



**Office of Strategic Operations and Regulatory Affairs
Freedom of Information Group
*Policy and Procedural Guide***

ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

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0501-1-00 PURPOSE

This Guide describes the CMS procedures for administering the Freedom of Information Act (FOIA) (5 U.S.C. 552). It conforms to and delineates for CMS the DHHS FOIA regulations published in the Federal Register by the Office of the Assistant Secretary for Public Affairs on November 25, 1988.

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(Replaces HCFA Administrative Issuances System Guide HCFA.g:0501-1. March 30, 1984..Public Affairs.Administration of the Freedom of Information Act)

0501-1-05 POLICY

- A. This Guide represents CMS policy for administering and implementing the Freedom of Information Act (FOIA). It supplements and is in full compliance with the Department's Freedom of Information Act Regulation (45 C.F.R. Part 5) and the CMS FOIA Regulations at 42 CFR 401.101 et seq.
- B. Any instructions to CMS components not in compliance with this issuance are null and void. All supplements to this issuance must be cleared with the Director, Freedom of Information Group in order to ensure uniformity of procedures, as well as consistency with the law and regulations.

0501-1-10 GENERAL INFORMATION

A. **Scope**

The Freedom of Information Act (FOIA) requires that most records in the custody of the Centers for Medicare & Medicaid Services be made available to the general public when requested. The Act does not apply to materials specifically prepared for public distribution or sale, e.g., press releases, speeches, fact sheets, listings (names and business addresses) of Medicaid and/or Medicare providers, MMACs, RADARs, information brochures, any publication which has been assigned a CMS, Health and Human Services, Government Printing Office or National Technical Information Service (NTIS) publication number, etc.

The FOIA covers records (paper or electronic/tape) only. It does not cover information which may be requested and imparted orally or in writing. For example, requests for dates, addresses, figures such as the Medicare enrollment for a state, which need not be responded to with the production of a document are not FOIA requests. Such requests should be directed to the proper public inquiries office.

Similarly, coverage inquiries by providers may not always be best resolved through the FOIA. They may often be handled most appropriately through the provider relations office or its equivalent.

B. **Authority to Release/Deny**

With the exception of the documents listed in sections C, D and E below, all requests for records which are received anywhere in CMS will be forwarded immediately to the Freedom of Information Group (FIG), in the manner described in Section C under Administrative Procedures. Only the Director, FIG can decide on release of non-excepted records, or the full or partial denial of any request. FOIA exemptions are shown in Exhibit G.

Requesters may appeal a decision to withhold all or part of the records requested. Only the Administrator or Deputy Administrator of CMS can rule on appeals of denials made under FOIA. The CMS procedure for handling FOIA requests is depicted graphically in Exhibit A. The CMS and Department FOIA policy permits certain categories of records to be released by the contractors and components/regions. When directly releasing records the cover letter to the requester should include pertinent information (e.g., no documents found in response to a specific item in the request, certain pages are of poor quality, no better copy could be located, etc.).

C. Direct Release of Routine Records

The first category of exceptions (identified herein by the prefix "I") includes those types of records whose routine release continues to be a policy of the Department. Thus, requests for the following will be directly released by any CMS component or its contractors:

I.1 -- Provider Cost Reports and Back-up Data

(Forms 339, Cost Report Reimbursement Questionnaires and working trial balances are not part of the cost report. Do not directly releasable these documents; send them to FIG for disposition.)

I.2 -- Budget Methodology (from OBRA 87)

I.3 -- DME Reimbursement Calculations (as per OBRA 87)

I.4 -- All Policy Issuances, Provider Bulletins Prepared for Distribution to the Provider Community, "Numbered" Program Memorandums (Including Intermediary and Carrier Letters, CMS Transmittals, etc.)

I.5 -- Provider Cost Data Tapes (from Cost Reports)

Directly release data arrays used to formulate routine cost limits for providers (include provider name, number, address, bed size, HI days, etc., per diem and cost limit).

I.6 -- Profiles of Customary Charges, Compilations of Prevailing Charges or Fee Schedules

Remove the frequency field when releasing profiles of customary charges that identify individual practitioners. Remove personal identifiers from backup data for prevailing charges - unless the

profiled practitioner is also the FOIA requester. Provide profiles of customary charges free of charge once per year to each practitioner who requests his or her own profile.

I.7 -- Lists of Medicare Contractors, Providers and Suppliers, including Provider Numbers.

I.8 -- CMS Manuals

The receiving component or contractor will meet requests for portions of manuals. If the request is for a complete manual, refer the requester to the Superintendent of Documents, Government Printing Office, P.O. Box 37194, Pittsburgh, PA. 15250-7954. (Phone Number: (202) 512-1800; fax number: (202) 512-2250), or to the nearest Regional Depository.

I.9 -- Hospital Diagnostic Related Group (DRG) Reports.

I.10 -- Statistical Prospective Payment Data

Release as provided in Regional Office guidance.

I.11 -- All Material Listed in the FOIA Index

The Index is a listing required by the Act, of all final opinions, orders made in the adjudication of cases and statements of policy and interpretations which have been adopted by the Agency but are not published in the Federal Register. The Index is published in the Federal Register and can be purchased from GPO.

I.12 -- Documents Addressing Medicare Coverage Issues.

Release documents listing and/or describing acceptable diagnostic/procedure codes, rate schedules, covered services. Do not release documents that contain any internal claims processing guidelines, service frequency and/or dollar limits.

I.13 -- Summary Provider Statistical and Reimbursement (PS&R) Reports

I.14 -- FOIA Request(s) Made by Other Requesters

Release the name of the FOIA requester. Do not release home addresses and phone numbers.

D. Regional Office Authorized Direct Releases

The second category of exceptions (identified herein by the prefix "II") includes those records that Medicare contractors may release when instructed to do so by their Regional Office.

II.1 -- Data that contrast a contractor's performance with the performance of any other contractor, or which compare a contractor's performance with any set of national, regional, or other combined contractor performance data.

II.2 -- Total Person-Years (or quarters, etc.) Employed Per Report Period.

II.3 -- Person-hours Per Claim Processed.

II.4 -- Number of Weeks Work on Hand, or Claims Processing Volume/Backlog.

II.5 -- Payment Record Error Rates.

II.6 -- Denial Rates.

II.7 -- Percent of Claims or Total Payments Involving Reduction in Charges.

II.8 -- Data Concerning More Than One Contractor or Comparing Contractor Performance

Release such data only in proper context, i.e., an interpretive/clarifying statement should always accompany release indicating the limitations of the data and the known variables, e.g., wage differentials. Essentially, cost information alone is not an accurate indication of a contractor's performance. Therefore, do not disclose such information without other relevant data accompanying it, e.g., information pertaining to workload volume and processing time.

Requests that include a geographical area beyond your jurisdiction may involve data that CMS has not made available for public release. The Regional Office will handle requests for such combined data.

E. Regional and Component Direct Releases

Direct release of the third category of exceptions (identified herein by the prefix "III" is limited to heads of CMS Centers and Offices and to Regional Administrators (or their designees). If contractors receive requests for such documents, they will refer the requests to the appropriate CMS Regional Office for disposition.

III.1 -- Statements of Policy or Definitive Policy Interpretations Communicated via Program Memorandums That Are Not Numbered

III.2 -- All Correspondence Between the Agency (including the contractors) and Any Outside Entity Including Public Comments.

Forward investigatory files and documents with personal identifiers or proprietary financial or business information to FIG for disposition.

III.3 -- All Final Evaluation Reports

- A. Report of Contractor Performance
- B. Contractor Performance Evaluation Program (CPEP) Guides and Final Reports
- C. Uniform Control Evaluation Program (UNICEP)
- D. State Medicaid Operations Reports (SMORs)
- E. Final Target Area Review Reports (TARRs)
- F. System Performance Review (SPR)
- G. State Assessment Review Guides
- H. State Agency Evaluation Program Reports
- I. State and CMS Survey Reports
- J. Final Medicare/Medicaid SNF and ICF Survey Report (HCFA 525) - unless the report contains patients identifiers.
- K. Final ICF/MR Survey Report (HCFA 3070 B) (unless the report contains patients identifiers)
- L. Contractor Workload Reports
- M. Notices of Cost Report Re-opening and Tentative Settlement Statements
- N. Quarterly Expenditure Report (HCFA 64)
- O. Medical Assistance Expenditure Report (HCFA 64-9p)
- P. Medicaid Program Budget Reports (HCFA 25)
- Q. PHDDS Tapes
- R. MACC Reports
- S. Statements of Deficiency and Plans of Correction (HCFA 2567) – *unless they contain patient identifiers.*

- T. Results of Follow-up Surveys (*do not release worksheets*)
- U. ESRD Facility Survey Reports (HCFA-2744)
- V. 1861 (j)(1) letters

III.4 -- Approved Contractor Agreements

Release approved contractor agreements between DHHS and Blue Cross Association (BCA) or between DHHS and commercial Part A or B contractors, and approved subcontracts between BCA and the Plans or between a contractor and a subcontractor.

III.5 -- Signed Federal Contracts, Awarded Demonstration Grants, Agreements and Memorandums of Understanding (MOU)

Do not release contracts that contain Dunn & Bradstreet identification numbers (DUN), contractor (grantee) bank account information, or the names of key personnel below the corporate level. Forward contracts containing such information to FIG for disposition.

III.6 -- State Plans, Plan Amendments and Related Correspondence Between CMS and Medicaid State Agencies and Advanced Planning Documents for MMIS Procurements

If the Plan Amendment or APD contains a State's financial strategy, forward the document to FIG for disposition. Also forward to FIG, internal communications related to State Plans.

III.7 -- Documents Already Released By A Hearing Officer for a Hearing, with Beneficiary Identifiers Removed

If removal of beneficiary identifiers is not sufficient to protect the beneficiary's identity, forward the documents to FIG for disposition.

III.8 -- Lists of Sanctioned/Terminated Providers

Release after OIG notifies the providers, and provides the applicable "Medicare/Medicaid Sanction-Reinstatement Report" to CMS. Only directly release lists of excluded persons after removing social security numbers.

III.9 -- Information Instruments

- A. MEQC Error Rate List, after publication
- B. Computer Listing of MEQC data

- C. SPECTRUM Report
- D. AAPCC and Other Aggregated Demographic Data
- E. Ownership and Control Forms (HCFA-1513)
- F. ESRD Application for Certification (HCFA 3402)
- G. ESRD Provider Statistical and Cost Questionnaires (HCFA 2552 Hospital-based and HCFA-265-Independent Facilities)
- H. HHA Request to Establish Eligibility (HCFA-1515)
- I. Certification and Transmittal Forms (HCFA-1539)
- J. Other Routine Certification Applications and Documents (e.g., OSCAR listings of selected provider certification data).

III.10 -- PRO Generic Quarterly Screens

III.11-- Amounts Paid to Medicare Institutional Providers

Release amounts paid to: (1) organizations (such as hospices, home health agencies, and health maintenance organizations), (2) facilities (such as hospitals, skilled nursing facilities), and (3) suppliers (such as durable medical equipment suppliers), for services and/or equipment and supplies provided to Medicare beneficiaries.

Do not disclose information identifying a particular beneficiary nor the amounts paid to a particular individual, such as a physician or practitioner. Forward requests for such information to FIG for disposition.

F. Reporting Requirements for Direct Release

Concomitant with this authority for direct release, however, is the responsibility for complete and accurate reporting of the use of this authority. The following details the reporting requirements and responsibilities for Medicare contractors, Regional Offices and central office components.

1. Medicare Intermediaries and Carriers
 - a. Fill out, completely and accurately, a Form 632 for each "direct release."
 - b. Maintain the "Freedom of Information Log" on a daily basis. (Exhibit J)
 - c. Prepare, on a monthly basis, the "Summary Sheet for the CMS Monthly FOIA Report." (Exhibit H). This

“Summary Sheet” aggregates data from the individual Forms 632.

- d. Submit the “Daily Log” and original “Summary Sheet” for a given month to your designated Regional Office Freedom of Information Coordinator by the end of the fifth work day of the following month.
- e. Retain copies of all completed Forms 632 in your files until FIG provides a written directive to you to destroy them. Do not submit copies of the Forms 632 to your Regional Office or to FIG.

2. CMS Regional Offices

- a. Fill out, completely and accurately, a Form 632 for each “direct release” processed within the Region.
- b. Maintain the “Freedom of Information Log” (Exhibit J) for Regional “direct releases” on a daily basis.
- c. Assure your receipt of each contractor’s monthly report (i.e., Daily Log and Summary Sheet) for a given month by the end of the fifth work day of the following month.
- d. Review all contractor monthly reports to identify and resolve reporting inconsistencies or inaccuracies. Retain contractor monthly reports in your files until FIG provides a written directive to you to destroy them.
- e. Complete the “Summary Sheet for the CMS Monthly Report” following the instructions attached to the form. (Exhibit I)
- f. Fax your completed Summary Sheet for a given month to FIG by the end of the tenth work day of the following month.
- g. Retain copies of all completed Forms 632 in your files until FIG provides a written directive to you to destroy them. Do not submit copies of the Forms 632 to FIG.

3. CMS Central Office Components

- a. Fill out, completely and accurately, a Form 632 for each “direct release” processed within the component.
- b. Maintain the “Freedom of Information Log” (Exhibit J) for component “direct releases” on a daily basis.

- c. Complete the "Summary Sheet for the CMS Monthly Report" following the instructions attached to the form. (Exhibit I)
- d. Fax your completed Summary Sheet for a given month to FIG by the end of the tenth work day of the following month.
- e. Retain copies of all completed Forms 632 in your files until FIG provides a written directive to you to destroy them. Do not submit copies of the Forms 632 to FIG.

G. Time Frames for FOIA Processing

The Act establishes specific time frames within which FOIA requests and appeals must be acted upon. These include:

- 1. An initial determination as to whether to make requested records available must be made within 20 working days after receipt of the request by the Freedom of Information Group or the appropriate office if that office is responding directly.
- 2. A determination on appeal of a decision to withhold records must be made within 20 working days after receipt in the Freedom of Information Group. The CMS appeal official is the Deputy Administrator, CMS (Room C5-16-03, 7500 Security Boulevard, Baltimore, Maryland 21244).
- 3. An extension of these time limits is authorized only in unusual circumstances, as specified in the Act.

The requester may take action in Federal District Court if the specific time limits are not met. Further, Federal District Courts can be asked to order disciplinary action against Federal employees responsible for arbitrary and capricious withholding of records.

