specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise as a Food and Drug Administration employee.

PART 20—PUBLIC INFORMATION

Subpart A—Official Testimony and Information

Sec.

Subpart B—General Policy

Subpart C—Procedures and Fees

Subpart D—Exemptions

Subpart E—Limitations on Exemptions

Subpart F—Availability of Specific Categories of Records

AUTHORITY: 5 U.S.C. 552; 18 U.S.C. 1905; 19 U.S.C. 2531–2582; 21 U.S.C. 321–393, 1401–1403; 42 U.S.C. 241, 242, 242a, 242l, 242n, 243, 262, 263, 263b–263n, 264, 265, 300u–300u–5, 300aa–1.

SOURCE: 42 FR 15616, Mar. 22, 1977, unless otherwise noted.

Subpart A—Official Testimony and Information

§ 20.1 Testimony by Food and Drug Administration employees.

(a) No officer or employee of the Food and Drug Administration or of any other office or establishment in the Department of Health and Human Services, except as authorized by the Commissioner of Food and Drugs pursuant to this section or in the discharge of his official duties under the laws administered by the Food and Drug Administration, shall give any testimony before any tribunal pertaining to any function of the Food and Drug Administration or with respect to any information acquired in the discharge of his official duties.

(b) Whenever a subpoena, in appropriate form, has been lawfully served upon an officer or employee of the Food and Drug Administration commanding the giving of any testimony, such officer or employee shall, unless otherwise authorized by the Commissioner, appear in response thereto and respectfully decline to testify on the grounds that it is prohibited by this section.

(c) A person who desires testimony from any employee may make written request therefor, verified by oath, directed to the Commissioner setting forth his interest in the matter sought to be disclosed and designating the use to which such testimony will be put in the event of compliance with such request: *Provided,* That a written request therefor made by a health, food, or drug officer, prosecuting attorney, or member of the judiciary of any State, Territory, or political subdivision thereof, acting in his official capacity, need not be verified by oath. If it is determined by the Commissioner, or any other officer or employee of the Food and Drug Administration whom he may designate to act on his behalf for the purpose, that such testimony will be in the public interest and will promote the objectives of the act and the agency, the request may be granted. Where a request for testimony is granted, one or more employees of the Food and Drug Administration may be designated to appear, in response to a subpoena, and testify with respect thereto.

§ 20.2 Production of records by Food and Drug Administration employees.

(a) Any request for records of the Food and Drug Administration, whether it be by letter or by a subpena duces tecum or by any other writing, shall be handled pursuant to the procedures established in subpart B of this part, and shall comply with the rules governing public disclosure established in subparts C, D, E, and F of this part and in other regulations cross-referenced in § 20.100(c).

(b) Whenever a subpoena duces tecum, in appropriate form, has been lawfully served upon an officer or employee of the Food and Drug Administration commanding the production of any record, such officer or employee shall appear in response thereto, respectfully decline to produce the record on the ground that it is prohibited by this section, and state that the production of the record(s) involved will be handled by the procedures established in this part.

§ 20.3 Certification and authentication of Food and Drug Administration records.

(a) Upon request, the Food and Drug administration will certify the authenticity of copies of records that are requested to be disclosed pursuant to this part or will authenticate copies of records previously disclosed.

(b) A request for certified copies of records or for authentication of records shall be sent in writing to the Division of Freedom of Information at the address located on the agency's web site at *http://www.fda.gov*.

[42 FR 15616, Mar. 22, 1977, as amended at 46 FR 8456, Jan. 27, 1981; 76 FR 31469, June 1, 2011; 79 FR 68114, Nov. 14, 2014]

Subpart B—General Policy

§ 20.20 Policy on disclosure of Food and Drug Administration records.

(a) The Food and Drug Administration (FDA) will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the property rights of persons in trade secrets and confidential commercial or financial information, and the need for the Agency to promote frank internal policy deliberations and to pursue its regulatory activities without disruption.

(b) Except where specifically exempt pursuant to the provisions of this part, all FDA records shall be made available for public disclosure. FDA will withhold requested information only if:

(1) The Agency reasonably foresees that disclosure would harm an interest protected by an exemption described in this part; or

(2) Disclosure is prohibited by law.

(c) Except as provided in paragraph (d) of this section, all nonexempt records shall be made available for public disclosure upon request regardless of whether any justification or need for such records have been shown.

(d) Under § 21.71 of this chapter, a statement of the purposes to which the record requested is to be put, and a certification that the record will be so used, may be requested when:

(1) The requested record is contained in a Privacy Act Record System as defined in § 21.3(c) of this chapter;

(2) The requester is a person other than the individual who is the subject of the record that is so retrieved or a person acting on his behalf; and

(3) The disclosure is one that is discretionary; *i.e.*, not required under this part.

(e) ''Record'' and any other term used in this part in reference to information includes any information that would be an Agency record subject to the requirements of this part when maintained by the Agency in any format, including an electronic format.

(f) FDA will establish procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting and indexing such records in a publicly accessible electronic format.

[87 FR 55911, Sept. 13, 2022]

§ 20.21 Uniform access to records.

Any record of the Food and Drug Administration that is disclosed in an authorized manner to any member of the public is available for disclosure to all members of the public, except that:

(a) Data and information subject to the exemptions established in § 20.61 for trade secrets and confidential commercial or financial information, and in § 20.63 for personal privacy, shall be disclosed only to the persons for the protection of whom these exemptions exist.

(b) The limited disclosure of records permitted in § 7.87(c) of this chapter for section 305 hearing records, in § 20.80(b) regarding certain limitations on exemptions, in § 20.103(b) for certain correspondence, and in § 20.104(b) for certain summaries of oral discussions, shall be subject to the special rules stated therein.

(c) Disclosure of a record about an individual, as defined in § 21.3(a) of this chapter, that is retrieved by the individual's name or other personal identifier and is contained in a Privacy Act Record System, as defined in § 21.3(c) of this chapter, shall be subject to the special requirements of part 21 of this chapter. Disclosure of such a record to an individual who is the subject of the record does not invoke the rule established in this section that such records

shall be made available for disclosure to all members of the public.

[42 FR 15616, Mar. 22, 1977, as amended at 54 FR 9037, Mar. 3, 1989]

§ 20.22 Partial disclosure of records.

(a) If a record contains both disclosable and nondisclosable information, the nondisclosable information will be deleted and the remaining record will be disclosed unless the two are so inextricably intertwined that it is not feasible to separate them or release of the disclosable information would compromise or impinge upon the nondisclosable portion of the record.

(b)(1) Whenever information is deleted from a record that contains both disclosable and nondisclosable information, the amount of information deleted shall be indicated on the portion of the record that is made available, unless including that indication would harm an interest protected by an exemption under the Freedom of Information Act.

(2) When technically feasible, the amount of information deleted shall be indicated at the place in the record where the deletion is made.

(3) The exemption(s) under which the information has been deleted shall be noted at the site of the deletion.

[42 FR 15616, Mar. 22, 1977, as amended at 68 FR 25285, May 12, 2003; 87 FR 55911, Sept. 13, 2022]

§ 20.23 Request for existing records.

(a) Any written request to the Food and Drug Administration for existing records not prepared for routine distribution to the public shall be deemed to be a request for records pursuant to the Freedom of Information Act, whether or not the Freedom of Information Act is mentioned in the request, and shall be governed by the provisions of this part.

(b) Records or documents prepared by the Food and Drug Administration for routine public distribution, e.g., pamphlets, speeches, and educational materials, shall be furnished free of charge upon request as long as the supply lasts. The provisions of this part shall not be applicable to such requests except when the supply of such material is exhausted and it is necessary to reproduce individual copies upon specific request.

(c) All existing Food and Drug Administration records are subject to routine destruction according to standard record retention schedules.

§ 20.24 Preparation of new records.

(a) The Freedom of Information Act and the provisions of this part apply only to existing records that are reasonably described in a request filed with the Food and Drug Administration pursuant to the procedures established in subpart C of this part.

(b) The Commissioner may, in his discretion, prepare new records in order to respond adequately to a request for information when he concludes that it is in the public interest and promotes the objectives of the act and the agency.

§ 20.25 Retroactive application of regulations.

The provisions of this part apply to all records in Food and Drug Administration files.

§ 20.26 Electronic availability and indexes of certain records.

(a) Indexes shall be maintained, and revised at least quarterly, and, as required, copies of electronic records shall be made available for the following Food and Drug Administration records:

(1) Final orders published in the FEDERAL REGISTER with respect to every denial or withdrawal of approval of a new drug application or a new animal drug application for which a public hearing has been requested.

