconduct (PM), law enforcement (LE), and counterintelligence (CI) investigations.
- At any time, the USG may inspect and seize data stored on this IS.
- Communications using, or data stored on, this IS are not private, are subject to routine monitoring, interception, and search, and may be disclosed or used for any USG authorized purpose.
- This IS includes security measures (e.g., authentication and access controls) to protect USG interests--not for your personal benefit or privacy.
- Notwithstanding the above, using this IS does not constitute consent to PM, LE or CI investigative searching or monitoring of the content of privileged communications, or work product, related to personal representation or services by attorneys, psychotherapists, or clergy, and their assistants. Such communications and work product are private and confidential. See User Agreement for details.

**Attachment 2**

[date]

MEMORANDUM FOR [Individual's Name]  
[Individual's Title]  
[Individual's Office Designation] via e-mail

FROM: TCJA

SUBJECT: Litigation Hold Notification, [Name of litigation or investigation]

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*You are **DIRECTED** to identify and preserve all items and information related to the matter described above*

*See important details below.*

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- Ensure that routine destruction policies and procedures which may alter or eliminate potentially relevant information be immediately suspended to prevent deletion, overwriting, or any other possible destruction of information potentially relevant to this litigation (note, this may require segregating the information).
- Identify all potentially relevant information outside your computer's hard drive and shared drives and preserve it (note, this may require segregating the information).
- Ensure that any newly created information relevant to this request also be preserved.
- Contact TCJA whenever there is a change in custodians for the items described in this notification or if you leave USTRANSCOM for any reason.

Sanctions may be imposed for failure to preserve any potentially relevant information. Such sanctions include, but are not limited to: costs, adverse inferences, evidentiary exclusions, and significant monetary penalties.

The identification and preservation process must include all potentially relevant information. Concerns regarding privileged or otherwise protected materials may be noted but those concerns do not affect in any way the obligation to preserve.

Please acknowledge receipt of this notification.

If you have any questions concerning this matter, please contact the undersigned at (618) 229-1366 or by email at [USTCJA@ustranscom.mil](mailto:USTCJA@ustranscom.mil).

/s/

[Attorney Name]

Attachments:

1. [Original request]