H. Creation of Records

The FOIA does not require that new records or documents be created to respond to requests. Writing a new program(s) to extract data from multiple computer files in order to compile such data into a "new" record is considered creating a record. However, deleting non-releasable data, or data not within the scope of the request, from an existing record is not considered creating a record. This applies even if, for administrative convenience, we write a new program to edit the existing record rather than editing the record manually after the hard copy has been run.

1. A response informing a requester that a requested record does not exist is not a denial and may be sent directly by the receiving contractor, Regional Administrator or component head if the request was originally received by that office. Since the response is considered an adverse determination, include notification of appeal rights within the body of this letter. Send a copy of your response, the incoming request and any pertinent documentation to the Freedom of Information Group.
 2. Such requests are to be included in the monthly report figures.
 3. Forms 632 (See Exhibit E) must be prepared if measurable search time was expended (requesters may be charged search time even though no documents were found).
 4. Responses to multi-regional/multi-component requests forwarded by FIG may be coordinated by FIG or it may be administratively more convenient to have each region/component respond and bill directly. Specific instructions will accompany each referral.
- I. These guidelines do not apply to requests for publications and published records available through existing government channels, such as the Government Printing Office and the CMS Publications Management Section, since, as indicated in Section A, these materials do not fall under the Freedom of Information Act.
- J. FOIA requests may be written or oral. Procedures for handling both types of requests are described under Section 0501-1-20, Administrative Procedures. A request need only describe the desired records in general terms. However, the more specific the request, the more readily an accurate response can be made. Department policy is to accept oral FOIA requests made to the CMS Freedom of Information Officer, only.

0501-1-15 RESPONSIBILITY

- A. If the records requested are exclusively records of the Centers for Medicare & Medicaid Services, including its records in the Regions and Medicare contractors, the authority and responsibility for granting or denying the FOIA request and for charging or reducing or waiving fees is vested only in the Director, Freedom of Information Group, as approved by the Assistant Secretary for Public Affairs. The direct release authority established earlier in this Guide applies only to the granting of certain types of requests and billing charges for those materials. Authority to deny or to reduce or waive fees is retained by the Director, FIG.

However, under the Department regulation published in the Federal Register on November 25, 1988 (Vol. 53, No.227) (Exhibit B) no search fees are charged to the media or to non profit educational institutions or non-commercial scientific institutions. In addition, these requesters receive the first 100 pages without charge. Since the CMS threshold for charging is \$25.00, these requesters may obtain up to 250 pages at no charge before a fee waiver is necessary. A full presentation of allowable charges and instructions for invoicing are included at Section 0501-1-25 Fees for Services, subsection A of this Guide.

- B. The authority and responsibility for deciding appeals from determinations to deny by the Director, Freedom of Information Group (or his/her designee(s) relative to FOIA requests made of CMS or any of its components and/or contractors is vested only in the Administrator or Deputy Administrator, Centers for Medicare & Medicaid Services. All decisions concerning appeals are made only after consultation with the Office of the General Counsel and with concurrence by the Assistant Secretary for Public Affairs.
- C. If the records requested are not exclusively records of the Centers for Medicare & Medicaid Services but, rather, include records of the Office of the Secretary (OS) or any OS Staff Division or any other organizational element of OS, or records of the Office of Human Development Services and the Family Services Administration, or of any other Operational Divisions (OPDIVs) of the Department of Health and Human Services, the Department's FOIA Officer will assume control of the response.
- D. The U.S. Railroad Retirement Board is an independent agency in the executive branch of the Federal Government. The Board's primary function is to administer comprehensive retirement-survivor and unemployment-sickness benefit programs for the nation's railroad workers and their families, under the Railroad Retirement and Railroad Unemployment Insurance Acts. In connection with the retirement program, the Board has administrative responsibilities for railroad workers' Medicare Coverage. The Board's Bureau of Retirement Claims maintains the authority to provide or deny release of information in its files under the Freedom of Information Act. Requests for information received by the Centers for Medicare & Medicaid Services or any of its regional offices or contractors concerning Board Medicare program responsibilities or railroad retirement beneficiaries should be forwarded to:

Director of Retirement Claims
Railroad Retirement Board
844 N. Rush Street
Chicago, Illinois 60611

- E. Non-federal court subpoenas for records are to be treated as FOIA requests. This is in accordance with Department policy published in the Federal Register on October 5, 1987 (Vol. 52, No. 192). The regulation is included in this Guide (Exhibit C).

When a non-federal court subpoena is for personal records contained in a Privacy Act System, Medicare contractors are to decline to produce the records based upon standing FIG instructions, use the standard response letter (Exhibit D).

0501-1-20 ADMINISTRATIVE PROCEDURES

- A. The Freedom of Information Group is responsible for administering, implementing and monitoring CMS Freedom of Information Act requirements.
- B. Each CMS Regional Office and Central Office Center and Office shall designate an FOIA Coordinator who shall be the contact point for that component. Except for requests for the types of records identified for direct release, all FOIA requests received anywhere in CMS must be forwarded immediately (hand-carried if possible) to the component coordinator for immediate action as described below. Components and contractors must follow reporting requirements for those documents which they release directly (see 0501-1-10 General Information, Section F, above).
- C. When an FOIA request for materials not releasable except by FIG is received by a central office component, either directly from a requester or referred by a subcomponent, a copy of the request shall be made and a search for the requested documents begun. The original copy of the request must be forwarded immediately to the FIG. The component coordinator should send the request by inter-office mail to FIG. Component coordinators in the Washington, D.C., metropolitan area should also follow this latter procedure.
- D. When an FOIA request is received by a Regional Office coordinator, a determination must be made that the request is or is not for the types of records identified for direct release.
 - 1. If the request may be responded to directly, it shall be forwarded to the appropriate contractor for response, or the response prepared for the Regional Administrator. If a portion of the documents may be released directly, a partial reply to the requester may be made. A copy of the partial reply, and/or an explanation of what documentation were released directly, should be included with the materials forwarded to FIG.

2. If the request cannot be responded to directly, a copy of the request shall be made and forwarded to FIG, and a search for the documents begun.
 3. In those instances when the material requested is available for forwarding to FIG on the same or the next day, copy of the incoming request need not be mailed separately to FIG; it can be included with the materials being mailed.
 4. When a Regional Office is aware that the documents requested are held in Central Office, (CO) and it would be more expedient for a CO component to respond (more timely, less costly, etc.), a note to that effect should be written on or attached to the copy sent to FIG.
- E. When FIG receives an FOIA request directly from a requester for material not on the direct release list:
1. It will time/date stamp the request, assign it a case file number (see Section 0501-1-25 H) and immediately forward the request to the CMS component(s) most likely to hold the requested documents with a transmittal memorandum directing the component(s) to conduct the search and return one (1) copy of all requested documents to FIG within ten (10) working days. (A request for directly release material will be forwarded to the appropriate office with a transmittal identifying it as a direct release).
 2. The transmittal will show all components to which the request has been referred so that all coordinators will be aware of which counterparts are also involved in each document search.
 3. Components are encouraged to suggest to FIG other CMS components which might appropriately be contacted regarding any FOIA request.
- F. When FIG receives a request which was originally received by any CMS component or coordinator, it will time/date stamp the request, assign it a case file number and follow the other procedures described above.
1. In most instances, the request will be referred back to the component originally receiving it (as well as to others likely to hold responsive documents), unless it is obvious that such referral would be inappropriate.

2. If the request was received originally in a Regional Office, FIG will assign the case file number upon receipt of the request and notify the RO of the case number on the transmittal memorandum which is prepared for formal referral of the request.
- G. Each transmittal memorandum from FIG will have attached to it a CMS Form 632-FOI (Exhibit E). These forms should not be attached to requests received directly by a component when those requests are sent initially to FIG to be entered into the system unless the requested documents are forwarded at the same time.
1. A Form 632 is to be completed and returned to FIG when the search is completed, regardless of whether documents are or not.
 2. The Form 632 is used to capture all actual costs associated with responding to a FOIA request. These actual costs are not reflective of the allowable charges invoiced to the requester on the Form 633 (Exhibit F). A full presentation of allowable charges and instructions for invoicing is included at Section 0501-1- 25A of this Guide. It is essential that a Form 632 be completely and accurately filled out for each FOIA request. The information they capture is the basis for the Department Report to the Attorney General on FOIA processing.
 3. Forms 632 for direct responses should be filled out completely by the individual(s) processing the request. Contractor monthly reports reflecting monthly 632 totals are sent to the Regional Office. Each Regional Office, in turn, completes a monthly report that reflects both Regional and contractor totals, and sends this report to FIG. Central office component reports are sent directly to FIG.
 4. When a request is referred by FIG for search and production of documents to be sent to FIG for processing, all applicable items on the Form 632 must be filled out.
 5. Contractors must retain copies of completed Forms 632 until FIG provides written instructions to dispose of them. The 632s serve as documentation of resources expended for FOIA processing.
- H. One complete set of all documents will be sent to FIG in response to the referral memorandum, along with the completed Form 632. When entire documents or portions of documents are recommended for denial, they will be supplied as follows:
1. The set will have the denial recommendations indicated in this

manner:

- a. When an entire document is recommended for denial, mark directly on the front page of this one copy "ENTIRE DOCUMENT RECOMMENDED FOR DENIAL;"
 - b. If only certain portions of a document are recommended for denial, place brackets around those portions (If you recommend that most of the documents be denied, you may bracket those sections recommended for release. In these cases, note on the front page that the bracketed sections are for release.)
 - c. Any non-CMS documents (OS, DHHS, other agencies) should be separated and clearly marked.
2. A formal memorandum is not required, but the component must inform FIG in writing of its reason for recommending denial (a summary of the nine exemption areas in the Freedom of Information Act is attached as Exhibit G). An index of documents recommended for denial is not required; copies of the documents recommended for denial are required.

When a request is for more than one item or subject, please include a cover sheet listing those items for which documents have been located and those for which no documents have been located. If any of the records copied for a request are of poor quality and difficult to copy, please note that for the record.

3. Each component coordinator will receive a copy of the FIG response to each request which was referred to that component for input to the response.
 4. FIG will consult with the Office of the General Counsel when prudent.
- I. When it assigns a case file number to a request, FIG will also prepare an automated case tracking card.
1. This card is maintained by the FIG staff and includes such information as: date of receipt in FIG, date of referral, components to which referred, etc.
 2. Each significant action taken anywhere in CMS relative to that request, e.g., calls from component coordinators, reports of contact with the requester, notification of problems in conducting,

completing the search, etc., is noted on the tracking card by date, to provide a total record of activity relative to that request. NOTE: component coordinators must stay in contact with the FOIA staff and provide continuing update information for the tracking card for each case which has been referred to them.

0501-1-25 FEES FOR SERVICES

- A. Chargeable Fees - Fees are charged on a three-tiered scale, according to the use to which the requested material will be put, as follows:
1. Commercial requesters - If the request is for a commercial use the requester will be charged for search, review and duplication. Examples of commercial requesters are attorneys, accountants, providers and professional associations.
 2. Educational and scientific institutions and news media - If the request is from (1) an educational institution or a non-commercial scientific institution or a non-commercial scientific institution operated primarily for scholarly or scientific research, or (2) a representative of the news media, charge will be made only for duplication. Also, no charge will be made for the first 100 pages of duplication.
 3. Other requesters - If the request fits into neither of the above categories, charge will be made for search and duplication. However, there will be no charge for the first two hours of search time and the first 100 pages of duplication. The services for which fees may be assessed to each of these types of requesters are listed below:

<u>SERVICE</u>	<u>Commercial</u>	<u>Educational</u>	<u>Other</u>
Search	yes	no chrg	1st 2 hrs-no chrg
Review	yes	no chrg	no charge
Copying	yes	1st 100 pgs-no chrg	1st 100 pgs-no chrg
Computer search	yes	no chrg	amount equivalent to 2 hrs pay for computer operator not charged*

<u>SERVICE</u>	<u>Commercial</u>	<u>Educational</u>	<u>Other</u>
Computer printout	yes	\$10.00 no chrg (equivalent of 100 photocopied pgs)	1st \$10.00 no chrg (equivalent of 100 photocopied pgs)
Postage & packaging	no longer chrgd	no longer chrgd	no longer chrgd

* e.g., - If operator earns \$20/hr and time for computer search costs \$70, subtract \$40 (2 hr at \$20/hr) from the \$70 and charge \$30 for computer search.

- B. The Department of HHS's fee schedule allows processing a request without charge when the cost of collecting a fee would exceed the amount of the fee. The Centers for Medicare & Medicaid Services has established that charges of less than \$25.00 should not be billed. Exception: when an individual or organization submits multiple FOIA requests within 90 calendar days which individually do not meet the minimum charge level, the charges for those requests may be aggregated and invoiced. (Section 5.42(e) of the DHHS Regulations at Exhibit B). When invoicing aggregate charges for two or more requests, be sure to advise the requester that the invoice is for aggregate charges.
- C. All checks or money orders for the payment of FOIA services are to be made payable to the Centers for Medicare & Medicaid Services.
- D. Waivers or reduction of fees in the public interest will be made only by the Director, Freedom of Information Group based on justification submitted by the requester. If the material for which the fee waiver is requested is directly releasable, FIG will inform the releasing component of the waiver decision. In such cases the materials involved are not to be forwarded to FIG for release, but the releasing component will be asked to verify the costs which are involved in the waiver and for its recommendation regarding the waiver request.
- E. When a requester asks to be advised of the cost of processing a request, or places a limit on the charges he is willing to accept, a good-faith estimate should be made prior to full processing of the request.
- F. Advance payment may be requested in two instances:
 1. when costs of \$250 or more are involved.
 2. where the requester has been delinquent in paying FOIA fees in the past.