(2) Statements of policy and interpretation adopted by the agency and still in force and not published in the FEDERAL REGISTER.

(3) Administrative staff manuals and instructions to staff that affect a member of the public.

(4) Records that have been released to any person in response to a Freedom of Information request, and that:

(i) The Agency has determined have become, or are likely to become, the subject of subsequent Freedom of Information requests for substantially the same records; or

(ii) Have been requested three or more times under the Freedom of Information Act.

(b) Each such record and index will be made available by accessing the Agency's website at *https://www.fda.gov*. A printed copy of each index is available by writing or visiting the Freedom of Information Staff's address on the Agency's website at *https://www.fda.gov*.

[42 FR 15616, Mar. 22, 1977, as amended at 46 FR 8456, Jan. 27, 1981; 68 FR 25285, May 12, 2003; 76 FR 31469, June 1, 2011; 79 FR 68114, Nov. 14, 2014; 87 FR 55911, Sept. 13, 2022]

§ 20.27 Submission of records marked as confidential.

Marking records submitted to the Food and Drug Administration as confidential, or with any other similar term, raises no obligation by the Food and Drug Administration to regard such records as confidential, to return them to the person who has submitted them, to withhold them from disclosure to the public, or to advise the person submitting them when a request for their public disclosure is received or when they are in fact disclosed.

[42 FR 15616, Mar. 22, 1977, as amended at 68 FR 25285, May 12, 2003]

§ 20.28 Food and Drug Administration determinations of confidentiality.

A determination that data or information submitted to the Food and Drug Administration will be held in confidence and will not be available for public disclosure shall be made only in the form of a regulation published or cross-referenced in this part.

[42 FR 15616, Mar. 22, 1977, as amended at 68 FR 25285, May 12, 2003]

§ 20.29 Prohibition on withdrawal of records from Food and Drug Administration files.

No person may withdraw records submitted to the Food and Drug Administration. All Food and Drug Administration records shall be retained by the agency until disposed of pursuant to routine record disposal procedures.

[42 FR 15616, Mar. 22, 1977, as amended at 68 FR 25285, May 12, 2003]

§ 20.30 Food and Drug Administration Division of Freedom of Information.

(a) The office responsible for Agency compliance with the Freedom of Information Act and this part is the Division of Freedom of Informationat the address located on the agency's web site at *http://www.fda.gov*.

(b) All requests for Agency records shall be sent in writing to this office.

[76 FR 31469, June 1, 2011, as amended at 79 FR 68114, Nov. 14, 2014]

§ 20.31 Retention schedule of requests for Food and Drug Administration records.

(a) Unless unusual circumstances dictate otherwise, the Food and Drug Administration shall maintain and dispose of files of requests and reponses furnished thereto within the time limits authorized by GSA General Records Schedule 14, FPMR 101–11–4, January 10, 1977, as follows:

(1) Files created by the receipt of and response to freedom of information requests, except denials and/or appeals, may be destroyed 2 years from date of final response.

(2) Files created by a freedom of information request which was wholly or partially denied may be destroyed 5 years after the denial letter was issued.

(3) Files created by a freedom of information request which was wholly or partially denied and which denial was subsequently appealed to the Department of Health and Human Services may be destroyed 4 years after final determination by FDA or 3 years after final adjudication by courts, whichever is later.

(b) This destruction schedule will automatically be revised whenever the time limits pertaining to these records are revised by the GSA General Records Schedule.

[47 FR 24277, June 4, 1982]

§ 20.32 Disclosure of Food and Drug Administration employee names.

The names of Food and Drug Administration employees will not be deleted from disclosable records except where such deletion is necessary to prevent disclosure of an informant or danger to

the life or physical safety of the employee or under other extraordinary circumstances.

§ 20.33 Form or format of response.

(a) The Food and Drug Administration shall make reasonable efforts to provide a record in any requested form or format if the record is readily reproducible by the agency in that form or format.

(b) If the agency determines that a record is not readily reproducible in the requested form or format, the agency may notify the requester of alternative forms and formats that are available. If the requester does not express a preference for an alternative in response to such notification, the agency may provide its response in the form and format of the agency's choice.

(c) Response letters shall contain contact information for the Freedom of Information Act (FOIA) Public Liaison and the Office of Government Information Services.

[68 FR 25285, May 12, 2003, as amended at 87 FR 55912, Sept. 13, 2022]

§ 20.34 Search for records.

(a) In responding to a request for records, the Food and Drug Administration shall make reasonable efforts to search for records kept in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information systems.

(b) The term ''search'' means to review, manually or by automated means, agency records for the purpose of locating those records that are responsive to the request.

[68 FR 25285, May 12, 2003]

Subpart C—Procedures and Fees

§ 20.40 Filing a request for records.

(a) All requests for Food and Drug Administration records shall be made in writing by mailing or delivering the request to the Freedom of Information Staff at the address on the Agency's website at *https://www.fda.gov*, by faxing it to the fax number listed on the Agency's website at *https://www.fda.gov*, or by submission through the Agency's online FOIA submission portal at *https://www.fda.gov*. All requests must contain the postal address and telephone number of the requester and the name of the person responsible for payment of any fees that may be charged.

(b) A request for Food and Drug Administration records shall reasonably describe the records being sought, in a way that they can be identified and located. A request should include all pertinent details that will help identify the records sought.

(1) If the description is insufficient to locate the records requested, the Food and Drug Administration will so notify the person making the request and indicate the additional information needed to identify the records requested.

(2) Every reasonable effort shall be made by the Food and Drug Administration to assist in the identification and location of the records sought.

(c) Upon receipt of a request for records, the Division of Freedom of Information shall enter it in a public log. The log shall state the date received, the name of the person making the request, the nature of the record requested, the action taken on the request, the date of determination letter sent pursuant to § 20.41(b), and the date(s) any records are subsequently furnished.

(d) A request by an individual, as defined in § 21.3(a) of this chapter, for a record about himself shall be subject to:

(1) The special requirements of part 21 of this chapter (the privacy regulations), and not to the provisions of this subpart, if the record requested is retrieved by the individual's name or other personal identifier and is contained in a Privacy Act Record System, as defined in § 21.3(c) of this chapter.

(2) The provisions of this subpart if the record requested is not retrieved by the individual's name or other personal identifier, whether or not the record is contained in a Privacy Act Record System.

[42 FR 15616, Mar. 22, 1977, as amended at 46 FR 8456, Jan. 27, 1981; 68 FR 25285, May 12, 2003; 76 FR 31469, June 1, 2011; 79 FR 68114, Nov. 14, 2014; 87 FR 55912, Sept. 13, 2022]

§ 20.41 Time limitations.

(a) All time limitations prescribed pursuant to this section shall begin as of the time at which a request for records is logged in by the Division of Freedom of Information pursuant to § 20.40(c). An oral request for records shall not begin any time requirement. A written request for records sent elsewhere within the agency shall not begin any time requirement until it is redirected to the Division of Freedom of Information and is logged in there in accordance with § 20.40(c).

(b) Within 20 working days (excluding Saturdays, Sundays, and legal public holidays) after a request for records is logged in at the Division of Freedom of Information, the agency shall send a letter to the requester providing the agency's determination as to whether, or the extent to which, the agency will comply with the request, and, if any records are denied, the reasons for the denial.

(1) If all of the records requested have been located and a final determination has been made with respect to disclosure of all of the records requested, the letter shall so state.

(2) If all of the records have not been located or a final determination has not yet been made with respect to disclosure of all of the records requested, e.g., because it is necessary to consult the person affected pursuant to § 20.47, the letter shall state the extent to which the records involved shall be disclosed pursuant to the rules established in this part.

(3)(i) In unusual circumstances, the agency may extend the time for sending the letter for an additional period.

(A) The Agency may provide for an extension of up to 10 working days by providing written notice to the requester setting out the reasons for the extension and the date by which a determination is expected to be sent. In the written notice, the Agency will inform the requester of the right to contact the Freedom of Information Act Public Liaison and to seek dispute resolution services from the Office of Government Information Services.

(B) The agency may provide for an extension of more than 10 working days by providing written notice to the requester setting out the reasons for the extension. The notice also will give the requester an opportunity to limit the scope of the request so that it may be processed in a shorter time and/or an opportunity to agree on a timeframe longer than the 10 extra working days for processing the request.

(ii) Unusual circumstances may exist under any of the following conditions:

(A) There is a need to search for and collect the requested records from field facilities or other components that are separate from the agency component responsible for processing the request;

(B) There is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or

(C) There is need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the Food and Drug Administration having substantial subject-matter interest in the determination.

