

§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,

45 CFR Subtitle A (10-1-06 Edition)

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

§ 5.21

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. In-

45 CFR Subtitle A (10–1–06 Edition)

clude your telephone number(s) to help 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