G. Invoice of Fees for Services

1. Fees are invoiced to the requester on the Form CMS 633. This is a 4-part form (Exhibit F) which presents the requester with a breakdown of charges assessed for processing the FOIA request. Be sure to fill out the Form 633 completely.
2. When filling out the Form 633, please type or print clearly. If you print, be certain to press hard and check to see that all the carbon copies are legible. Invoices which are not properly completed by the responding office will not be pursued for payment.
3. Each of the four parts bears a designation at the bottom, identifying the intended recipient of that copy, i.e., one copy for the files of the releasing office, one copy for the Division of Accounting (to open the receivable account), and two copies for the requester (one of these is to accompany the check for services when it is sent to the Division of Accounting to close the account).
4. When exercising its delegated direct release authority, a CMS component or contractor will prepare an Invoice of Fees for each request where the fees exceed \$25.00.
5. Two copies of the invoice will be sent to the requester with the materials being released, with instructions to forward one copy of the invoice with payment to the Division of Accounting, P.O. Box 7520, Baltimore, Maryland 21207-0520.
6. One copy of the invoice is to be sent by the releasing office to the Division of Accounting at the time the documents are released so that a receivable account can be opened.
7. If the releasing office is requesting payment in advance of the release of the materials, because of the size of the bill or concern over the requester's willingness or ability to pay, the releasing office should send two copies of the invoice with its request for advance payment. In these cases, the requester will be instructed to send one copy of the invoice along with the check for payment of the fees (made out to CMS) back to the releasing office. Since this is in contradiction to the instructions printed on the invoice itself, be very sure to explain this variance to the requester and make it clear that the advance payment should be sent to the releasing office, not the Division of Accounting. In such cases,

checks must still be made out to the Centers for Medicare & Medicaid Services.

8. Because requesters who are asked for advance payment frequently decline to pursue their requests when notified of the costs and therefore, do not respond in any way to the advance payment request, the letter should contain a request for a response within a specified time period beyond which the request will be considered canceled, e.g. "If we do not receive your check for the (give estimated amount) cost of providing the materials you have requested within 30 days, we will consider your request canceled and take no further action to provide the material requested."
9. To prevent the unnecessary opening of receivable accounts which would remain open indefinitely should the requester decline to make advance payment, retain the copy of the invoice marked for the Division of Accounting until the advance payment has been received. If payment is not received in the specified time period, or if the requester cancels the request upon notification of the costs, close the case, destroy the Division of Accounting copy of the invoice, and print "request canceled" across the remaining copies.
10. If the requested advance is received, the releasing office will process the request, send the material to the requester, and forward the check and the requester's copy of the invoice and the Division of Accounting copy of the invoice to the Division of Accounting, at the above address, so that the account can be opened and payment recorded at the same time.

H. Filling Out the Invoice

Case Number

An essential requirement of the automated FOIA Fees Accounting System is the ability to match incoming checks with the proper account pending for payment. Since many requesters make multiple FOIA requests, name identification alone is not adequate to assure proper accounting. Therefore, a Case Numbering System which includes unique identifiers for each releasing activity has been developed. The Case Numbering System should be used for all FOIA cases because it is not possible to always know in advance whether or not fees will be assessed and because a dual numbering system (one for cases in which fees are assessed and a second system where no fees are assessed) would be cumbersome and confusing.

The case number will be used in item one of the CMS Form 632-FOIA and in the "case number" block at the top left of the CMS Form 633

Invoice of Fees for FOIA Services. Requesters will be asked to put the case number on checks rendered for payment of FOIA services and on any correspondence relating to that case.

All case numbers in this system will consist of ten characters. These characters may be numeric or alphabetical and will be determined as follows:

1. Case Numbers - Central Office

- a. Case numbers for all requests which are responded to by a Central Office regardless of where the request is initially received, begin with "C":

C-----

- b. The second character in the case number is the last digit of the calendar year in which the request is received in the responding central office component. For example, the second character for a case received in CY 2000 would be "0":

C0-----

- c. Characters three through six indicate the central office component responding to the request. For example, if the Freedom of Information Act staff in FIG is responding to the request, these characters would be "FOIA":

C0FOIA----

- d. If the responding component has fewer than four initials the unused position is to be occupied by a zero at the beginning of the component designator. For example if the Center for Beneficiary Choices is responding to the request, characters three through six would be "0CBC":

C00CBC----

NOTE: Because this system is computerized by the Division of Accounting for billing purposes, each case number must have ten characters. Therefore, any unused space must be occupied by a zero.

- e. Characters seven through ten indicate the consecutively assigned case number. The first case received in any calendar year would be "0001":

C0FOIA0001
C00CBC0001

2. Case Numbers - Regional Offices and Contractors

- a. Case numbers for requests responded to directly by regional offices or by carriers or intermediaries begin with an Arabic number:

Boston	1	Dallas	6
New York	2	Kansas	7
Philadelphia	3	Denver	8
Atlanta	4	San Francisco	9
Chicago	5	Seattle	0

NOTE: Only one space is designated to indicate the responding regional office or contractor within the region. Therefore, Seattle is represented by "0" rather than by "10".

- b. For example, a request responded to directly by the Boston Regional Office or any carrier or intermediary within Region I would begin with the digit "1."

1-----

- c. In all case numbers, the second character is the last digit of the calendar year in which the request is received by the responding activity. Thus, for a 2000 request:

10-----

- d. Characters three through six indicate either the Regional Office or the contractor within the region. Case numbers for requests responded to by a Regional Office would contain the first four letters of the regional city name in positions three through six. For example, a request answered by Boston Regional Office would have "BOST" in those positions:

10BOST----

- e. A request answered by a contractor would use the last four digits of the carrier or intermediary number in positions three through six. Thus, a request responded to directly by Massachusetts Blue Cross would be:

100200----

- f. As with Central Office cases, the last four characters indicate the consecutively assigned case number, beginning with "0001". Thus, the first request responded to by the Boston Regional Office received in calendar year 2000 would be:

10BOST0001

- g. Please remember that this system is to be used for component direct release cases only; cases processed by the FIG will be numbered by FIG.

Other Items on Invoice

DATE

This is the date that the material and invoice are mailed to the requester. If more than one package is sent to a requester for one FOIA request, the invoice should be sent with the final response.

MATERIAL REQUESTED

This is a brief description of the requested documents. For example: cost report, St. Joseph's Hospital; customary charge profile, or state plan amendment. If the request is for multiple items, identify category of material, e.g. cost reports for several Chicago hospitals; or list first item and add "plus other documents."

NAME OF REQUESTER

This line must show the name of the person who signed the request letter. The name of the organization, if any, will be entered on the next line. Requests must be signed by an individual for billing purposes. If a request is not signed by an individual, return it to the sender and ask that a member of the organization sign it and accept responsibility.

ORGANIZATION

This line must show the name of the organization, as shown on the letterhead of the request. If the letter or envelope does not indicate any organizational affiliation, enter N/A on this line.

STREET ADDRESS

The full street address must be entered here, even if the requester is going to pick up or send a messenger for the requested documents.

NOTE: The agency accounting office will be unable to pursue unpaid bills unless all of the information is accurately and completely filled out.

REPRODUCTION

The charge established by CMS for photocopying is ten cents per page for both standard and legal size pages. This fee includes the salary of the person photocopying the documents.

Computer printouts and computer tapes and disks are charged at actual cost.

SEARCH FEES and REVIEW FEES

The Department of HHS charges for manual search and for review are now established at three levels:

Charge Levels for Search and for Review

<u>Hourly Wage Range (includes benefits)</u>	<u>GS Grade Range</u>	<u>CMS Bills</u>
Level 1 -- up to \$25.38/hr	GS-1 -- GS-8	\$20/hr
Level 2-- \$25.39--\$57.13/hr	GS-9 -- GS-14	\$40/hr
Level 3 -- \$57.14 or more/hr	GS-15 and above	\$72/hr

Do not charge the actual wage compensation rate. Charges may be made for time increments down to one quarter of an hour.

NOTE: The Director, FIG updates the above scale based upon changes to the HHS fee schedule, and provides such updates to all CMS FOIA Coordinators.

COMPUTER SEARCH

Computer search and printing time is charged at actual cost for the computer plus the charge for the operator's time.

SPECIAL SERVICES

The standard charge for document certification and return receipt are listed on the invoice. Charges for other services such as insurance or freight, if the package is too large or heavy for postal delivery, should be listed under "other".

QUESTIONS REGARDING ENCLOSED MATERIAL OR CHARGES

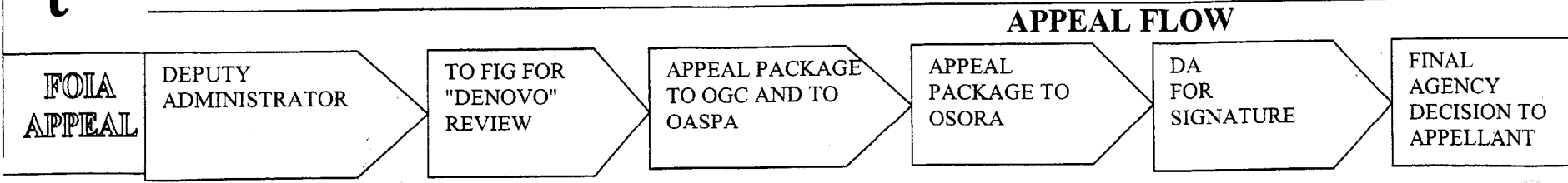
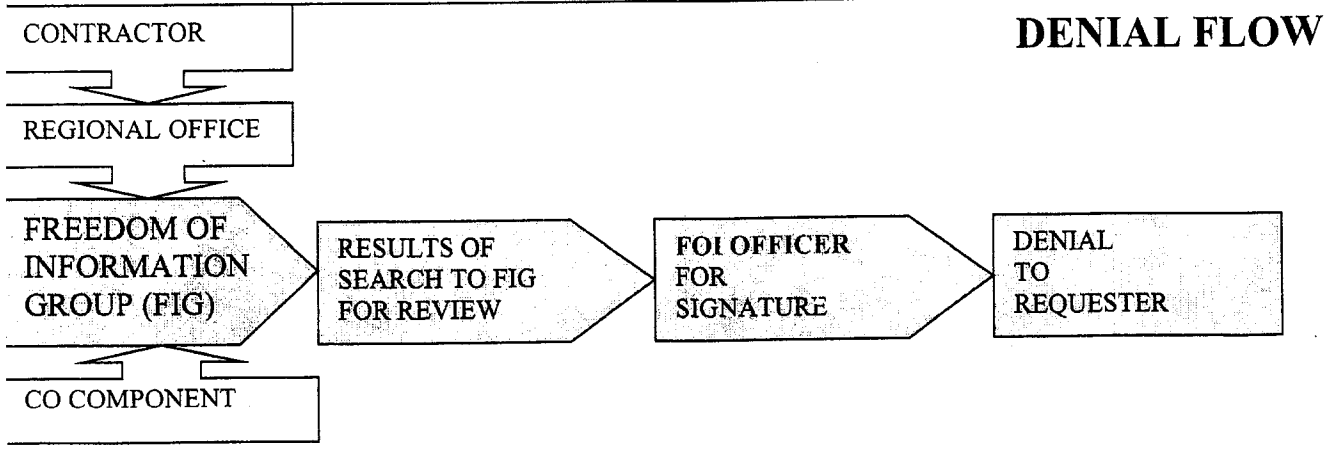
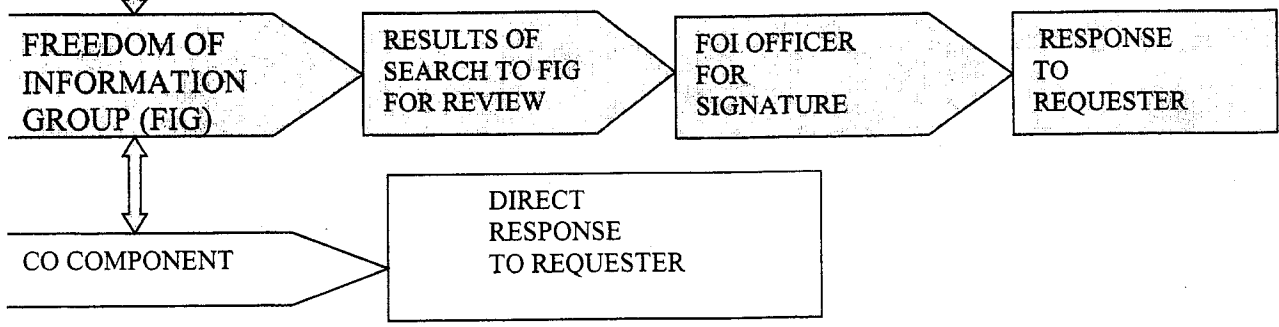
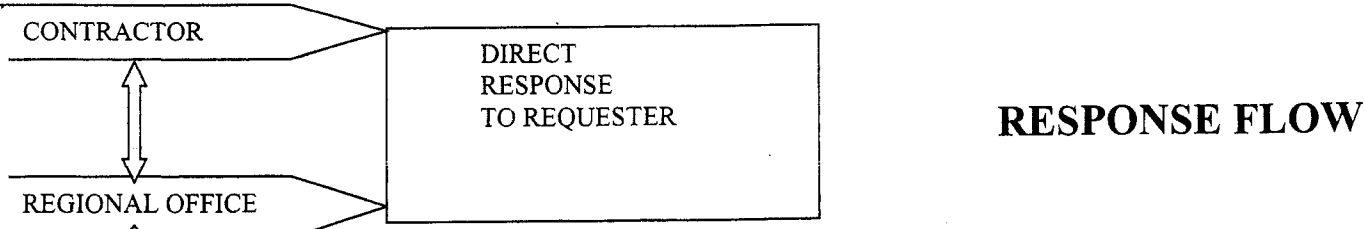
The phone number, including the area code, of the person responsible for processing the request must be entered here.

NOTE: Do not enter the phone number of the CMS Accounting Office or the Freedom of Information Group.

FREEDOM OF INFORMATION ACT PROGRAM

Exhibit A

FOIA Request



*FIG =Freedom of Information Group/CMS

*OSORA =Office of Strategic Operations and Regulatory Affairs/CMS

*OGC = Office of General Counsel/HHS

*OASPA = Office of Assistant Secretary for Public Affairs/HHS

Department of Health and Human Services**§5.1****§ 4.4 Acknowledgement of mailed process.**

The Department will not provide a receipt or other acknowledgement of process received, except for a return receipt associated with certified mail and, where required, the acknowledgement specified by Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure.

§ 4.5 Effect of regulations.

The regulations in this part are intended solely to identify Department officials who are authorized to accept service of process. Litigants must comply with all requirements pertaining to service of process that are established by statute and court rule even though they are not repeated in these regulations.

§ 4.6 Materials related to petitions under the National Vaccine Injury Compensation Program.