(4) The Agency may contact the requester for clarification about the request or regarding fee assessment. The Agency may toll the 20-day period as follows:

(i) One time while it is awaiting a response from the requester regarding clarification that it has reasonably requested from the requester; and

(ii) One or more times while the Agency is awaiting a response from the requester regarding fee assessment.

(5) If any record is denied, the letter shall state the right of the person requesting such record to appeal any adverse determination to the appropriate review official, in accordance with the provisions of 45 CFR 5.62.

(c) The Food and Drug Administration shall provide a determination of whether to provide expedited processing within 10 calendar days of receipt by the Division of Freedom of Information of the request and the required documentation of compelling need in accordance with § 20.44(b).

(d) If a court determines that exceptional circumstances exist, as defined by the Freedom of Information Act, the Agency's failure to comply with a time limit shall be excused for the

length of time provided by the court order.

[42 FR 15616, Mar. 22, 1977, as amended at 46 FR 8456, Jan. 27, 1981; 55 FR 1405, Jan. 16, 1990; 59 FR 533, Jan. 5, 1994; 68 FR 25285, May 12, 2003; 76 FR 31469, June 1, 2011; 87 FR 55912, Sept. 13, 2022]

§ 20.42 Aggregation of certain requests.

The Food and Drug Administration may aggregate certain requests by the same requester, or by a group of requesters acting in concert, if the requests involve clearly related matters and the agency reasonably believes that such requests actually constitute a single request which would otherwise satisfy the unusual circumstances specified in § 20.41(b)(3)(ii)(B). FDA may extend the time for processing aggregated requests in accordance with the unusual circumstances provisions of § 20.41.

[68 FR 25286, May 12, 2003]

§ 20.43 Multitrack processing.

(a) Each Food and Drug Administration component is responsible for determining whether to use a multitrack system to process requests for records maintained by that component. A multitrack system provides two or more tracks for processing requests, based on the amount of work and/or time required for a request to be processed. The availability of multitrack processing does not affect expedited processing in accordance with § 20.44.

(b) If multitrack processing is not adopted by a particular agency component, that component will process all requests in a single track, ordinarily on a first-in, first-out basis.

(c) If a multitrack processing system is established by a particular agency component, that component may determine how many tracks to establish and the specific criteria for assigning requests to each track. Multiple tracks may be established for requests based on the amount of work and/or time required for a request to be processed.

(d) Requests assigned to a given track will ordinarily be processed on a first-in, first-out basis within that track.

(e) If a request does not qualify for the fastest processing track, the requester may be provided an opportunity to limit the scope of the request in order to qualify for faster processing.

[68 FR 25286, May 12, 2003]

§ 20.44 Expedited processing.

(a) The Food and Drug Administration will provide expedited processing of a request for records when the requester demonstrates a compelling need, or in other cases as determined by the agency. A compelling need exists when:

(1) A failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) With respect to a request made by a person primarily engaged in disseminating information, there is a demonstrated urgency to inform the public concerning actual or alleged Federal Government activity.

(b) A request for expedited processing made under paragraph (a)(1) of this section must be made by the specific individual who is subject to an imminent threat, or by a family member, medical or health care professional, or other authorized representative of the individual, and must demonstrate a reasonable basis for concluding that failure to obtain the requested records on an expedited basis could reasonably be expected to pose a specific and identifiable imminent threat to the life or safety of the individual.

(c) A request for expedited processing made under paragraph (a)(2) of this section must demonstrate that:

(1) The requester is primarily engaged in disseminating information to the general public and not merely to a narrow interest group;

(2) There is an urgent need for the requested information and that it has a particular value that will be lost if not obtained and disseminated quickly; however, a news media publication or broadcast deadline alone does not qualify as an urgent need, nor does a request for historical information; and

(3) The request for records specifically concerns identifiable operations or activities of the Federal Government.

(d) All requests for expedited processing shall be filed in writing as provided by § 20.40. Each such request shall include information that demonstrates a reasonable basis for concluding that a compelling need exists within the meaning of paragraph (a) of this section and a certification that the information provided in the request is true and correct to the best of the requester's knowledge and belief. Any statements made in support of a request for expedited processing are subject to the False Reports to the Government Act (18 U.S.C. 1001).

(e) The Director, Division of Freedom of Information, (or delegatee) will determine whether to grant a request for expedited processing within 10 days of receipt by the Division of Freedom of Information of all information required to make a decision.

(f) If the agency grants a request for expedited processing, the agency shall process the request as soon as practicable.

(g) If the agency denies a request for expedited processing, the agency shall process the request with other nonexpedited requests.

(h) If the agency denies a request for expedited processing, the requester may appeal the agency's decision by writing to the official identified in the denial letter.

[68 FR 25286, May 12, 2003, as amended at 76 FR 31469, June 1, 2011; 87 FR 55912, Sept. 13, 2022]

§ 20.45 Fees to be charged.

(a) *Categories of requests.* Paragraphs (a) (1) through (3) of this section state, for each category of request, the type of fees that the Food and Drug Administration will generally charge. However, for each of these categories, the fees may be limited, waived, or reduced for the reasons given in paragraphs (b) and (c) of this section and in § 20.46 or for other reasons.

(1) *Commercial use request.* If the request is for a commercial use, the Food and Drug Administration will charge for the costs of search, review, and duplication. The Agency shall not assess search fees if the Agency fails to comply with any time limit, as described in § 20.41, if no unusual or exceptional circumstances apply to the processing of the request. If unusual circumstances, as outlined in § 20.41, apply and more than 5,000 pages are responsive to the request, the Food and Drug Administration may charge search fees if timely written notice has been made to the requester and the Agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(2) *Educational and scientific institutions and news media.* If the request is from an educational institution or a noncommercial scientific institution, operated primarily for scholarly or scientific research, or a representative of the news media, and the request is not for a commercial use, the Food and Drug Administration will charge only for the duplication of documents. Also, the Food and Drug Administration will not charge the copying costs for the first 100 pages of duplication (or its cost equivalent of other media). The Agency shall not assess duplication fees if the Agency fails to comply with any time limit, as described in § 20.41, if no unusual or exceptional circumstances apply to the processing of the request. If unusual circumstances, as outlined in § 20.41, apply and more than 5,000 pages are responsive to the request, the Food and Drug Administration may charge duplication fees if timely written notice has been made to the requester and the Agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(3) *Other requests.* If the request is not the kind described in paragraph (a)(1) or (a)(2) of this section, then the Food and Drug Administration will charge only for the search and the duplication. Also, the Food and Drug Administration will not charge for the first 2 hours of search time or for the copying costs of the first 100 pages of duplication (or the cost equivalent of other media). The Agency shall not assess search or duplication fees if the Agency fails to comply with any time limit, as described in § 20.41, if no unusual or exceptional circumstances apply to the

processing of the request. If unusual circumstances, as outlined in § 20.41, apply and more than 5,000 pages are responsive to the request, the Food and Drug Administration may charge search or duplication fees if timely written notice has been made to the requester and the Agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(b) *General provisions.* (1) The Food and Drug Administration may charge search fees even if the records found are exempt from disclosure or if no records are found.

(2) If, under paragraph (a)(3) of this section, there is no charge for the first 2 hours of search time, and those 2 hours are spent on a computer search, then the 2 free hours are the first 2 hours of the operator's own operation. If the operator spends less than 2 hours on the search, the total search fees will be reduced by the average hourly rate for the operator's time, multiplied by 2.

(3) If, under paragraph (a)(2) or (a)(3) of this section, there is no charge for the first 100 pages of duplication, then those 100 pages are the first 100 pages of photocopies of standard size pages, or the first 100 pages of computer printout. If this method to calculate the fee reduction cannot be used, then the total duplication fee will be reduced by the normal charge for photocopying a standard size page, multiplied by 100.

(4) No charge will be made if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee.

(5) If it is determined that a requester (acting either alone or together with others) is breaking down a single request into a series of requests in order to avoid (or reduce) the fees charged, all these requests may be aggregated for purposes of calculating the fees charged.

(6) Interest will be charged on unpaid bills beginning on the 31st day following the day the bill was sent. Provisions in 45 CFR part 30, the Department of Health and Human Services regulations governing claims collection, will be used in assessing interest, administrative costs, and penalties, and in taking actions to encourage payment.

(7) Requesters may contact Agency Freedom of Information Act staff or the Freedom of Information Act Public Liaison to assist in reformulating a request to meet their needs at lower cost.

(c) *Fee schedule.* The Food and Drug Administration charges the following fees in accordance with the regulations of the Department of Health and Human Services at 45 CFR part 5.