Notwithstanding the provisions of §§4.1, 4.2, and 4.3, service of the Secretary's copies of petitions for compensation under the VICP and of related filings, by mail, shall be served upon the Director, Division of Vaccine Injury Compensation, Office of Special Programs, Health Resources and Services Administration 5600 Fishers Lane, Parklawn Building, Room 16C-17, Rockville, Maryland 20857, or in person, shall be served upon the Director, Division of Vaccine Injury Compensation, Office of Special Programs, Health Resources and Services Administration, 4350 East West Highway, 10th Floor, Bethesda, Maryland 20814.

[67 FR 78990, Dec. 27, 2002]

PART 5—FREEDOM OF INFORMATION REGULATIONS**Subpart A—Basic Policy**

- Sec.
- 5.1 Purpose.
 - 5.2 Policy.
 - 5.3 Scope.
 - 5.4 Relationship between the FOIA and the Privacy Act of 1974.
 - 5.5 Definitions.

Subpart B—Obtaining a Record

- 5.21 How to request records.
- 5.22 Requests not handled under the FOIA.

- 5.23 Referral of requests outside the Department.
- 5.24 Responding to your request.

Subpart C—Release and Denial of Records

- 5.31 Designation of authorized officials.
- 5.32 Release of records.
- 5.33 Denial of requests.
- 5.34 Appeal of denials.
- 5.35 Time limits.

Subpart D—Fees

- 5.41 Fees to be charged—categories of requests.
- 5.42 Fees to be charged—general provisions.
- 5.43 Fee schedule.
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- 5.51 Records available.
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- 5.61 General.
- 5.62 Exemption one: National defense and foreign policy.
- 5.63 Exemption two: Internal personnel rules and practices.
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- 5.66 Exemption five: Internal memoranda.
- 5.67 Exemption six: Clearly unwarranted invasion of personal privacy.
- 5.68 Exemption seven: Law enforcement.
- 5.69 Exemptions 8 and 9: Records on financial institutions; records on wells.

AUTHORITY: 5 U.S.C. 552, 18 U.S.C. 1905, 31 U.S.C. 9701, 42 U.S.C. 1306(c), E.O. 12600.

SOURCE: 53 FR 47700, Nov. 25, 1988, unless otherwise noted.

Subpart A—Basic Policy**§ 5.1 Purpose.**

This part contains the rules that the Department of Health and Human Services (HHS) follows in handling requests for records under the Freedom of Information Act (FOIA). It describes how to make a FOIA request; who can release records and who can decide not to release; how much time it should take to make a determination regarding release; what fees may be charged;

§5.2

what records are available for public inspection; why some records are not released; and your right to appeal and then go to court if we refuse to release records.

§5.2 Policy.

As a general policy, HHS follows a balanced approach in administering FOIA. We not only recognize the right of public access to information in the possession of the Department, but also protect the integrity of internal processes. In addition, we recognize the legitimate interests of organizations or persons who have submitted records to the Department or who would otherwise be affected by release of records. For example, we have no discretion to release certain records, such as trade secrets and confidential commercial information, prohibited from release by law. This policy calls for the fullest responsible disclosure consistent with those requirements of administrative necessity and confidentiality which are recognized in the Freedom of Information Act.

§5.3 Scope.

These rules apply to all components of the Department. Some units may establish additional rules because of unique program requirements, but such rules must be consistent with these rules and must have the concurrence of the Assistant Secretary for Public Affairs. Existing implementing rules remain in effect to the extent that they are consistent with the new Departmental regulation. If additional rules are issued, they will be published in the FEDERAL REGISTER, and you may get copies from our Freedom of information Officers.

§5.4 Relationship between the FOIA and the Privacy Act of 1974.

(a) *Coverage.* The FOIA and this rule apply to all HHS records. The Privacy Act, 5 U.S.C. 552a, applies to records that are about individuals, but only if the records are in a system of records. "Individuals" and "system of records" are defined in the Privacy Act and in our Privacy Act regulation, part 5b of this title.

(b) *Requesting your own records.* If you are an individual and request records,

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then to the extent you are requesting your own records in a system of records, we will handle your request under the Privacy Act and part 5b. If there is any record that we need not release to you under those provisions, we will also consider your request under the FOIA and this rule, and we will release the record to you if the FOIA requires it.

(c) *Requesting another individual's record.* Whether or not you are an individual, if you request records that are about an individual (other than yourself) and that are in a system of records, we will handle your request under the FOIA and this rule. (However, if our disclosure in response to your request would be permitted by the Privacy Act's disclosure provision, 5 U.S.C. 552a(b), for reasons other than the requirements of the FOIA, and if we decide to make the disclosure, then we will not handle your request under the FOIA and this rule. For example, when we make routine use disclosures pursuant to requests, we do not handle them under the FOIA and this rule. "Routine use" is defined in the Privacy Act and in Part 5b). If we handle your request under the FOIA and this rule and the FOIA does not require releasing the record to you, then the Privacy Act may prohibit the release and remove our discretion to release.

§5.5 Definitions.

As used in this part.

Agency means any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the Federal Government, or any independent regulatory agency. Thus, HHS is an agency. A private organization is not an agency even if it is performing work under contract with the Government or is receiving Federal financial assistance. Grantee and contractor records are not subject to the FOIA unless they are in the possession or under the control of HHS or its agents, such as Medicare health insurance carriers and intermediaries.

Commercial use means, when referring to a request, that the request is from or on behalf of one who seeks information for a use or purpose that furthers

the commercial, trade, or profit interests of the requester or of a person on whose behalf the request is made. Whether a request is for a commercial use depends on the purpose of the request and the use to which the records will be put; the identity of the requester (individual, non-profit corporation, for-profit corporation), on the nature of the records, while in some cases indicative of that purpose or use, is not necessarily determinative. When a request is from a representative of the news media, a purpose or use supporting the requester's news dissemination function is not a commercial use.

Department or HHS means the Department of Health and Human Services. It includes Medicare health insurance carriers and intermediaries to the extent they are performing functions under agreements entered into under sections 1816 and 1842 of the Social Security Act, 42 U.S.C. 1395h, 1395u.

Duplication means the process of making a copy of a record and sending it to the requester, to the extent necessary to respond to the request. Such copies include paper copy, microform, audio-visual materials, and magnetic tapes, cards, and discs.

Educational institution means a pre-school, elementary or secondary school, institution of undergraduate or graduate higher education, or institution of professional or vocational education, which operates a program of scholarly research.

Freedom of Information Act or FOIA means section 552 of Title 5, United States Code, as amended.

Freedom of Information Officer means an HHS official who has been delegated the authority to release or withhold records and assess, waive, or reduce fees in response to FOIA requests.

Non-commercial scientific institution means an institution that is not operated substantially for purposes of furthering its own or someone else's business, trade, or profit interests, and that is operated for purposes of conducting scientific research whose results are not intended to promote any particular product or industry.

Records means any handwritten, typed, or printed documents (such as memoranda, books, brochures, studies, writings, drafts, letters, transcripts,

and minutes) and documentary material in other forms (such as punch-cards; magnetic tapes, cards, or discs; paper tapes; audio or video recordings; maps; photographs; slides; microfilm; and motion pictures). It does not include objects or articles such as exhibits, models, equipment, and duplication machines or audiovisual processing materials. Nor does it include books, magazines, pamphlets, or other reference material in formally organized and officially designated HHS libraries, where such materials are available under the rules of the particular library.

Representative of the news media means a person actively gathering information for an entity organized and operated to publish or broadcast news to the public. News media entities include television and radio broadcasters, publishers of periodicals who distribute their products to the general public or who make their products available for purchase or subscription by the general public, and entities that may disseminate news through other media (e.g., electronic dissemination of text). We will treat freelance journalists as representatives of a new media entity if they can show a likelihood of publication through such an entity. A publication contract is such a basis, and the requester's past publication record may show such a basis.

Request means asking for records, whether or not you refer specifically to the Freedom of Information Act. Requests from Federal agencies and court orders for documents are not included within this definition. Subpoenas are requests only to the extent provided by Part 2 of this title.

Review means, when used in connection with processing records for a commercial use request, examining the records to determine what portions, if any, may be withheld, and any other processing that is necessary to prepare the records for release. It includes only the examining and processing that are done the first time we analyze whether a specific exemption applies to a particular record or portion of a record. It does not include examination done in the appeal stage with respect to an exemption that was applied at the initial request stage. However, if we initially

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withhold a record under one exemption, and on appeal we determine that that exemption does not apply, then examining the record in the appeal stage for the purpose of determining whether a different exemption applies is included in *review*. It does not include the process of researching or resolving general legal or policy issues regarding exemptions.

Search means looking for records or portions of records responsive to a request. It includes reading and interpreting a request, and also page-by-page and line-by-line examination to identify responsive portions of a document. However, it does not include line-by-line examination where merely duplicating the entire page would be a less expensive and quicker way to comply with the request.

Subpart B—Obtaining a Record

§ 5.21 How to request records.

(a) *General*. Our policy is to answer all requests, both oral and written, for records. However, in order to have the rights given you by the FOIA and by this regulation (for example, the right to appeal if we deny your request and the right to have our decisions reviewed in court), you must either make your request in writing or make it orally to a Freedom of Information Officer. Freedom of Information Officers and their staffs may put in writing any oral requests they receive directly.

(b) *Addressing requests*. It will help us to handle your request sooner if you address it to the Freedom of Information Officer in the HHS unit that is most likely to have the records you want. (See § 5.31 of this Part for a list of Freedom of Information Officers.) If you cannot determine this, send the request to: HHS Freedom of Information Officer, 645-F, Hubert H. Humphrey Building, Department of Health and Human Services, 200 Independence Avenue SW., Washington, DC 20201. Write the words "Freedom of Information Act Request" on the envelope and letter.

(c) *Details in the letter*. You should provide details that will help us identify and find the records you are requesting. If there is insufficient information, we will ask you for more. Include your telephone number(s) to help

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us reach you if we have questions. If you are not sure how to write your request or what details to include, communicate with a Freedom of Information Officer.

§ 5.22 Requests not handled under the FOIA.

(a) We will not handle your request under the FOIA and this regulation to the extent it asks for records that are currently available, either from HHS or from another part of the Federal Government, under a statute that provides for charging fees for those records. For example, we will not handle your request under the FOIA and this regulation to the extent it asks for detailed earnings statements under the Social Security program, or records currently available from the Government Printing Office of the National Technical Information Service.

(b) We will not handle your request under the FOIA and this regulation to the extent it asks for records that are distributed by an HHS program office as part of its regular program activity, for example, health education brochures distributed by the Public Health Service or public information leaflets distributed by the Social Security Administration.

§ 5.23 Referral of requests outside the Department.

If you request records that were created by, or provided to us by, another Federal agency, and if that agency asserts control over the records, we may refer the records and your request to that agency. We may likewise refer requests for classified records to the agency that classified them. In these cases, the other agency will process and respond to your request, to the extent it concerns those records, under that agency's regulation, and you need not make a separate request to that agency. We will notify you when we refer your request to another agency.

§ 5.24 Responding to your request.

(a) *Retrieving records*. The Department is required to furnish copies of records only when they are in our possession or we can retrieve them from storage. If we have stored the records you want in the National Archives or

another storage center, we will retrieve and review them for possible disclosure. However, the Federal Government destroys many old records, so sometimes it is impossible to fill requests. Various laws, regulations, and manuals give the time periods for keeping records before they may be destroyed. For example, there is information about retention of records in the Records Disposal Act of 1944, 44 U.S.C. 3301 through 3314; the Federal Property Management Regulations, 41 CFR 101-11.4; the General Records Schedules of the National Archives and Records Administration; and in the HHS Handbook: *Files Maintenance and Records Disposition*.

(b) *Furnishing records.* The requirement is that we furnish copies only of records that we have or can retrieve. We are not compelled to create new records. For example, we are not required to write a new program so that a computer will print information in the format you prefer. However, if the requested information is maintained in computerized form, but we can, with minimal computer instructions, produce the information on paper, we will do this if it is the only way to respond to a request. Nor are we required to perform research for you. On the other hand, we may decide to conserve government resources and at the same time supply the records you need by consolidating information from various records rather than copying them all. Moreover, we are required to furnish only one copy of a record and usually impose that limit. If information exists in different forms, we will provide the record in the form that best conserves government resources. For example, if it requires less time and expense to provide a computer record as a paper printout rather than in an electronic medium, we will provide the printout.

Subpart C—Release and Denial of Records

§5.31 Designation of authorized officials.

(a) *Freedom of Information Officers.* To provide coordination and consistency in responding to FOIA requests, only Freedom of Information Officers have the authority to release or deny

records. These same officials determine fees.

(1) *HHS Freedom of Information Officer.* Only the HHS Freedom of Information Officer may determine whether to release or deny records in any of the following situations:

(i) The records you seek include records addressed to or sent from an official or office of the Office of the Secretary, including its staff offices, or of any Regional Director's Office;

(ii) The records you seek include any records of the Office of Human Development Services, the Family Support Administration, or any organizational unit of HHS not specifically identified below; or

(iii) The records include records of more than one of the major units identified below (PHS, CMS, and SSA) either at headquarters or in a Regional Office.

(2) *PHS Freedom of Information Officer.* If the records you seek are exclusively records of the Public Health Service or if the records you seek involve more than one health agency of the Public Health Service, including its records in the regions, only the Deputy Assistant Secretary for Health (Communications), who also is the PHS Freedom of Information Officer, may determine whether to release or deny the records, except as follows:

(i) *CDC and ATSDR Freedom of Information Officer.* If the records you seek are exclusively records of the Centers for Disease Control and/or the Agency for Toxic Substances and Disease Registry, only the Director, Office of Public Affairs, CDC, who also is the CDC and ATSDR Freedom of Information Officer, may determine whether to release or deny the records.

(ii) *FDA Freedom of Information Officer.* If the records you seek are exclusively records of the Food and Drug Administration, only the Associate Commissioner for Public Affairs, FDA, who also is the FDA Freedom of Information Officer, may determine whether to release or deny the records.

(iii) *NIH Freedom of Information Officer.* If the records you seek are exclusively records of the National Institutes of Health, only the Associate Director of Communications, NIH, who also is the NIH Freedom of Information

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Officer, may determine whether to release or deny the records.

(iv) *HRSA Freedom of Information Officer.* If the records you seek are exclusively records of the Health Resources and Services Administration, only the Associate Administrator for Communications, HRSA, who also is the HRSA Freedom of Information Officer, may determine whether to release or deny the records.

(v) *ADAMHA Freedom of Information Officer.* If the records you seek are exclusively records of the Alcohol, Drug Abuse and Mental Health Administration, only the Associate Administrator for Communications and Public Affairs, ADAMHA, who is also the ADAMHA Freedom of Information Officer, may determine whether to release or deny the records.

(vi) *IHS Freedom of Information Officer.* If the records you seek are exclusively records of the Indian Health Service, only the Director of Communications, IHS, who also is the IHS Freedom of Information Officer, may determine whether to release or deny the records.

(3) *SSA Freedom of Information Officer.* If the records you seek are exclusively records of the Social Security Administration, including its records in the regions, only the Director, Office of Public Inquiries, SSA, who also is the SSA Freedom of Information Officer, may determine whether to release or deny the records.

(4) *CMS Freedom of Information Officer.* If the records you seek are exclusively records of the Centers for Medicare & Medicaid Services, including its records in the regions, only the Director, Office of Public Affairs, CMS, who also is the CMS Freedom of Information Officer, may determine whether to release or deny the records.

(b) *Delegations.* Any of the above Freedom of Information Officers may delegate his or her authority to release or deny records and to determine fees. Any such delegation requires the concurrence of the Assistant Secretary for Public Affairs.

(c) *Addresses and telephone numbers.* The addresses and telephone numbers of the Freedom of Information Officers are listed below.

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FREEDOM OF INFORMATION OFFICERS

HHS Freedom of Information Officer, Room 645-F, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201, *Tel:* (202) 472-7453

SSA Freedom of Information Officer, Room 4-H-8, Annex Building, 6401 Security Boulevard, Baltimore, Maryland 21235, *Tel:* (301) 965-3962

CMS Freedom of Information Officer, Room 100, Professional Building, Office of Public Affairs, 6660 Security Boulevard, Baltimore, Maryland 21207, *Tel:* (301) 966-5352

PHS Freedom of Information Officer, Room 13-C-24, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, *Tel:* (301) 443-5252

FDA Freedom of Information Officer, HFW-35, Room 12A16, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, *Tel:* (301) 443-1813

NIH Freedom of Information Officer, National Institutes of Health, Building 31, Room 2B39, 9000 Rockville Pike, Bethesda, Maryland 20892, *Tel:* (301) 496-5633

CDC Freedom of Information Officer, Centers for Disease Control, 1600 Clifton Road, NE., Atlanta, Georgia 30333, *Tel:* (404) 329-3286

HRSA Freedom of Information Officer, Room 14-43, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, *Tel:* (301) 443-2086

ADAMHA Freedom of Information Officer, Room 12-C-15, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, *Tel:* (301) 443-3783

IHS Freedom of Information Officer, Room 5-A-39, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, *Tel:* (301) 443-1397.

§ 5.32 Release of records.

(a) *Records previously released.* If we have released a record, or a part of a record, to others in the past, we will ordinarily release it to you also. However, we will not release it to you if a statute forbids this disclosure, and we will not necessarily release it to you if an exemption applies in your situation and did not apply, or applied differently, in the previous situations.

(b) *Unauthorized disclosure.* The principle stated in paragraph (a) of this section, does not apply if the previous release was unauthorized.

(c) *Poor copy.* If we cannot make a legible copy of a record to be released, we do not attempt to reconstruct it. Instead, we furnish the best copy possible and note its poor quality in our reply.

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§ 5.33 Denial of requests.

(a) *Information furnished.* All denials are in writing and describe in general terms the material withheld; state the reasons for the denial, including, as applicable, a reference to the specific exemption of the FOIA authorizing the withholding or deletion; explain your right to appeal the decision and identify the official to whom you should send the appeal; and are signed by the person who made the decision to deny all or part of the request.

(b) *Unproductive searches.* We make a diligent search for records to satisfy your request. Nevertheless, we may not be able always to find the records you want using the information you provided, or they may not exist. If we advise you that we have been unable to find the records despite a diligent search, this does not constitute a denial of your request.

§ 5.34 Appeal of denials.

(a) *Right of appeal.* You have the right to appeal a partial or full denial of your FOIA request. To do so, you must put your appeal in writing and send it to the review official identified in the denial letter. You must send your appeal within 30 days from the date you receive that letter or from the date you receive the records released as a partial grant of your request, whichever is later.

(b) *Letter of appeal.* The appeal letter should state reasons why you believe that the FOIA exemption(s) we cited do not apply to the records that you requested, or give reasons why they should be released regardless of whether the exemption(s) apply. Because we have some discretionary authority in deciding whether to release or withhold records, you may strengthen your request by explaining your reasons for wanting the records. However, you are not required to give any explanation.

(c) *Review process.* Before making a decision on an appeal of a denial, the designated review official will consult with the General Counsel to ensure that the rights and interests of all parties affected by the request are protected. Also, the concurrence of the Assistant Secretary for Public Affairs is required in all appeal decisions, including those on fees. When the review offi-

cial responds to an appeal, that constitutes the Department's final action on the request. If the review official grants your appeal, we will send the records to you promptly or let you inspect them, or else we will explain the reason for any delay and the approximate date you will receive copies or be allowed to inspect the records. If the decision is to deny your appeal, the official will state the reasons for the decision in writing and inform you of the FOIA provision for judicial review.

§ 5.35 Time limits.

(a) *General.* FOIA sets certain time limits for us to decide whether to disclose the records you requested, and to decide appeals. If we fail to meet the deadlines, you may proceed as if we had denied your request or your appeal. We will try diligently to comply with the time limits, but if it appears that processing your request may take longer than we would wish, we will acknowledge your request and tell you its status. Since requests may be misaddressed or misrouted, you should call or write to confirm that we have the request and to learn its status if you have not heard from us in a reasonable time.

(b) *Time allowed.* (1) We will decide whether to release records within 10 working days after your request reaches the appropriate FOI office, as identified in § 5.31 of this part. When we decide to release records, we will actually provide the records, or let you inspect them, as soon as possible after that decision.

(2) We will decide an appeal within 20 working days after the appeal reaches the appropriate review official.

(c) *Extension of time limits.* FOI Officers of review officials may extend the time limits in unusual circumstances. Extension at the request stage and at the appeal stage may total up to 10 working days. We will notify you in writing of any extension. "Unusual circumstances" include situations when we:

(1) Search for and collect records from field facilities, archives, or locations other than the office processing the request.

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(2) Search for, collect, or examine a great many records in response to a single request.

(3) Consult with another office or agency that has substantial interest in the determination of the request.

(4) Conduct negotiations with submitters and requesters of information to determine the nature and extent of non-disclosable proprietary materials.

Subpart D—Fees

§5.41 Fees to be charged—categories of requests.

The paragraphs below state, for each category of request, the type of fees that we will generally charge. However, for each of these categories, the fees may be limited, waived, or reduced for the reasons given in §§5.42 through 5.45 or for other reasons.

(a) *Commercial use request.* If your request is for a commercial use, HHS will charge you the costs of search, review, and duplication.

(b) *Educational and scientific institutions and news media.* If you are an educational institution or a non-commercial scientific institution, operated primarily for scholarly or scientific research, or a representative of the news media, and your request is not for a commercial use, HHS will charge you only for the duplication of documents. Also, HHS will not charge you the copying costs for the first 100 pages of duplication.

(c) *Other requesters.* If your request is not the kind described by paragraph (a) or (b) of this section, then HHS will charge you only for the search and the duplication. Also, we will not charge you for the first two hours of search time or for the copying costs of the first 100 pages of duplication.

§5.42 Fees to be charged—general provisions.

(a) We may charge search fees even if the records we find are exempt from disclosure, or even if we do not find any records at all.

(b) If we are not charging you for the first two hours of search time, under §5.41(c), and those two hours are spent on a computer search, then the two free hours are the first two hours of the operator's own operation. If the oper-

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ator spends less than two hours on the search, we will reduce the total search fees by the average hourly rate for the operator's time, multiplied by two.

(c) If we are not charging you for the first 100 pages of duplication, under §5.41 (b) or (c), then those 100 pages are the first 100 pages of photocopies of standard size pages, or the first 100 pages of computer printout. If we cannot use this method to calculate the fee reduction, then we will reduce your total duplication fee by the normal charge for photocopying a standard size page, multiplied by 100.

(d) We will not charge you any fee at all if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. As of May 1987, such costs among the units HHS ranged between \$6.00 and \$12.50.

(e) If we determine that you (acting either alone or together with others) are breaking down a single request into a series of requests in order to avoid (or reduce) the fees charged, we may aggregate all these requests for purposes of calculating the fees charged.

(f) We will charge interest on unpaid bills beginning on the 31st day following the day the bill was sent. We will use the provisions of Part 30 of this Title in assessing interest, administrative costs, and penalties and in taking actions to encourage payment.

(g) This subpart does not apply to requests for Social Security program records on Social Security number holders, wage earners, employers, and claimants, where the requests are governed by section 1106 of the Social Security Act, 42 U.S.C. 1306(c), and by 20 CFR 442.441.

§5.43 Fee schedule.

HHS charges the following fees:

(a) Manual searching for or reviewing of records—when the search or review is performed by employees at grade GS-1 through GS-8, an hourly rate based on the salary of a GS-5, step 7, employee; when done by a GS-9 through GS-14, an hourly rate based on the salary of a GS-12, step 4, employee; and when done by a GS-15 or above, an hourly rate based on the salary of a GS-15, step 7, employee. In each case, the hourly rate will be computed by taking the current hourly rate for the

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specified grade and step, adding 16% of that rate to cover benefits, and rounding to the nearest whole dollar. As of November 25, 1988, these rates were \$10, \$20, and \$37 respectively. When a search involves employees at more than one of these levels, we will charge the rate appropriate for each.

(b) Computer searching and printing—the actual cost of operating the computer plus charges for the time spent by the operator, at the rates given in paragraph (a) of this section.

(c) Photocopying standard size pages—\$0.10 per page. FOI Officers may charge lower fees for particular documents where—

(1) The document has already been printed in large numbers,

(2) The program office determines that using existing stock to answer this request, and any other anticipated FOI requests, will not interfere with program requirements, and

(3) The FOI Officer determines that the lower fee is adequate to recover the prorated share of the original printing costs.

(d) Photocopying odd-size documents (such as punchcards or blueprints), or reproducing other records (such as tapes)—the actual costs of operating the machine, plus the actual cost of the materials used, plus charges for the time spent by the operator, at the rates given in paragraph (a) of this section.

(e) Certifying that records are true copies. This service is not required by the FOIA. If we agree to provide it, we will charge \$10 per certification.

(f) Sending records by express mail, certified mail, or other special methods. This service is not required by the FOIA. If we agree to provide it, we will charge our actual costs.

(g) Performing any other special service that you request and we agree to—actual costs of operating any machinery, plus actual cost of any materials used, plus charges for the time of our employees, at the rates given in paragraph (a) of this section.

§ 5.44 Procedures for assessing and collecting fees.

(a) *Agreement to pay.* We generally assume that when you request records you are willing to pay the fees we

charge for services associated with your request. You may specify a limit on the amount you are willing to spend. We will notify you if it appears that the fees will exceed the limit and ask whether you nevertheless want us to proceed with the search.

(b) *Advance payment.* If you have failed to pay previous bills in a timely fashion, or if our initial review of your request indicates that we will charge you fees exceeding \$250, we will require you to pay your past due fees and/or the estimated fees, or a deposit, before we start searching for the records you want. If so, we will let you know promptly upon receiving your request. In such cases, the administrative time limits prescribed in § 5.35 of the part (i.e., ten working days from receipt of initial requests and 20 working days from receipt of appeals from initial denials, plus permissible extensions of these time limits) will begin only after we come to an agreement with you over payment of fees, or decide that fee waiver or reduction is appropriate.

(c) *Billing and payment.* We will normally require you to pay all fees before we furnish the records to you. We may, at our discretion, send you a bill along with or following the furnishing of the records. For example, we may do this if you have a history of prompt payment. We may also, at our discretion, aggregate the charges for certain time periods in order to avoid sending numerous small bills to frequent requesters, or to businesses or agents representing requesters. For example, we might send a bill to such a requester once a month. Fees should be paid in accordance with the instructions furnished by the person who responds to your requests.

§ 5.45 Waiver or reduction of fees.

(a) *Standard.* We will waive or reduce the fees we would otherwise charge if disclosure of the information meets both of the following tests:

(1) It is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(2) It is not primarily in the commercial interest of the requester.

These two tests are explained in paragraphs (b) and (c) of this section.

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(b) *Public interest.* The disclosure passes the first test only if it furthers the specific public interest of being likely to contribute significantly to public understanding of government operations or activities, regardless of any other public interest it may further. In analyzing this question, we will consider the following factors.

(1) How, if at all, do the records to be disclosed pertain to the operations or activities of the Federal Government?

(2) Would disclosure of the records reveal any meaningful information about government operations or activities? Can one learn from these records anything about such operations that is not already public knowledge?

(3) Will the disclosure advance the understanding of the general public as distinguished from a narrow segment of interested persons? Under this factor we may consider whether the requester is in a position to contribute to public understanding. For example, we may consider whether the requester has such knowledge or expertise as may be necessary to understand the information, and whether the requester's intended use of the information would be likely to disseminate the information among the public. An unsupported claim to be doing research for a book or article does not demonstrate that likelihood, while such a claim by a representative of the news media is better evidence.

(4) Will the contribution to public understanding be a significant one? Will the public's understanding of the government's operations be substantially greater as a result of the disclosure?

(c) *Not primarily in the requester's commercial interest.* If the disclosure passes the test of furthering the specific public interest described in paragraph (b) of this section, we will determine whether it also furthers the requester's commercial interest and, if so, whether this effect outweighs the advancement of that public interest. In applying this second test, we will consider the following factors:

(1) Would the disclosure further a commercial interest of the requester, or of someone on whose behalf the requester is acting? "Commercial interests" include interests relating to business, trade, and profit. Not only profit-

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making corporations have commercial interests—so do nonprofit corporations, individuals, unions, and other associations. The interest of a representative of the news media in using the information for news dissemination purposes will not be considered a commercial interest.

(2) If disclosure would further a commercial interest of the requester, would that effect outweigh the advancement of the public interest defined in paragraph (b) of this section? Which effect is primary?

(d) *Deciding between waiver and reduction.* If the disclosure passes both tests, we will normally waive fees. However, in some cases we may decide only to reduce the fees. For example, we may do this when disclosure of some but not all of the requested records passes the tests.