(1) *Manual searching for or reviewing of records.* When the search or review is performed by employees at grade GS–1 through GS–8 (or equivalent), an hourly rate based on the salary of a GS–5, step 7, employee; when done by a GS–9 through GS–14 (or equivalent), an hourly rate based on the salary of a GS–12, step 4, employee; and when done by a GS–15 or above (or equivalent), 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 specified grade and step in the General Schedule Locality Pay Table for the Locality of Washington-Baltimore-Northern Virginia, DC–MD–VA–WV–PA, adding 16 percent of that rate to cover benefits, and rounding to the nearest whole dollar. When a search involves employees at more than one of these levels, the Food and Drug Administration will charge the rate appropriate for each.

(2) *Electronic searching.* Charges for the time spent by the operator to search the computer, database, or network, including development of any specialized programming required to perform the search, at the rate given in paragraph (c)(1) of this section plus the cost of any materials.

(3) *Photocopying standard size pages.* $0.10 per page. Freedom of Information Officers may charge lower fees for particular documents where:

(i) The document has already been printed in large numbers;

(ii) The program office determines that using existing stock to answer this request, and any other anticipated Freedom of Information requests, will not interfere with program requirements; and

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

(4) *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 (c)(1) of this section.

(5) *Certifying that records are true copies.* This service is not required by the Freedom of Information Act. If the Food and Drug Administration agrees to provide certification, there is a $10 charge per certification.

(6) *Sending records by express mail or other special methods.* This service is not required by the Freedom of Information Act. If the Food and Drug Administration agrees to provide this service, the requester will be required to directly pay, or be directly charged by, the courier. The agency will not agree to any special delivery method that does not permit the requester to directly pay or be directly charged for the service.

(7) *Performing any other special service in connection with a request to which the Food and Drug Administration has agreed.* Actual costs of operating any machinery, plus actual cost of any materials used, plus charges for the time of the Food and Drug Administration's employees, at the rates given in paragraph (c)(1) of this section.

(d) *Procedures for assessing and collecting fees*—(1) *Agreement to pay.* The Food and Drug Administration generally assumes that a requester is willing to pay the fees charged for services associated with the request. The requester may specify a limit on the amount to be spent. If it appears that the fees will exceed the limit, the Food and Drug Administration will consult the requester to determine whether to proceed with the search.

(2) *Advance payment.* If a requester has failed to pay previous bills in a timely fashion, or if the Food and Drug Administration's initial review of the request indicates that the charges will exceed $250, the requester will be required to pay past due fees and/or the estimated fees, or a deposit, before the search for the requested records begins. In such cases, the requester will be notified promptly upon receipt of the request, and the administrative time limits prescribed in § 20.41 will begin only after there is an agreement with the requester over payment of fees, or a decision that fee waiver or reduction is appropriate.

(3) *Billing and payment.* Ordinarily, the requester will be required to pay all fees before the Food and Drug Administration will furnish the records. At its discretion, the Food and Drug Administration may send the requester a bill along with or following the records. For example, the Food and Drug Administration may do this if the requester has a history of prompt payment. The Food and Drug Administration may also, at its 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, the Food and Drug Administration 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 the request.

[59 FR 533, Jan. 5, 1994. Redesignated and amended at 68 FR 25286, May 12, 2003; 87 FR 55912, Sept. 13, 2022]

§ 20.46 Waiver or reduction of fees.

(a) *Standard.* The Assistant Commissioner for Public Affairs (or delegatee) will waive or reduce the fees that would otherwise be charged if disclosure of the information meets both of the following tests:

(1) 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.

(b) *Public interest.* Disclosure of information satisfies 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, the

Food and Drug Administration will consider the following factors:

(1) Whether the records to be disclosed pertain to the operations or activities of the Federal Government;

(2) Whether disclosure of the records would reveal any meaningful information about Government operations or activities that is not already public knowledge;

(3) Whether disclosure will advance the understanding of the general public as distinguished from a narrow segment of interested persons. Under this factor, the Food and Drug Administration may consider whether the requester is in a position to contribute to public understanding. For example, the Food and Drug Administration 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 to 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; and

(4) Whether the contribution to public understanding will be a significant one, i.e., 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 disclosure passes the test of furthering the specific public interest described in paragraph (b) of this section, the Food and Drug Administration will determine whether disclosure 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, the Food and Drug Administration will consider the following factors:

(1) Whether disclosure would 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. Both profit and nonprofit-making corporations have commercial interests, as well as 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, whether that effect outweighs the advancement of the public interest as defined in paragraph (b) of this section.

(d) *Deciding between waiver and reduction.* If the disclosure of the information requested passes both tests described in paragraphs (b) and (c) of this section, the Food and Drug Administration will normally waive fees. However, in some cases the Food and Drug Administration may decide only to reduce the fees. For example, the Food and Drug Administration 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.* A requester must request a waiver or reduction of fees at the same time as the request for records. The requester should explain why a waiver or reduction is proper under the factors set forth in paragraphs (a) through (d) of this section. Only the Associate Commissioner for Public Affairs may make the decision whether to waive or reduce the fees. If the Food and Drug Administration does not completely grant the request for a waiver or reduction, the denial letter will designate a review official. The requester may appeal the denial to that official. The appeal letter should address reasons for the Associate Commissioner's decision that are set forth in the denial letter.

[59 FR 534, Jan. 5, 1994. Redesignated and amended at 68 FR 25286, 25287, May 12, 2003]

§ 20.47 Situations in which confidentiality is uncertain.

In situations where the confidentiality of data or information is uncertain and there is a request for public disclosure, the Food and Drug Administration will consult with the person who has submitted or divulged the data or information or who would be affected by disclosure before determining whether or not such data or information is available for public disclosure.

[42 FR 15616, Mar. 22, 1977. Redesignated at 68 FR 25286, May 12, 2003]

§ 20.48 Judicial review of proposed disclosure.

Where the Food and Drug Administration consults with a person who will be affected by a proposed disclosure of data or information contained in Food and Drug Administration records pursuant to § 20.47, and rejects the person's request that part or all of the records not be made available for public disclosure, the decision constitutes final agency action that is subject to judicial review pursuant to 5 U.S.C. chapter 7. The person affected will be permitted 5 days after receipt of notification of such decision within which to institute suit in a United States District Court to enjoin release of the records involved. If suit is brought, the Food and Drug Administration will not disclose the records involved until the matter and all related appeals have been concluded.

[42 FR 15616, Mar. 22, 1977. Redesignated and amended at 68 FR 25286, 25287, May 12, 2003]

§ 20.49 Denial of a request for records.

(a) A denial of a request for records, in whole or in part, shall be signed by the Director, Division of Freedom of Information (or delegatee).

(b) The name and title or position of each person who participated in the denial of a request for records shall be set forth in the letter denying the request. This requirement may be met by attaching a list of such individuals to the letter.

(c) A letter denying a request for records, in whole or in part, shall state the reasons for the denial, the appropriate review official and address to which the appeal should be sent, and that an appeal must be transmitted within 90 calendar days from the date of the adverse determination, in accordance with 45 CFR 5.61. The Agency will also make a reasonable effort to include in the letter an estimate of the volume of the records denied, unless providing such an estimate would harm an interest protected by an exemption under the Freedom of Information Act. This estimate will ordinarily be provided in terms of the approximate number of pages or some other reasonable measure. This estimate will not be provided if the volume of records denied is otherwise indicated through deletions on records disclosed in part. The letter will also include contact information for the Freedom of Information Act Public Liaison and the Office of Government Information Services.

[42 FR 15616, Mar. 22, 1977, as amended at 46 FR 8457, Jan. 27, 1981; 55 FR 1405, Jan. 16, 1990. Redesignated and amended at 68 FR 25286, 25287, May 12, 2003; 87 FR 55913, Sept. 13, 2022]

§ 20.50 Nonspecific and overly burdensome requests.

The Food and Drug Administration will make every reasonable effort to comply fully with all requests for disclosure of nonexempt records. Nonspecific requests or requests for a large number of documents that require the deployment of a substantial amount of agency man-hours to search for and compile will be processed taking into account the staff-hours required, the tasks from which these resources must be diverted, the impact that this diversion will have upon the agency's consumer protection activities, and the public policy reasons justifying the requests. A decision on the processing of such a request for information shall be made after balancing the public benefit to be gained by the disclosure against the public loss that will result from diverting agency personnel from their other responsibilities. In any situation in which it is determined that a request for voluminous records would unduly burden and interfere with the operations of the Food and Drug Administration, the person making the request will be asked to be more specific and to narrow the request, and to agree on an orderly procedure for the production of the requested records, in order to satisfy the request without disproportionate adverse effects on agency operations.