(e) *Procedure for requesting a waiver or reduction.* You must make your request for a waiver or reduction at the same time you make your request for records. You should explain why you believe a waiver or reduction is proper under the analysis in paragraphs (a) through (d) of this section. Only FOI Officers may make the decision whether to waive, or reduce, the fees. If we do not completely grant your request for a waiver or reduction, the denial letter will designate a review official. You may appeal the denial to that official. In your appeal letter, you should discuss whatever reasons are given in our denial letter. The process prescribed in §5.34(c) of this part will also apply to these appeals.

Subpart E—Records Available for Public Inspection

§ 5.51 Records available.

(a) *Records of general interest.* We will make the following records of general interest available for your inspection and copying. Before releasing them, however, we may delete the names of people, or information that would identify them, if release would invade their personal privacy to a clearly unwarranted degree. (See §5.67 of this part.)

(1) Orders and final opinions, including concurring and dissenting opinions in adjudications, such as Letters of Finding issued by the Office for Civil

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Rights in civil rights complaints, and Social Security Rulings. (See § 5.66 of this part for availability of internal memoranda, including attorney opinions and advice.)

(2) Statements of policy and interpretations that we have adopted but have not published in the FEDERAL REGISTER.

(3) Administrative staff manuals and instructions to staff that affect the public. (We will not make available, however, manuals or instructions that reveal investigative or audit procedures as described in §§ 5.63 and 5.68 of this part.)

(b) *Other records.* In addition to such records as those described in paragraph (a) of this section, we will make available to any person a copy of all other agency records, unless we determine that such records should be withheld from disclosure under subsection (b) of the Act and Subpart F of this regulation.

§ 5.52 Indexes of records.

(a) *Inspection and copying.* We will maintain and provide for your inspection and copying current indexes of the records described in § 5.51(a). We will also publish and distribute copies of the indexes unless we announce in the FEDERAL REGISTER that it is unnecessary or impracticable to do so. For assistance in locating indexes maintained in the Department, you may contact the HHS Freedom of Information Officer at the address and telephone number in § 5.31(c).

(b) *Record citation as precedent.* We will not use or cite any record described in § 5.51(a) as a precedent for an action against a person unless we have indexed the record and published it or made it available, or unless the person has timely notice of the record.

Subpart F—Reasons for Withholding Some Records

§ 5.61 General.

Section 552(b) of the Freedom of Information Act contains nine exemptions to the mandatory disclosure of records. We describe these exemptions below and explain how this Department applies them to disclosure determinations. (In some cases more than one ex-

emption may apply to the same document.) Information obtained by the Department from any individual or organization, furnished in reliance on a provision for confidentiality authorized by applicable statute or regulation, will not be disclosed, to the extent it can be withheld under one of these exemptions. This section does not itself authorize the giving of any pledge of confidentiality by any officer or employee of the Department.

§ 5.62 Exemption one: National defense and foreign policy.

We are not required to release records that, as provided by FOIA, are “(a) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (b) are in fact properly classified pursuant to such Executive Order.” Executive Order No. 12356 (1982) provides for such classification. When the release of certain records may adversely affect U.S. relations with foreign countries, we usually consult with officials of those countries or officials of the Department of State. Also, we may on occasion have in our possession records classified by some other agency. We may refer your request for such records to the agency that classified them and notify you that we have done so, as explained in § 5.23.

§ 5.63 Exemption two: Internal personnel rules and practices.

We are not required to release records that are “related solely to the internal personnel rules and practices of an agency.” Under this exemption, we may withhold routine internal agency practices and procedures. For example, we may withhold guard schedules and rules governing parking facilities or lunch periods. Also under this exemption, we may withhold internal records whose release would help some persons circumvent the law or agency regulations. For example, we ordinarily do not disclose manuals that instruct our investigators or auditors how to investigate possible violations of law, to the extent that this release would help some persons circumvent the law.

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§ 5.64 Exemption three: Records exempted by other statutes.

We are not required to release records if another statute specifically allows us to withhold them. We may use another statute to justify withholding only if it absolutely prohibits disclosure or if it sets forth criteria to guide our decision on releasing or identifies particular types of material to be withheld.

§ 5.65 Exemption four: Trade secrets and confidential commercial or financial information.

We will withhold trade secrets and commercial or financial information that is obtained from a person and is privileged or confidential.

(a) *Trade secrets.* A trade secret is a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. There must be a direct relationship between the trade secret and the productive process.

(b) *Commercial or financial information.* We will not disclose records whose information is "commercial or financial," is obtained from a person, and is "privileged or confidential."

(1) Information is "commercial or financial" if it relates to businesses, commerce, trade, employment, profits, or finances (including personal finances). We interpret this category broadly.

(2) Information is "obtained from a person" if HHS or another agency has obtained it from someone outside the Federal Government or from someone within the Government who has a commercial or financial interest in the information. "Person" includes an individual, partnership, corporation, association, state or foreign government, or other organization. Information is not "obtained from a person" if it is generated by HHS or another federal agency. However, information is "obtained from a person" if it is provided by someone, including but not limited to an agency employee, who retains a commercial or financial interest in the information.

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(3) Information is "privileged" if it would ordinarily be protected from disclosure in civil discovery by a recognized evidentiary privilege, such as the attorney-client privilege or the work product privilege. Information may be privileged for this purpose under a privilege belonging to a person outside the government, unless the providing of the information to the government rendered the information no longer protectable in civil discovery.

(4) Information is "confidential" if it meets one of the following tests:

(i) Disclosure may impair the government's ability to obtain necessary information in the future;

(ii) Disclosure would substantially harm the competitive position of the person who submitted the information;

(iii) Disclosure would impair other government interests, such as program effectiveness and compliance; or

(iv) Disclosure would impair other private interests, such as an interest in controlling availability of intrinsically valuable records, which are sold in the market by their owner.

The following questions may be relevant in analyzing whether a record meets one or more of the above tests: Is the information of a type customarily held in strict confidence and not disclosed to the public by the person to whom it belongs? What is the general custom or usage with respect to such information in the relevant occupation or business? How many, and what types of, individuals have access to the information? What kind and degree of financial injury can be expected if the information is disclosed?

(c) *Designation of certain confidential information.* A person who submits records to the government may designate part or all of the information in such records as exempt from disclosure under Exemption 4 of the FOIA. The person may make this designation either at the time the records are submitted to the government or within a reasonable time thereafter. The designation must be in writing. Where a legend is required by a request for proposals or request for quotations, pursuant to 48 CFR 352.215-12, then that legend is necessary for this purpose. Any such designation will expire ten years

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after the records were submitted to the government.

(d) *Predisclosure notification.* The procedures in this paragraph apply to records on which the submitter has designated information as provided in paragraph (c) of this section. They also apply to records that were submitted to the government where we have substantial reason to believe that information in the records could reasonably be considered exempt under Exemption 4. Certain exceptions to these procedures are stated in paragraph (e) of this section.

(1) When we receive a request for such records, and we determine that we may be required to disclose them, we will make reasonable efforts to notify the submitter about these facts. The notice will include a copy of the request, and it will inform the submitter about the procedures and time limits for submission and consideration of objections to disclosure. If we must notify a large number of submitters, we may do this by posting or publishing a notice in a place where the submitters are reasonably likely to become aware of it.

(2) The submitter has five working days from receipt of the notice to object to disclosure of any part of the records and to state all bases for its objections.

(3) We will give consideration to all bases that have been timely stated by the submitter. If we decide to disclose the records, we will notify the submitter in writing. This notice will briefly explain why we did not sustain its objections. We will include with the notice a copy of the records about which the submitter objected, as we propose to disclose them. The notice will state that we intend to disclose the records five working days after the submitter receives the notice unless we are ordered by a United States District Court not to release them.

(4) When a requester files suit under the FOIA to obtain records covered by this paragraph, we will promptly notify the submitter.

(5) Whenever we send a notice to a submitter under paragraph (d)(1) of this section, we will notify the requester that we are giving the submitter a notice and an opportunity to

object. Whenever we send a notice to a submitter under paragraph (d)(3) of this section, we will notify the requester of this fact.

(e) *Exceptions to predisclosure notification.* The notice requirements in paragraph (d) of this section do not apply in the following situations:

(1) We decided not to disclose the records;

(2) The information has previously been published or made generally available;

(3) Disclosure is required by a regulation, issued after notice and opportunity for public comment, that specifies narrow categories of records that are to be disclosed under the FOIA, but in this case a submitter may still designate records as described in paragraph (c) of this section, and in exceptional cases, we may, at our discretion, follow the notice procedures in paragraph (d) of this section; or

(4) The designation appears to be obviously frivolous, but in this case we will still give the submitter the written notice required by paragraph (d)(3) of this section (although this notice need not explain our decision or include a copy of the records), and we will notify the requester as described in paragraph (d)(5) of this section.

§5.66 Exemption five: Internal memoranda.

This exemption covers internal government communications and notes that fall within a generally recognized evidentiary privilege. Internal government communications include an agency's communications with an outside consultant or other outside person, with a court, or with Congress, when those communications are for a purpose similar to the purpose of privileged intra-agency communications. Some of the most-commonly applicable privileges are described in the following paragraphs.

(a) *Deliberative process privilege.* This privilege protects predecisional deliberative communications. A communication is protected under this privilege if it was made before a final decision was reached on some question of policy and if it expressed recommendations or opinions on that question. The purpose of the privilege is to prevent

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injury to the quality of the agency decisionmaking process by encouraging open and frank internal policy discussions, by avoiding premature disclosure of policies not yet adopted, and by avoiding the public confusion that might result from disclosing reasons that were not in fact the ultimate grounds for an agency's decision. Purely factual material in a deliberative document is within this privilege only if it is inextricably intertwined with the deliberative portions so that it cannot reasonably be segregated, if it would reveal the nature of the deliberative portions, or if its disclosure would in some other way make possible an intrusion into the decisionmaking process. We will release purely factual material in a deliberative document unless that material is otherwise exempt. The privilege continues to protect predecisional documents even after a decision is made.

(b) *Attorney work product privilege.* This privilege protects documents prepared by or for an agency, or by or for its representative (typically, HHS attorneys) in anticipation of litigation or for trial. It includes documents prepared for purposes of administrative adjudications as well as court litigation. It includes documents prepared by program offices as well as by attorneys. It includes factual material in such documents as well as material revealing opinions and tactics. Finally, the privilege continues to protect the documents even after the litigation is closed.

(c) *Attorney-client communication privilege.* This privilege protects confidential communications between a lawyer and an employee or agent of the government where there is an attorney-client relationship between them (typically, where the lawyer is acting as attorney for the agency and the employee is communicating on behalf of the agency) and where the employee has communicated information to the attorney in confidence in order to obtain legal advice or assistance.

§5.67 Exemption six: Clearly unwarranted invasion of personal privacy.

(a) *Documents affected.* We may withhold records about individuals if disclosure would constitute a clearly unwar-

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ranted invasion of their personal privacy.

(b) *Balancing test.* In deciding whether to release records to you that contain personal or private information about someone else, we weigh the foreseeable harm of invading that person's privacy against the public benefit that would result from the release. If you were seeking information for a purely commercial venture, for example, we might not think that disclosure would primarily benefit the public and we would deny your request. On the other hand, we would be more inclined to release information if you were working on a research project that gave promise of providing valuable information to a wide audience. However, in our evaluation of requests for records we attempt to guard against the release of information that might involve a violation of personal privacy because of a requester being able to "read between the lines" or piece together items that would constitute information that normally would be exempt from mandatory disclosure under Exemption Six.

(c) *Examples.* Some of the information that we frequently withhold under Exemption Six is: Home addresses, ages, and minority group status of our employees or former employees; social security numbers; medical information about individuals participating in clinical research studies; names and addresses of individual beneficiaries of our programs, or benefits such individuals receive; earning records, claim files, and other personal information maintained by the Social Security Administration, the Public Health Service, and the Centers for Medicare & Medicaid Services.

§5.68 Exemption seven: Law enforcement.

We are not required to disclose information or records that the government has compiled for law enforcement purposes. The records may apply to actual or potential violations of either criminal or civil laws or regulations. We can withhold these records only to the extent that releasing them would cause harm in at least one of the following situations:

(a) *Enforcement proceedings.* We may withhold information whose release

could reasonably be expected to interfere with prospective or ongoing law enforcement proceedings. Investigations of fraud and mismanagement, employee misconduct, and civil rights violations may fall into this category. In certain cases—such as when a fraud investigation is likely—we may refuse to confirm or deny the existence of records that relate to the violations in order not to disclose that an investigation is in progress, or may be conducted.

(b) *Fair trial or impartial adjudication.* We may withhold records whose release would deprive a person of a fair trial or an impartial adjudication because of prejudicial publicity.

(c) *Personal privacy.* We are careful not to disclose information that could reasonably be expected to constitute an unwarranted invasion of personal privacy. When a name surfaces in an investigation, that person is likely to be vulnerable to innuendo, rumor, harassment, and retaliation.

(d) *Confidential sources and information.* We may withhold records whose release could reasonably be expected to disclose the identity of a confidential source of information. A confidential source may be an individual; a state, local, or foreign government agency; or any private organization. The exemption applies whether the source provides information under an express promise of confidentiality or under circumstances from which such an assurance could be reasonably inferred. Also, where the record, or information in it, has been compiled by a criminal law enforcement authority conducting a criminal investigation, or by an agency conducting a lawful national security investigation, the exemption also protects all information supplied by a confidential source. Also protected from mandatory disclosure is any information which, if disclosed, could reasonably be expected to jeopardize the system of confidentiality that assures a flow of information from sources to investigatory agencies.

(e) *Techniques and procedures.* We may withhold records reflecting special techniques or procedures of investigation or prosecution, not otherwise generally known to the public. In some cases, it is not possible to describe even

in general terms those techniques without disclosing the very material to be withheld. We may also withhold records whose release would disclose guidelines for law enforcement investigations or prosecutions if this disclosure could reasonably be expected to create a risk that someone could circumvent requirements of law or of regulation.

(f) *Life and physical safety.* We may withhold records whose disclosure could reasonably be expected to endanger the life or physical safety of any individual. This protection extends to threats and harassment as well as to physical violence.

§ 5.69 Exemptions 8 and 9: Records on financial institutions; records on wells.

Exemption eight permits us to withhold records about regulation or supervision of financial institutions. Exemption nine permits the withholding of geological and geophysical information and data, including maps, concerning wells.