[42 FR 15616, Mar. 22, 1977. Redesignated at 68 FR 25286, May 12, 2003]

§ 20.51 Referral to primary source of records.

Upon receipt of a request for a record or document which is contained in Food and Drug Administration files but which is available elsewhere at a lower cost, the person requesting the record or document shall be referred to

the primary source of the record or document.

[42 FR 15616, Mar. 22, 1977. Redesignated at 68 FR 25286, May 12, 2003]

§ 20.52 Availability of records at National Technical Information Service.

The Food and Drug Administration is furnishing a number of records to the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22162, which reproduces and distributes such information to the public at cost. A single copy of each such record shall be available for public review at the Food and Drug Administration. All persons requesting copies of such records shall be answered by referring the person requesting the records to NTIS.

[42 FR 15616, Mar. 22, 1977, as amended at 54 FR 9038, Mar. 3, 1989. Redesignated at 68 FR 25286, May 12, 2003]

§ 20.53 Use of private contractor for copying.

The Food and Drug Administration may furnish requested records to a private contractor for copying after deletion of all nondisclosable data and information. Under these circumstances, the Food and Drug Administration will charge the person requesting the records for all of the fees involved pursuant to § 20.45.

[42 FR 15616, Mar. 22, 1977. Redesignated and amended at 68 FR 25286, 25287, May 12, 2003]

§ 20.54 Request for review without copying.

(a) A person requesting disclosure of records shall be permitted an opportunity to review them without the necessity for copying them where the records involved contain only disclosable data and information. Under these circumstances, the Food and Drug Administration will charge only for the costs of searching for the records.

(b) Where a request is made for review of records without copying, and the records involved contain both disclosable and nondisclosable information, the records containing nondisclosable information shall first be copied with the nondisclosable information blocked out and the Food and Drug Administration will charge for the costs of searching and copying.

[42 FR 15616, Mar. 22, 1977. Redesignated at 68 FR 25286, May 12, 2003]

§ 20.55 Indexing trade secrets and confidential commercial or financial information.

Whenever the Food and Drug Administration denies a request for a record or portion thereof on the grounds that the record or portion thereof is exempt from public disclosure as trade secret or confidential commercial or financial data and information under § 20.61, and the person requesting the record subsequently contests the denial in the courts, the Food and Drug Administration will so inform the person affected, i.e., the person who submitted the record, and will require that such person intervene to defend the exempt status of the record. If a court requires the Food and Drug Administration to itemize and index such records, the Food and Drug Administration will so inform the person affected and will require that such person undertake the itemization and indexing of the records. If the affected person fails to intervene to defend the exempt status of the records and to itemize and index the disputed records, the Food and Drug Administration will take this failure into consideration in deciding whether that person has waived such exemption so as to require the Food and Drug Administration to promptly make the records available for public disclosure.

[42 FR 15616, Mar. 22, 1977, as amended at 59 FR 535, Jan. 5, 1994. Redesignated at 68 FR 25286, May 12, 2003]

Subpart D—Exemptions

§ 20.60 Applicability of exemptions.

(a) The exemptions established in this subpart shall apply to all Food and Drug Administration records, except as provided in subpart E of this part. Accordingly, a record that is ordinarily available for public disclosure in accordance with the provisions in subpart F of this part or of another regulation cross-referenced in § 20.100(c) is not

available for such disclosure to the extent that it falls within an exemption contained in this subpart, except as provided by the limitations on exemptions specified in subpart E of this part. For example, correspondence that is ordinarily disclosable under § 20.103 is not disclosable to the extent that it contains trade secrets exempt from disclosure under § 20.61 and is not subject to discretionary release under § 20.82.

(b) Where application of one or more exemptions results in a record being disclosable in part and nondisclosable in part, the rule established in § 20.22 shall apply.

§ 20.61 Trade secrets and commercial or financial information which is privileged or confidential.

(a) A trade secret may consist of any 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 that is privileged or confidential means valuable data or information which is used in one's business and is of a type customarily held in strict confidence or regarded as privileged and not disclosed to any member of the public by the person to whom it belongs.

(c) Data and information submitted or divulged to the Food and Drug Administration which fall within the definitions of a trade secret or confidential commercial or financial information are not available for public disclosure.

(d) 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 Freedom of Information Act. 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 10 years after the records were submitted to the Government.

(e) The procedures in this paragraph apply to records on which the submitter has designated information as provided in paragraph (d) of this section. These procedures also apply to records that were submitted to the Food and Drug Administration when the agency has substantial reason to believe that information in the records could reasonably be considered exempt under exemption 4 of the Freedom of Information Act. Certain exceptions to these procedures are set forth in paragraph (f) of this section.

(1) When the Food and Drug Administration receives a request for such records and determines that disclosure may be required, the Food and Drug Administration 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 the Food and Drug Administration must notify a large number of submitters, notification may be done by posting or publishing a notice in a place where the submitters are reasonably likely to become aware of it.

(2) The submitter has 10 working days from the date of the notice to object to disclosure of any part of the records and to state all bases for its objections. The Division of Freedom of Information may extend this period as appropriate and necessary.

(3) The Food and Drug Administration will give consideration to all bases that have been stated in a timely manner by the submitter. If the Food and Drug Administration decides to disclose the records, the Food and Drug Administration will notify the submitter in writing. This notice will briefly explain why the agency did not sustain the submitter's objections. The Food and Drug Administration will include with the notice a copy of the records about which the submitter objected, as the agency proposes to disclose them. The notice will state that the Food and Drug Administration intends to disclose the records 5 working days after the submitter receives the

notice unless a U.S. District Court orders the agency not to release them.

(4) If a requester files suit under the Freedom of Information Act to obtain records covered by this paragraph, the Food and Drug Administration will promptly notify the submitter.

(5) Whenever the Food and Drug Administration sends a notice to a submitter under paragraph (e)(1) of this section, the Food and Drug Administration will notify the requester that the Food and Drug Administration is giving the submitter a notice and an opportunity to object. Whenever the Food and Drug Administration sends a notice to a submitter under paragraph (e)(3) of this section, the Food and Drug Administration will notify the requester of this fact.

(f) The notice requirements in paragraph (e) of this section do not apply in the following situations:

(1) The Food and Drug Administration 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 Freedom of Information Act, but in this case a submitter may still designate records as described in paragraph (d) of this section, and in exceptional cases, the Food and Drug Administration may, at its discretion, follow the notice procedures in paragraph (e) of this section;

(4) The information requested has not been designated by the submitter as exempt from disclosure when the submitter had an opportunity to do so at the time of submission of the information or within a reasonable time thereafter, unless the Food and Drug Administration has substantial reason to believe that disclosure of the information would result in competitive harm; or

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

[42 FR 15616, Mar. 22, 1977, as amended at 59 FR 535, Jan. 5, 1994; 87 FR 55913, Sept. 13, 2022]

§ 20.62 Inter- or intra-agency memoranda or letters.

Interagency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the Food and Drug Administration may be withheld from public disclosure except that factual information that is reasonably segregable in accordance with the rule established in § 20.22 is available for public disclosure. The deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

[87 FR 55913, Sept. 13, 2022]

§ 20.63 Personnel, medical, and similar files, disclosure of which constitutes a clearly unwarranted invasion of personal privacy.

(a) The names or other information which would identify patients or research subjects in any medical or similar report, test, study, or other research project shall be deleted before the record is made available for public disclosure.

(b) The names and other information which would identify patients or research subjects should be deleted from any record before it is submitted to the Food and Drug Administration. If the Food and Drug Administration subsequently needs the names of such individuals, a separate request will be made.

(c) Requests for deletion of business or product names prior to disclosure of any record to the public shall not be granted on the ground of privacy, but such deletion may be justified under another exemption established in this subpart, e.g., the exemption for trade secrets and confidential commercial or financial information under § 20.61.

(d) Names of individuals conducting investigations, studies, or tests on products or ingredients shall not be deleted prior to disclosure of any record

to the public unless extraordinary circumstances are shown.

(e) A request for all records relating to a specific individual will be denied as a clearly unwarranted invasion of personal privacy unless accompanied by the written consent of the individual named.

(f) The names and any information that would identify the voluntary reporter or any other person associated with an adverse event involving a human drug, biologic, or medical device product shall not be disclosed by the Food and Drug Administration or by a manufacturer in possession of such reports in response to a request, demand, or order. Information that would identify the voluntary reporter or persons identified in the report includes, but is not limited to, the name, address, institution, or any other information that would lead to the identities of the reporter or persons identified in a report. This provision does not affect disclosure of the identities of reporters required by a Federal statute or regulation to make adverse event reports. Disclosure of the identities of such reporters is governed by the applicable Federal statutes and regulations.

(1) *Exceptions.* (i) Identities may be disclosed if both the voluntary reporter and the person identified in an adverse event report or that person's legal representative consent in writing to disclosure, but neither FDA nor any manufacturer in possession of such reports shall be required to seek consent for disclosure from the voluntary reporter or the person identified in the adverse event report or that person's legal representative; or

(ii) Identities of the voluntary reporter and the person who experienced the reported adverse event may be disclosed pursuant to a court order in the course of medical malpractice litigation involving both parties; or (iii) The report, excluding the identities of any other individuals, shall be disclosed to the person who is the subject of the report upon request.

(2) *Preemption.* No State or local governing entity shall establish or continue in effect any law, rule, regulation, or other requirement that permits or requires disclosure of the identities of the voluntary reporter or other person identified in an adverse event report except as provided in this section.

[42 FR 15616, Mar. 22, 1977, as amended at 60 FR 16968, Apr. 3, 1995]

§ 20.64 Records or information compiled for law enforcement purposes.

(a) Records or information compiled for law enforcement purposes may be withheld from public disclosure pursuant to the provisions of this section to the extent that disclosure of such records or information:

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person to a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) 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 information furnished by a confidential source in the case of a record compiled by the Food and Drug Administration or any other criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation;

(5) 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

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

(b) Records include all records relating to regulatory enforcement action, including both administrative and court action, which have not been disclosed to any member of the public, including any person who is the subject of the investigation.

(c) Any record which is disclosed to any person, including any person who is the subject of a Food and Drug Administration investigation, and any

data or information received from any person who is the subject of a Food and Drug Administration investigation relating to such investigation, is available for public disclosure at that time in accordance with the rule established in § 20.21, except that:

(1) Disclosure of such records shall be subject to the other exemptions established in this subpart and to the limitations on exemptions established in subpart E of this part.

(2) The record of a section 305 hearing shall be available for public disclosure only in accordance with the provisions of § 7.87 of this chapter.

(d) Records for law enforcement purposes shall be subject to the following rules:

(1) No such record is available for public disclosure prior to the consideration of regulatory enforcement action based upon that record's being closed, except as provided in § 20.82. The Commissioner will exercise his discretion to disclose records relating to possible criminal prosecution pursuant to § 20.82 prior to consideration of criminal prosecution being closed only very rarely and only under circumstances that demonstrate a compelling public interest.

(2) After the consideration of regulatory enforcement action is closed, such records shall be made available for public disclosure except to the extent that other exemptions from disclosure in this subpart are applicable. No statements of witnesses obtained through promises of confidentiality are available for public disclosure.

(3) The consideration of regulatory enforcement action based upon a particular record shall be deemed to be closed within the meaning of this section:

(i) If it relates to administrative action, when a final decision has been made not to take such action or such action has been taken and the matter has been concluded.

(ii) If it relates to court action, when a final decision has been made not to recommend such action to a United States attorney based upon that record, or a recommendation has been finally refused by a United States attorney, or court action has been instituted and the matter and all related appeals have been concluded, or the statute of limitations runs.

(iii) If it relates to both administrative and court action, when the events described in both paragraph (d)(3) (i) and (ii) of this section have occurred.

(4) Prior to disclosure of any record specifically reflecting consideration of possible criminal prosecution of any individual, all names and other information that would identify an individual who was considered for criminal prosecution but who was not prosecuted shall be deleted unless the Commissioner concludes that there is a compelling public interest in the disclosure of such names.

(e) Names and other information that would identify a Food and Drug Administration employee shall be deleted from records prior to public disclosure only pursuant to § 20.32.

[42 FR 15616, Mar. 22, 1977, as amended at 59 FR 536, Jan. 5, 1994]

§ 20.65 National defense and foreign policy.

(a) Records or information may be withheld from public disclosure if they are:

(1) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; and

(2) In fact properly classified under such Executive order.

(b) [Reserved]

[70 FR 41958, July 21, 2005]

§ 20.66 Internal personnel rules and practices.

Records or information may be withheld from public disclosure if they are related solely to the internal personnel rules and practices of the Food and Drug Administration (FDA). Under this exemption, FDA may withhold records or information about routine internal agency practices and procedures. Under this exemption, the agency may also withhold internal records whose release would help some persons circumvent the law.

[70 FR 41958, July 21, 2005]

§ 20.67 Records exempted by other statutes.

Records or information may be withheld from public disclosure if a statute specifically allows the Food and Drug Administration (FDA) to withhold them. FDA may use another statute to justify withholding records and information only if it absolutely prohibits disclosure, sets forth criteria to guide our decision on releasing material, or identifies particular types of matters to be withheld.

[70 FR 41958, July 21, 2005]

Subpart E—Limitations on Exemptions

§ 20.80 Applicability of limitations on exemptions.

(a) The limitations on exemptions established in this subpart shall apply to all Food and Drug Administration records, except as specifically provided herein. Accordingly, a record that is ordinarily exempt from public disclosure in accordance with the provisions in subpart D of this part is available for such disclosure to the extent that it falls within a limitation on the exemption contained in this subpart. For example, an investigatory record that is ordinarily exempt from disclosure under § 20.64 is disclosable to Congress in accordance with the provisions of § 20.87.

(b) Disclosure of a record to any member of the public pursuant to the provisions in § 20.81, data and information previously disclosed to the public, in § 20.82, discretionary disclosure by the Commissioner, and in § 20.83, disclosure pursuant to a court order, shall involve the rule established in § 20.21 that the record shall be made available for disclosure to all members of the public who request it. Disclosure of a record only to the limited categories of persons and under the conditions specified in § 20.84, special government employees, in § 20.85, other Federal government departments and agencies, in § 20.86, in camera disclosure in administrative or court proceedings, in § 20.87(b), Congress, in § 20.88, State and local government officials, in § 20.89, foreign government officials, and in § 20.90, contractors, which does not result in disclosure of the record to any member of the public in an authorized manner, shall not invoke the rule established in § 20.21.

(c) Disclosure to government employees and special government employees of records exempt from public disclosure shall subject those persons to the same restrictions with respect to the disclosure of such records as any Food and Drug Administration employee.

(d) In the case of a record in a Privacy Act Record System, as defined in § 21.3(c) of this chapter:

(1) The availability to an individual, as defined in § 21.3(a), of a record about himself that is retrieved by the individual's name or other personal identifier and is contained in a Privacy Act Record System shall be subject to the special requirements of part 21 of this chapter (the privacy regulations) and shall not be subject to the exemptions in subpart D of this part except that where the system is exempt and the requested record is not available under § 21.61 of this chapter, the provisions of this part shall apply.

(2) The availability of a record about an individual to persons other than the individual who is the subject of the record shall be subject to the special requirements of part 21, subpart G, of this chapter (restrictions on disclosure in the privacy regulations), and shall not be subject to the limitations on exemptions in this subpart except as provided in part 21, subpart G, of this chapter.

§ 20.81 Data and information previously disclosed to the public.

(a) Any Food and Drug Administration record that is otherwise exempt from public disclosure pursuant to subpart D of this part is available for public disclosure to the extent that it contains data or information that have previously been disclosed in a lawful manner to any member of the public, other than an employee or consultant or pursuant to other commercial arrangements with appropriate safeguards for secrecy.

(1) For purposes of this section, an individual shall be deemed to be a consultant only if disclosure of the information was necessary in order to perform that specific consulting service

and the purpose of the disclosure was solely to obtain that service. The number of consultants who have received such information shall have been limited to the number reasonably needed to perform that particular consulting service.

(2) For purposes of this section, other commercial arrangements shall include licenses, contracts, and similar legal relationships between business associates.

(3) For purposes of this section, data and information disclosed to clinical investigators or members of institutional review committees, whether required by regulations of the Food and Drug Administration, or made voluntarily, if accompanied by appropriate safeguards to assure secrecy and otherwise in accordance with this section, are not deemed to have been previously disclosed to any member of the public within the meaning of paragraph (a) of this section.

(b) Any statement relating to prior public disclosure is subject to the False Reports to the Government Act, 18 U.S.C. 1001.

[42 FR 15616, Mar. 22, 1977, as amended at 54 FR 9038, Mar. 3, 1989; 59 FR 536, Jan. 5, 1994; 68 FR 25287, May 12, 2003]

§ 20.82 Discretionary disclosure by the Commissioner.