PART 5a [RESERVED]

PART 5b—PRIVACY ACT REGULATIONS

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- 5b.1 Definitions.
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- 5b.4 Maintenance of records.
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APPENDIX A TO PART 5b—EMPLOYEE STANDARDS OF CONDUCT

APPENDIX B TO PART 5b—ROUTINE USES APPLICABLE TO MORE THAN ONE SYSTEM OF RECORDS MAINTAINED BY HHS

APPENDIX C TO PART 5b—DELEGATIONS OF AUTHORITY [RESERVED]

AUTHORITY: 5 U.S.C. 301, 5 U.S.C. 552a.

SOURCE: 40 FR 47409, Oct. 8, 1975, unless otherwise noted.

SUBCHAPTER A—GENERAL ADMINISTRATION

PART 1—HHS'S REGULATIONS

Sec.

- 1.1 Location of HHS regulations.
1.2 Subject matter of Office of the Secretary regulations in parts 1-99.

§ 1.1 Location of HHS regulations.

Regulations for HHS's programs and activities are located in several different titles of the Code of Federal Regulations:

- Regulations having HHS-wide application or which the Office of the Secretary administers are located in Parts 1-99 of Title 45.
- Health regulations are located at Parts 1-399 of Title 42.
- Health care financing regulations are located at Parts 400-499 of Title 42. These include regulations for Medicare and Medicaid.
- Human development services regulations are located at Parts 200-299 and 1300-1399 of Title 45. These include regulations for Head Start, social services, social and nutrition services for older persons, rehabilitative services, developmental disabilities services, Native American programs, and various programs relating to families and children.
- Social Security regulations are located at Parts 400-499 of Title 20.
- Food and Drug regulations are located at Parts 1-1299 of Title 21.
- Procurement (contract) regulations are located at Chapter 3 of Title 41.

Each volume of the Code contains an index of its parts.

(5 U.S.C. 301)

[44 FR 61598, Oct. 26, 1979, as amended at 48 FR 35099, Aug. 3, 1983]

§ 1.2 Subject matter of Office of the Secretary regulations in parts 1-99.

This subject matter of the regulations in Parts 1-99 of this title includes:

- *Civil rights/nondiscrimination*: Parts 80, 81, 83, 84, 86, 90.
- *Protection of human subjects*: Part 46.
- *Day care requirements*: Part 71.
- *Information, privacy, advisory committees*: Parts 5, 5a, 5b, 11, 17, 99.
- *Personnel*: Parts 50, 57, 73, 73a.
- *Grants and letter of credit administration, property, hearing rights*: Parts 10, 12, 15, 16, 74, 75, 77, 95.
- *Claims*: Parts 30, 35.
- *Inventions and patents*: Parts 6, 7, 8.

- *Miscellaneous*: Parts 3, 4, 9, 67.

(5 U.S.C. 301)

[50 FR 781, Jan. 7, 1985, as amended at 52 FR 28658, July 31, 1987]

PART 2—TESTIMONY BY EMPLOYEES AND PRODUCTION OF DOCUMENTS IN PROCEEDINGS WHERE THE UNITED STATES IS NOT A PARTY

Sec.

- 2.1 Scope, purpose, and applicability.
2.2 Definitions.
2.3 Policy on presentation of testimony and production of documents.
2.4 Procedures when voluntary testimony is requested or when an employee is subpoenaed.
2.5 Subpoenas duces tecum.
2.6 Certification and authentication of records.

AUTHORITY: 5 U.S.C. 301, 5 U.S.C. 552.

SOURCE: 52 FR 37146, Oct. 5, 1987, unless otherwise noted.

§ 2.1 Scope, purpose, and applicability.

(a) This part sets forth rules to be followed when an employee or former employee of the Department of Health and Human Services ("DHHS" or "Department"), other than an employee of the Food and Drug Administration, is requested or subpoenaed to provide testimony in a deposition, trial, or other similar proceeding concerning information acquired in the course of performing official duties or because of such person's official capacity with DHHS. This part also sets forth procedures for the handling of subpoenas duces tecum and other requests for any document in the possession of DHHS, other than the Food and Drug Administration, and for the processing of requests for certification of copies of documents. Separate regulations, 21 CFR part 20, govern the Food and Drug Administration, and those regulations are not affected by this part.

(b) It is the policy of the DHHS to provide information, data, and records to non-federal litigants to the same extent and in the same manner that they

§2.1

are made available to the general public and, when subject to the jurisdiction of a court or other tribunal presiding over non-federal party litigation, to follow all applicable procedural and substantive rules relating to the production of information, data, and records by a non-party. The availability of Department employees to testify in litigation not involving federal parties is governed by the Department's policy to maintain strict impartiality with respect to private litigants and to minimize the disruption of official duties.

(c) This part applies to state, local and tribal judicial, administrative, and legislative proceedings, and to federal judicial and administrative proceedings.

(d) This part does not apply to:

(1) Any civil or criminal proceedings where the United States, the Department of Health and Human Services, and any agency thereof, or any other Federal agency is a party.

(2) Congressional requests or subpoenas for testimony or documents.

(3) Consultative services and technical assistance provided by the Department of Health and Human Services, or any agency thereof, in carrying out its normal program activities.

(4) Employees serving as expert witnesses in connection with professional and consultative services as approved outside activities in accordance with 5 CFR 2635.805 and 5 CFR 5501.106. (In cases where employees are providing such outside services, they must state for the record that the testimony represents their own views and does not necessarily represent the official position of the DHHS.)

(5) Employees making appearances in their private capacity in legal or administrative proceedings that do not relate to the Department of Health and Human Services (such as cases arising out of traffic accidents, crimes, domestic relations, etc.) and not involving professional and consultative services.

(6) Any matters covered in 21 CFR part 20, involving the Food and Drug Administration.

(7) Any civil or criminal proceedings in State court brought on behalf of the Department of Health and Human Services.

45 CFR Subtitle A (10-1-04 Edition)

Example (1): While on duty, an employee of the Department witnesses an incident in which a fellow employee trips on a loose piece of carpeting and sustains an injury. The injured employee brings a private tort action against the contractor installing the carpeting and the private landlord maintaining the building. The employee/witness is served with a subpoena to appear at a deposition to testify about the incident. The person seeking the testimony would not be required to obtain Agency head approval prior to requesting the testimony, because the subject of the testimony does not "relate to" the Department, within the meaning of §2.1(d)(5).

Example (2): While on duty, an employee of the Department witnesses a mugging while looking out the window to check the weather, and then notifies the local police of what she observed. She is subsequently subpoenaed to testify in a criminal proceeding. The local prosecutor would not be required to obtain Agency head approval prior to requiring the employee to testify, because the subject of the testimony does not "relate to" the Department, within the meaning of §2.1(d)(5).

Example (3): A nurse on duty at an Indian Health Service hospital emergency room treats a child who is brought in following a report of domestic violence. The nurse is subsequently served with a subpoena to testify in a criminal proceeding against one of the child's parents concerning the injuries to the child which he observed. The local prosecutor would be required to obtain Agency head approval prior to requiring the nurse to testify, because the subject of the testimony involves "information acquired in the course of performing official duties or because of the person's official capacity," within the meaning of §2.1(a).

Example (4): A personnel specialist working for the Department is subpoenaed to testify concerning the meaning of entries on time and attendance records of an employee, which the requesting party received from the employee pursuant to discovery in a personal injury action brought by the employee. The party requesting the personnel specialist to appear would be required to obtain Agency head approval prior to compelling the personnel specialist to testify, because the testimony sought involves "information acquired in the course of performing official duties or because of the person's official capacity," within the meaning of §2.1(a).

Example (5): A National Institutes of Health physician is subpoenaed in a private medical malpractice action to provide expert testimony in her specialty. The party requesting her testimony would be required to obtain Agency head approval prior to her testifying in response to the subpoena, because the expert testimony sought involves

Department of Health and Human Services

§ 2.4

"information acquired in the course of performing official duties or because of the person's official capacity," within the meaning of § 2.1(a).

[52 FR 37146, Oct. 5, 1987, as amended at 55 FR 4611, Feb. 9, 1990; 68 FR 25838, May 14, 2003]

§ 2.2 Definitions.

Agency head refers to the head of the relevant operating division or other major component of the DHHS, or his or her delegatee. *Agency head* for the purposes of this part means the following officials for the components indicated:

- (1) Office of the Secretary—Assistant Secretary for Administration and Management;
- (2) Administration on Aging—Assistant Secretary for Aging;
- (3) Administration for Children and Families—Assistant Secretary for Children and Families;
- (4) Agency for Healthcare Research and Quality—Administrator;
- (5) Agency for Toxic Substances and Disease Registry—Administrator;
- (6) Centers for Disease Control and Prevention—Director;
- (7) Centers for Medicare and Medicaid Services—Administrator;
- (8) Health Resources and Services Administration—Administrator;
- (9) Indian Health Service—Director;
- (10) National Institutes of Health—Director;
- (11) Substance Abuse and Mental Health Services Administration—Administrator;
- (12) Office of Inspector General—Inspector General.

Employee includes:

(1) Commissioned officers in the Public Health Service Commissioned Corps, as well as regular and special DHHS employees (except employees of the Food and Drug Administration), when they are performing the duties of their regular positions, as well as when they are performing duties in a temporary assignment at DHHS or another organization.

(2) Any employees of health insurance intermediaries and carriers performing functions under agreements entered into pursuant to sections 1816 and 1842 of the Social Security Act, 42 U.S.C. 1395h, 1395u; and

(3) Current and former employees and contractors of entities covered under the Federally Supported Health Centers Assistance Act of 1992, as amended, 42 U.S.C § 233 (FSHCAA), provided that the requested testimony or information relates to the performance of medical, surgical, dental or related functions which were performed at a time when the DHHS deemed the entity to be covered by the FSHCAA.

Certify means to authenticate under seal, pursuant to 42 U.S.C 3505, official documents of the Department.

Testify and testimony includes both in-person, oral statements before a court, legislative or administrative body and statements made pursuant to depositions, interrogatories, declarations, affidavits, or other formal participation.

[68 FR 25839, May 14, 2003]

§ 2.3 Policy on Presentation of testimony and production of documents.

No employee or former employee of the DHHS may provide testimony or produce documents in any proceedings to which this part applies concerning information acquired in the course of performing official duties or because of the person's official relationship with the Department unless authorized by the Agency head pursuant to this part based on a determination by the Agency head, after consultation with the Office of the General Counsel, that compliance with the request would promote the objectives of the Department.

[68 FR 25839, May 14, 2003]

§ 2.4 Procedures when voluntary testimony is requested or when an employee is subpoenaed.

(a) All requests for testimony by an employee or former employee of the DHHS in his or her official capacity and not subject to the exceptions set forth in § 2.1(d) of this part must be addressed to the Agency head in writing and must state the nature of the requested testimony, why the information sought is unavailable by any other means, and the reasons why the testimony would be in the interest of the DHHS or the federal government.

(b) If the Agency head denies approval to comply with a subpoena for testimony, or if the Agency head has

§2.5

not acted by the return date, the employee will be directed to appear at the stated time and place, unless advised by the Office of the General Counsel that responding to the subpoena would be inappropriate (in such circumstances as, for example, an instance where the subpoena was not validly issued or served, where the subpoena has been withdrawn, or where discovery has been stayed), produce a copy of these regulations, and respectfully decline to testify or produce any documents on the basis of these regulations.

[68 FR 25840, May 14, 2003]

§2.5 Subpoenas duces tecum.

(a) Whenever a subpoena duces tecum has been served upon a DHHS employee or former employee commanding the production of any record, such person shall refer the subpoena to the Office of the General Counsel (including regional chief counsels) for a determination of the legal sufficiency of the subpoena, whether the subpoena was properly served, and whether the issuing court or other tribunal has jurisdiction over the Department.) If the General Counsel or his designee determines that the subpoena is legally sufficient, the subpoena was properly served, and the tribunal has jurisdiction, the terms of the subpoena shall be complied with unless affirmative action is taken by the Department to modify or quash the subpoena in accordance with Fed. R. Civ. P. 45 (c).

(b) If a subpoena duces tecum served upon a DHHS employee or former employee commanding the production of any record is determined by the Office of the General Counsel to be legally insufficient, improperly served, or from a tribunal not having jurisdiction, such subpoena shall be deemed a request for records under the Freedom of Information Act and shall be handled pursuant to the rules governing public disclosure established in 45 CFR part 5.

[68 FR 25840, May 14, 2003]

§2.6 Certification and authentication of records.

Upon request, DHHS agencies will certify, pursuant to 42 U.S.C. 3505, the authenticity of copies of records that

45 CFR Subtitle A (10-1-04 Edition)

are to be disclosed. Fees for copying and certification are set forth in 45 CFR 5.43.

[68 FR 25840; May 14, 2003]

PART 3—CONDUCT OF PERSONS AND TRAFFIC ON THE NATIONAL INSTITUTES OF HEALTH FEDERAL ENCLAVE

Subpart A—General

Sec.

- 3.1 Definitions.
- 3.2 Applicability.
- 3.3 Compliance.
- 3.4 False reports and reports of injury or damage.
- 3.5 Lost and found, and abandoned property.
- 3.6 Nondiscrimination.

Subpart B—Traffic Regulations

- 3.21 Emergency vehicles.
- 3.22 Request for identification.
- 3.23 Parking.
- 3.24 Parking permits.
- 3.25 Servicing of vehicles.
- 3.26 Speed limit.
- 3.27 Bicycles.

Subpart C—Facilities and Grounds

- 3.41 Admission to facilities or grounds.
- 3.42 Restricted activities.
- 3.43 Removal of property.
- 3.44 Solicitation.

Subpart D—Penalties

- 3.61 Penalties.

AUTHORITY: 40 U.S.C. 318-318d, 486; Delegation of Authority, 33 FR 604.

SOURCE: 55 FR 2068, Jan. 22, 1990, unless otherwise noted.

Subpart A—General

§3.1 Definitions.

Director means the Director or Acting Director of the National Institutes of Health (NIH), or other officer or employee of NIH to whom the authority involved has been delegated.

Enclave means, unless the context requires a different meaning, the area, containing about 318 acres, acquired by the United States in several parcels in the years 1935 through 1983, and any further future acquisitions, comprising

LETTER FOR USE IN RESPONDING TO SUBPOENA DUCES TECUM

Dear Sir or Madam:

This is in response to the subpoena duces tecum, initiated by your firm, for certain Medicare records in our possession.

The Department of Health and Human Services regulation at 45 C.F.R. Part 2 states, among other things, that the Department will treat subpoenas duces tecum in non-federal litigation for records in its possession as requests under the Freedom of Information Act (5 U.S.C. 552).