(a) Except as provided in paragraph (b) of this section, the Commissioner may, in his or her discretion, disclose part or all of any Food and Drug Administration (FDA) record that is otherwise exempt from disclosure pursuant to subpart D of this part. As set forth in § 20.20(b), FDA will withhold requested information only if:

(1) The Agency reasonably foresees that disclosure would harm an interest protected by an exemption described in this part; or

(2) Disclosure is prohibited by law. FDA shall exercise its discretion to disclose such records whenever it determines that such disclosure is in the public interest, will promote the objectives of the Freedom of Information Act and the Agency, and is, for example, consistent with the rights of individuals to privacy, the property rights of persons in trade secrets, and the need for the Agency to promote frank internal policy deliberations and to pursue its regulatory activities without disruption.

(b) The Commissioner shall not make available for public disclosure any record that is:

(1) Exempt from public disclosure pursuant to § 20.61.

(2) Exempt from public disclosure pursuant to § 20.63.

(3) Prohibited from public disclosure under statute.

(4) Contained in a Privacy Act Record System where disclosure would constitute a clearly unwarranted invasion of personal privacy or is otherwise in violation of 5 U.S.C. 552a(b), as applied in part 21, subpart G, of this chapter (restrictions on disclosure in the privacy regulations).

(c) Discretionary disclosure of a record pursuant to this section shall invoke the requirement that the record shall be disclosed to any person who requests it pursuant to § 20.21, but shall not set a precedent for discretionary disclosure of any similar or related record and shall not obligate the Commissioner to exercise his discretion to disclose any other record that is exempt from disclosure.

[42 FR 15616, Mar. 22, 1977, as amended at 70 FR 41958, July 21, 2005; 87 FR 55913, Sept. 13, 2022]

§ 20.83 Disclosure required by court order.

(a) Records of the Food and Drug Administration which the Commissioner has determined are not available for public disclosure, in the form of a regulation published or cross-referenced in this part, shall nevertheless be made available for public disclosure in compliance with a final court order requiring such disclosure.

(b) Where the Food and Drug Administration record ordered disclosed under paragraph (a) of this section is a record about an individual that is not available for public disclosure under § 20.63, the Food and Drug Administration shall attempt to notify the individual who is the subject of the record of the disclosure, by sending a notice to the individual's last known address.

(c) Paragraph (b) of this section shall not apply where the name or other personal identifying information is deleted prior to disclosure.

[42 FR 15616, Mar. 22, 1977, as amended at 68 FR 25287, May 12, 2003]

§ 20.84 Disclosure to consultants, advisory committees, State and local government officials commissioned pursuant to 21 U.S.C. 372(a), and other special government employees.

Data and information otherwise exempt from public disclosure may be disclosed to Food and Drug Administration consultants, advisory committees, State and local government officials commissioned pursuant to 21 U.S.C. 372(a), and other special government employees for use only in their work with the Food and Drug Administration. Such persons are thereafter subject to the same restrictions with respect to the disclosure of such data and information as any other Food and Drug Administration employee.

§ 20.85 Disclosure to other Federal Government departments and agencies.

Any Food and Drug Administration (FDA) record otherwise exempt from public disclosure may be disclosed to other Federal Government departments and agencies, except that trade secrets and confidential commercial or financial information prohibited from disclosure by 21 U.S.C. 331(j), 21 U.S.C. 360j(c), 21 U.S.C. 360ll(d), 21 U.S.C. 360nn(e), and 21 U.S.C. 387f(c) may be released only as provided by those sections. Any disclosure under this section shall be pursuant to a written agreement that the record shall not be further disclosed by the other department or agency except with the written permission of FDA.

[87 FR 55913, Sept. 13, 2022]

§ 20.86 Disclosure in administrative or court proceedings.

Data and information otherwise exempt from public disclosure may be revealed in Food and Drug Administration (FDA) administrative proceedings, such as those pursuant to parts 10, 12, 13, 14, 15, 17, and 19 of this chapter, or court proceedings, where data or information are relevant. FDA will take appropriate measures, or request that appropriate measures be taken, to reduce disclosure to the minimum necessary under the circumstances.

[87 FR 55913, Sept. 13, 2022]

§ 20.87 Disclosure to Congress.

(a) All records of the Food and Drug Administration shall be disclosed to Congress upon an authorized request.

(b) An authorized request for Food and Drug Administration records by Congress shall be made by the chairman of a committee or subcommittee of Congress acting pursuant to committee business.

(c) An individual member of Congress who requests a record for his own use or on behalf of any constituent shall be subject to the same rules in this part that apply to any other member of the public.

[42 FR 15616, Mar. 22, 1977, as amended at 59 FR 536, Jan. 5, 1994]

§ 20.88 Communications with State and local government officials.

(a) A State or local government official commissioned by the Food and Drug Administration pursuant to 21 U.S.C. 372(a) shall have the same status with respect to disclosure of Food and Drug Administration records as any special government employee.

(b) Communications with State and local government officials with respect to law enforcement activities undertaken pursuant to a contract between the Food and Drug Administration and such officials shall be subject to the rules for public disclosure established in § 20.64.

(c) Communications with State and local government officials who are not commissioned pursuant to 21 U.S.C. 372(a) or under a contract to perform law enforcement activities shall have the same status as communications with any member of the public, except that:

(1) Investigatory records compiled for law enforcement purposes by State and local government officials who perform counterpart functions to the Food and Drug Administration at the State and

local level, and trade secrets and confidential commercial or financial information obtained by such officials, which are voluntarily disclosed to the Food and Drug Administration as part of cooperative law enforcement and regulatory efforts, shall be exempt from public disclosure to the same extent to which the records would be so exempt pursuant to §§ 20.61 and 20.64, as if they had been prepared by or submitted directly to Food and Drug Administration employees, except that investigatory records shall be exempt from disclosure for a longer period of time if the State or local government officials so require as a condition of their furnishing the information to the Food and Drug Administration.

(2) Disclosure of investigatory records compiled for law enforcement purposes by the Food and Drug Administration to State and local government officials who perform counterpart functions to the Food and Drug Administratrion at the State and local level as part of cooperative law enforcement efforts does not invoke the rule established in § 20.21 that such records shall be made available for disclosure to all members of the public.

(d)(1) The Commissioner of Food and Drugs (or delegatee) may authorize the disclosure of confidential commercial information submitted to the Food and Drug Administration, or incorporated into Agency-prepared records, to State and local government officials as part of cooperative law enforcement or regulatory efforts, provided that:

(i) The State or local government agency has provided both a written statement establishing its authority to protect confidential commercial information from public disclosure and a written commitment not to disclose any such information provided without the written permission of the sponsor or written confirmation by the Food and Drug Administration that the information no longer has confidential status; and

(ii) The Commissioner of Food and Drugs or the Commissioner's designee makes one or more of the following determinations:

(A) The sponsor of the product application has provided written authorization for the disclosure;

(B) Disclosure would be in the interest of public health by reason of the State or local government's possessing information concerning the safety, effectiveness, or quality of a product or information concerning an investigation, or by reason of the State or local government being able to exercise its regulatory authority more expeditiously than the Food and Drug Administration; or

(C) The disclosure is to a State or local government scientist visiting the Food and Drug Administration on the Agency's premises as part of a joint review or long-term cooperative training effort authorized under section 708 of the Federal Food, Drug, and Cosmetic Act, the review is in the interest of public health, the Food and Drug Administration retains physical control over the information, the Food and Drug Administration requires the visiting State or local government scientist to sign a written commitment to protect the confidentiality of the information, and the visiting State or local government scientist provides a written assurance that he or she has no financial interest in the regulated industry of the type that would preclude participation in the review of the matter if the individual were subject to the conflict of interest rules applicable to the Food and Drug Administration advisory committee members under § 14.80(b)(1) of this chapter. Subject to all the foregoing conditions, a visiting State or local government scientist may have access to trade secret information, entitled to protection under section 301(j) of the Federal Food, Drug, and Cosmetic Act, in those cases where such disclosures would be a necessary part of the joint review or training.

(2) Except as provided under paragraph (d)(1)(ii)(C) of this section, the provisions of paragraph (d) of this section do not authorize the disclosure to State and local government officials of trade secret information concerning manufacturing methods and processes prohibited from disclosure by section 301(j) of the Federal Food, Drug, and Cosmetic Act, unless pursuant to an express written authorization provided by the submitter of the information.

(3) Any disclosure under this section of information submitted to the Food and Drug Administration or incorporated into agency-prepared records does not invoke the rule established in § 20.21 that such records shall be made available to all members of the public.