Because the records the subpoena seeks are in a Privacy Act system of records, the Privacy Act (5 U.S.C. 552a) precludes release of the records except pursuant to a written authorization to release signed by the subject(s) of the records or unless the Freedom of Information Act requires release of the records or a court of competent jurisdiction orders release. Regarding the first condition of disclosure, we advise that since the requested records contain protected health information, the Health Insurance Portability and Accountability Act of 1966 sets forth the core elements and required statements that an authorization must contain in order for the Centers for Medicare & Medicaid Services (CMS) to consider it valid. Regarding the last condition of disclosure, we advise that for purposes of the Privacy Act, this agency considers a court of competent jurisdiction to be a Federal court, only.

Review of this matter indicates that your firm has not presented a valid authorization to release the requested records. Moreover, we cannot interpret your firm's subpoena as an order of a court of competent jurisdiction since 45 C.F.R. Part 2 identifies a subpoena duces tecum in non-federal litigation as a Freedom of Information Act request. Further, the Freedom of Information Officer for the Centers for Medicare & Medicaid Services has determined that the requested records are exempt from mandatory disclosure under the Freedom of Information Act by exemption (b)(6) of that Act. Exemption (b)(6) permits the withholding of personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Based upon the foregoing, we respectfully decline to produce the Medicare records requested by your firm's subpoena duces tecum.

If you have reason to disagree with this decision, you may appeal. Your appeal should be mailed, within 30 days of the date of this letter, to the Deputy Administrator, Centers for Medicare & Medicaid Services, Room C5-16-03, 7500 Security Boulevard, Baltimore, Maryland 21244-1850. Please mark your envelope "Freedom of Information Act Appeal" and enclose a copy of this letter.

Sincerely yours,

Signature of Authorized Official

Enclosure: HIPAA/Privacy Authorization Requirements

cc: FOIA Officer, CMS

CENTERS FOR MEDICARE & MEDICAID SERVICES FREEDOM OF INFORMATION ACT REQUEST

Exhibit E

1. Case #: _____
2. Date Received: _____ 3. Due Date: _____ 4. Response Date: _____ 5. Processing Days: _____
6. Requester: _____
7. Affiliation/Address: _____
8. Subject: _____
9. Referred To: _____
10. Category of Requester _____ Commercial
 _____ Educational/Scientific or News Media
 _____ Other

11. IS THERE PROGRAM CONCERN ABOUT DISCLOSING THESE RECORDS? _____ Yes _____ No

- _____ Ongoing Deliberations _____ Invasion of Privacy _____ Circumvention of
 _____ Decision-making Process _____ Pending Litigation _____ Agency Rules
 _____ Proprietary Information _____ Open Investigation
 _____ Other (Specify) _____

- 12. ACTIONS:** _____ Direct Reply _____ No Records Found _____ Request Withdrawn
 _____ Not FOIA _____ Records Not Reasonably Described _____ Subpoena Denial
 _____ Fee Related Closure _____ Referral to Next Review Level _____ Other

ACTUAL COSTS OF RESPONDING TO REQUEST

13. ACTUAL PROCESSING COSTS:	Hours	Hourly Wage	Total	17. Invoiceable Fees
Reading/Interpreting/Logging				XXXXXXXXXXXXXXXXXX
Clarifying/Negotiating/Consultation				XXXXXXXXXXXXXXXXXX
Searching for Records				\$
Review/Edit/Delete (DFOI Only)				\$
Compose/Type Response				XXXXXXXXXXXXXXXXXX
Other (specify)				\$

14. COPYING COSTS - @ \$.10 per page:	No. of Pages	No. of Sets	Total	
Pages Located/Copied		1 x \$.10 per page		XXXXXXXXXXXXXXXXXX
No. of Pages Released to Requester		1 x \$.10 per page	XXXXXXXXXXXXXX	\$ _____
No. of Pages Sent to Next Review Level		1	XXXXXXXXXXXXXX	XXXXXXXXXXXXXXXXXX

15. MAILING COSTS: Postage _____ Special Handling _____	XXXXXXXXXXXXXXXXXX _____
--	-----------------------------

16. Total Actual Cost: _____

18. Total Invoiceable Fees: _____

19. Fees Charged: _____

20. Fee Waived: _____

21. Name(s), Phone Number(s) and Component(s) of Person(s) Who Searched For and Compiled These Records:

INSTRUCTIONS FOR COMPLETING FORM CMS-632-FOI

Completion of this form is mandatory. It must be attached to and remain with every Freedom of Information Act (FOIA) request for control and tracking. Every CMS employee involved in processing the request must add to a given Form CMS-632-FOI data accounting for that involvement. This data will be the base for the Annual Report.

Item

1. **Case #:** number assigned in accordance with DFOI instructions.
2. **Date Received:** date request was received in the FOIA unit.
3. **Due Date:** date 20 working days from receipt of request in the FOIA unit.
4. **Response Date:** actual date case was completed and response sent.
5. **Processing Days:** the number of work days it took to process the request.
6. **Requester:** last name, first name, initial of person who signed the request.
7. **Affiliation/Address:** name of company, law firm etc., and complete address of requester.
8. **Subject:** explain briefly the nature of the request by subject or records requested.
9. **Referred To:** where the request was sent for records search(es).
10. **Category of Requester:** check appropriate category based upon number seven above.
11. **Program Concern:** check appropriate item(s) to show concern about release of these records.
12. **Actions:** check all appropriate items that show the disposition of the request.
13. **Actual Processing Costs:** actual costs of time spent by each person involved in processing this request. Complete all items. Include computer-based data costs in the block entitled "other."
14. **Copying Costs:** cost for photocopying the responsive records. Complete all applicable items. Copying costs are \$.10 per page.
15. **Mailing Costs:** input postage and special handling, such as certification of records.
16. **Total Actual Costs:** summation of totals for actual processing, copying and mailing costs.
17. **Invoiceable Fees:** different from actual costs. They are based upon the HHS fee schedule for search, review and copying activities.
18. **Total Invoiceable Fees:** summation of search, review and copying fees.
19. **Fees charged:** responding office tallies. If invoiceable fee is \$15.00 or more, invoice the requester.
20. **Fees waived:** If invoiceable fee is less than \$15.00, do not invoice requester. Insert amount waived in this block.
21. **Name, Phone Number and Component of Person Who Searched For/Compiled Records:** be specific; give name and title of person who searched, their component, address and phone number.

*U.S. GPO: 2004-670-853/80018

IMPORTANT: RETURN A COPY OF THIS INVOICE WITH REMITTANCE

INVOICE OF FEES FOR FOIA SERVICES

*CASE NUMBER	DATE
--------------	------

MATERIAL REQUESTED

CHARGE TO	NAME OF REQUESTOR		
	ORGANIZATION		
	STREET ADDRESS		
	CITY	STATE	ZIP CODE

	NUMBER	CHARGE
REPRODUCTION		
EACH PAGE 10 ¢		
OTHER (e.g. COMPUTER PRINTOUT)		
SEARCH FEES; Per hour (Based on Salary of Searcher as per 45 CFR 5.43)		
Level 1		
Level 2		
Level 3		
REVIEW FEES; Per hour (Based on Salary of Reviewer as per 45 CFR 5.43)		
Level 1		
Level 2		
Level 3		
SPECIAL SERVICES;		
CERTIFICATION (\$10.00)		
RETURN RECEIPT (\$1.35)		
OTHER		
	PAY TOTAL OF	\$

Questions regarding enclosed material or charges, call:

MAKE CHECK OR MONEY ORDER PAYABLE TO: CENTERS FOR MEDICARE & MEDICAID SERVICES AND REMIT WITH A COPY OF THIS INVOICE TO:

CENTERS FOR MEDICARE & MEDICAID SERVICES
 DIVISION OF ACCOUNTING
 P.O. BOX 7520
 BALTIMORE, MD 21207-0520

*PLEASE INCLUDE THE CASE NUMBER ON YOUR CHECK OR MONEY ORDER

Enclosed is payment of \$ _____ by check _____ money order _____

Reverse Side

If payment is not made within 30 days of the date of this invoice, interest and administrative costs will be assessed and future requests for information will not be honored until payment is made. Your name and account information will be turned over to a private collection agency and credit bureau if your account becomes 60 days overdue and associated costs will be added to the account. Additional penalties of six percent will be assessed on accounts delinquent for more than 90 days and such accounts may be referred to the IRS or the Justice Department for judicial action. (The Debt Collection Act of 1982.)

FREEDOM OF INFORMATION ACT EXEMPTIONS

SUBSECTION OF TITLE 5, UNITED STATES CODE, SECTION 552

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

**INTERMEDIARY/CARRIER/CENTRAL OFFICE COMPONENT
SUMMARY SHEET FOR THE CMS MONTHLY FOIA REPORT**

*Data on this Summary Sheet is a summation of the data from all Forms
CMS-632-FOI completed during the month.*

INSTRUCTIONS

- 1) Enter the month and year that this summary sheet covers.
- 2) Enter, in the applicable space, appropriate identifying information concerning your unit.
- 3) Enter the total number of 632s completed during the identified month.
- 4) Enter the number of times the 632s showed a request was closed by the cited action.
- 5) Enter the total of all staff hours used during the identified month. Use only whole numbers and fractions or decimals, e.g., 102 ½ or 102.25, not 102 hours and fifteen minutes.
- 6) Enter the total of actual cost figures, based on the salaries of the staff involved.
- 7) Enter the total of copying charges.
- 8) Enter the mailing/postage costs.
- 9) Enter the total dollar amount of fees charged. This figure is not the same as actual costs.
- 10) Enter the total of all fees waived. (Unless the FOI Officer, CMS has granted a waiver, this figure is a compilation of all fees which were waived because they were lower than CMS's \$15.00 threshold).
- 11) Enter the name, office and address of the person who completed this summary sheet.
- 12) Enter the date the summary sheet was completed.

PLEASE FILL OUT COMPLETELY

- 1) MONTH: _____ YEAR: _____
- 2) INTERMEDIARY/CARRIER: _____
CENTRAL OFFICE COMPONENT: _____
- 3) Total 632s: _____
- 4) Actions: _____ Direct Reply (Records Sent) _____ No Records Found
 _____ Request Withdrawn _____ Not FOIA
 _____ Records Not Reasonably Described _____ Subpoena Denial
 _____ Fee Related Closure _____ Other
- 5) Staff Hours: _____
- 6) Staff Charges: _____
- 7) Copy Charges: _____
- 8) Postage: _____
- 9) Fees Charged: _____
- 10) Fees Waived: _____
- 11) Name/Phone: _____
Office: _____
Address: _____
- 12) Date: _____

Exhibit I

HCFA REGIONAL OFFICE MONTHLY FOIA REPORT

REGION NAME AND NUMBER: _____

MONTH / YEAR: _____

	TOTAL 632S	DR	RW	RNRD	FRC	NRF	NF	SD	OTHER	STAFF HOURS	STAFF CHARGES (INCLUDES COMPUTER BASED COSTS)	COPY CHARGES	POSTAGE	FEES CHARGED	FEES WAIVED
REGIONAL OFFICE															
ENTITY 1															
ENTITY 2															
ENTITY 3															
ENTITY 4															
ENTITY 5															
ENTITY 6															
ENTITY 7															
ENTITY 8															
ENTITY 9															
ENTITY 10															
ENTITY 11															
ENTITY 12															
ENTITY 13															
ENTITY 14															
TOTALS	0	0	0	0	0	0	0	0	0	0	\$ -	\$ -	\$ -	\$ -	\$ -

FOIA COORDINATOR NAME: _____
 PHONE NUMBER: _____
 ADDRESS: _____
 FAX: _____

KEY

- DR - DIRECT REPLY (RECORDS SENT)
- RW - REQUEST WITHDRAWN
- RNRD - RECORDS NOT REASONABLY DESCRIBED
- FRC - FEE RELATED CLOSURE
- NRF - NO RECORDS FOUND
- NF - NOT FOIA
- SD - SUBPOENA DENIAL
- OTHER - CLOSURES FOR ANY OTHER REASON NOT CITED

**Instructions for Completing the CMS Regional Office
Summary Sheet for the CMS Monthly FOIA Report**

Enter appropriate identifying information at the head of the form, i.e., Regional Office name and number, and the month and year the monthly report covers.

- 1) **REGIONAL OFFICE** - The totals at this line are Regional Office totals, only.
- 2) **ENTITY** - List each individual contractor within your jurisdiction as a separate entity.

For each entity listed, provide the following:

- 3) **TOTAL 632s** - enter the total number of 632s completed during the identified month.
- 4) **DR** - Enter the total number of times requests were closed by directly releasing responsive records.
- 5) **RW** - Enter the total number of times requests were withdrawn during the month.
- 6) **RNRD** - Enter the total number of times requests were closed because the records were not reasonably described within the request.
- 7) **FRC** - Enter the total number to times requests were closed due to a fee-related reason, i.e., requester's failure to pay a delinquent account or to make an advance payment.
- 8) **NRF** - Enter the total number of times a "no records found" response was provided to the requester.
- 9) **Not FOIA** - Enter the total number of times a request was not a FOIA request, and, therefore, was not processed under FOIA rules.
- 10) **SD** - Enter the total number of times a subpoena denial response was issued.
- 11) **Other** - Enter the total number of times a request was closed for reasons other than those specified above.
- 12) **Staff Hours** - Enter the total of all staff hours used during the identified month. Use only whole numbers and fractions or decimals, e.g., 102 1/4 or 102.25, not 102 hours and 15 minutes.
- 13) **Staff Charges** - Enter the total of actual cost figures, based on the salaries of the staff involved.
- 14) **Copy Charges** - Enter the total of copying charges.
- 15) **Mailing/Postage Cost** - Enter the mailing/postage cost.
- 16) **Fees Assessed** - Enter the total dollar amount of fees assessed. This figure is not the same as the actual costs.
- 17) **Fees Waived** - Enter the total of all fees waived. (Unless the Freedom of Information Officer, CMS has granted a waiver, this figure is a compilation of all fees which were waived because they were lower than CMS's \$15.00 threshold.)
- 18) **FOIA Coordinator Name, Phone Number, Address, Fax** - be specific; give identifying information on the person who completed the report.

Month of: _____

FREEDOM OF INFORMATION REQUEST LOG

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Case Number	Date of Incoming Letter	Requester's Name	Subject of Request	Date Received	Date Released	Billed Amount