(e)(1) The Commissioner of Food and Drugs or (delegatee), may authorize the disclosure to, or receipt from, an official of a State or local government agency of nonpublic, predecisional documents concerning the Food and Drug Administration's or the other Government agency's regulations or other regulatory requirements, or other nonpublic information relevant to either agency's activities, as part of efforts to improve Federal-State and/or Federal-local uniformity, cooperative regulatory activities, or implementation of Federal-State and/or Federal-local agreements, provided that:

(i) The State or local government agency has the authority to protect such nonpublic documents from public disclosure and will not disclose any such documents provided without the written confirmation by the Food and Drug Administration that the documents no longer have nonpublic status; and

(ii) The Commissioner (or delegatee) makes the determination that the exchange is reasonably necessary to improve Federal-State and/or Federal-local uniformity, cooperative regulatory activities, or implementation of Federal-State and/or Federal-local agreements.

(2) Any exchange under this section of nonpublic documents does not invoke the rule established at § 20.21 that such records shall be made available to all members of the public.

(3) For purposes of paragraph (e) of this section, the term *official of a State or local government agency* includes, but is not limited to, an agent contracted by the State or local government, and an employee of an organization of State or local officials having responsibility to facilitate harmonization of State or local standards and requirements in the Food and Drug Administration's areas of responsibility. For such officials, the statement and commitment required by paragraph (e)(1)(i) of this section shall be provided by both the organization and the individual.

[42 FR 15616, Mar. 22, 1977, as amended at 60 FR 63381, Dec. 8, 1995; 65 FR 11887, Mar. 7, 2000; 87 FR 55913, Sept. 13, 2022]

§ 20.89 Communications with foreign government officials.

Communications with foreign government officials shall have the same status as communications with any member of the public, except that:

(a) Investigatory records compiled for law enforcement purposes by foreign government officials who perform counterpart functions to the Food and Drug Administration in a foreign country, and trade secrets and confidential commercial or financial information obtained by such officials, which are voluntarily disclosed to the Food and Drug Administration as part of cooperative law enforcement and regulatory efforts, shall be exempt from public disclosure to the same extent to which the records would be so exempt pursuant to §§ 20.61 and 20.64, as if they had been prepared by or submitted directly to Food and Drug Administration employees, except that investigatory records shall be exempt from disclosure for a longer period of time if the foreign government officials so require as a condition of their furnishing the information to the Food and Drug Administration.

(b) Disclosure of investigatory records compiled for law enforcement purposes by the Food and Drug Administration to foreign government officials who perform counterpart functions to the Food and Drug Administration in a foreign country as part of cooperative law enforcement efforts does not invoke the rule established in § 20.21 that such records shall be made available for disclosure to all members of the public.

(c)(1) The Commissioner of Food and Drugs, or any other officer or employee of the Food and Drug Administration whom the Commissioner may designate to act on his or her behalf for the purpose, may authorize the disclosure of confidential commercial information submitted to the Food and Drug Administration, or incorporated into agency-prepared records, to foreign government officials who perform

counterpart functions to the Food and Drug Administration as part of cooperative law enforcement or regulatory efforts, provided that:

(i) The foreign government agency has provided both a written statement establishing its authority to protect confidential commercial information from public disclosure and a written commitment not to disclose any such information provided without the written permission of the sponsor or written confirmation by the Food and Drug Administration that the information no longer has confidential status; and

(ii) The Commissioner of Food and Drugs or the Commissioner's designee makes one or more of the following determinations:

(A) The sponsor of the product application has provided written authorization for the disclosure;

(B) Disclosure would be in the interest of public health by reason of the foreign government's possessing information concerning the safety, efficacy, or quality of a product or information concerning an investigation; or

(C) The disclosure is to a foreign scientist visiting the Food and Drug Administration on the agency's premises as part of a joint review or long-term cooperative training effort authorized under section 708 of the act, the review is in the interest of public health, the Food and Drug Administration retains physical control over the information, the Food and Drug Administration requires the visiting foreign scientist to sign a written commitment to protect the confidentiality of the information, and the scientist provides a written assurance that he or she has no financial interest in the regulated industry of the type that would preclude participation in the review of the matter if the individual were subject to the conflict of interest rules applicable to the Food and Drug Administration advisory committee members under § 14.80(b)(1) of this chapter. Subject to all of the foregoing conditions, visiting foreign scientists may have access to trade secret information, entitled to protection under section 301(j) of the Federal Food, Drug, and Cosmetic Act (the act), in those cases where such disclosures would be a necessary part of the joint review or training.

(2) Except as provided under paragraph (c)(1)(ii)(C) of this section, this provision does not authorize the disclosure to foreign government officials of other countries of trade secret information concerning manufacturing methods and processes prohibited from disclosure by section 301(j) of the act, unless pursuant to an express written authorization provided by the submitter of the information.

(3) Any disclosure under this section of information submitted to the Food and Drug Administration or incorporated into agency-prepared records does not invoke the rule established in § 20.21 that such records shall be made available to all members of the public.

(d)(1) The Commissioner of Food and Drugs (or delegatee) may authorize the disclosure to, or receipt from, an official of a foreign government agency of nonpublic, predecisional documents concerning the Food and Drug Administration's or the other Government agency's regulations or other regulatory requirements, or other nonpublic information relevant to either agency's activities, as part of cooperative efforts to facilitate global harmonization of regulatory requirements, cooperative regulatory activities, or implementation of international agreements, provided that:

(i) The foreign government agency has the authority to protect such nonpublic documents from public disclosure and will not disclose any such documents provided without the written confirmation by the Food and Drug Administration that the documents no longer have nonpublic status; and

(ii) The Commissioner (or delegatee) makes the determination that the exchange is reasonably necessary to facilitate global harmonization of regulatory requirements, cooperative regulatory activities, or implementation of international agreements.

(2) Any exchange under this section of nonpublic documents does not invoke the rule established in § 20.21 that such records shall be made available to all members of the public.

(e) For purposes of this section, the term ''official of a foreign government agency'' includes, but is not limited to, employees (whether temporary or permanent) of and agents contracted by

the foreign government, or by an international organization established by law, treaty, or other governmental action and having responsibility to facilitate global or regional harmonization of standards and requirements in FDA's areas of responsibility or to promote and coordinate public health efforts. For such officials, the statement and commitment required by paragraph (c)(1)(i) of this section shall be provided on behalf of both the organization and the individual.

[42 FR 15616, Mar. 22, 1977, as amended at 58 FR 61603, Nov. 19, 1993; 60 FR 63382, Dec. 8, 1995; 65 FR 11888, Mar. 7, 2000; 87 FR 55914, Sept. 13, 2022]

§ 20.90 Disclosure to contractors.

(a) Data and information otherwise exempt from public disclosure may be disclosed to contractors with the Food and Drug Administration and their employees for use only in their work for the Food and Drug Administration. Contractors and their employees are thereafter subject to the same legal restrictions and penalties with respect to the disclosure of such data and information as Food and Drug Administration employees.

(b) A written agreement between the Food and Drug Administration and any contractor shall be entered into before data and information otherwise exempt from public disclosure may be disclosed to the contractor. The contractor shall agree to establish and follow security precautions considered by the Food and Drug Administration to be necessary to ensure proper and confidential handling of the data and information. The written agreement shall include, where appropriate, provisions establishing:

(1) Restrictions on access to the data and information by the contractor, its employees, or other persons;

(2) Physical storage requirements;

(3) Requirements for the handling and accountability of the data and information by the contractor and its employees;

(4) Limitations on reproduction, transmission, and disclosure of the data and information;

(5) A requirement of advance approval by the Food and Drug Administration of the use by the contractor of subcontractors, vendors, or suppliers;

(6) Procedures to be followed when the contractor employs time-shared computer operations;

(7) Methods of destroying source documents or related waste material; and

(8) The period during which the contractor may retain such data and information.

§ 20.91 Use of data or information for administrative or court enforcement action.

Nothing in this part or this chapter shall prevent the Food and Drug Administration from using any data or information, whether obtained voluntarily or involuntarily and whether or not it is available for public disclosure, as the basis for taking any administrative or court enforcement action within its jurisdiction. Data and information otherwise exempt from public disclosure are nevertheless available for public disclosure to the extent necessary to effectuate such action, e.g., the brand name, code designation, and distribution information are released when a product is recalled.

Subpart F—Availability of Specific Categories of Records

§ 20.100 Applicability; cross-reference to other regulations.

(a) The provisions set forth in this subpart or cross-referenced in paragraph (c) of this section state the way in which specific categories of Food and Drug Administration records are handled upon a request for public disclosure. The exemptions established in subpart D of this part and the limitations on exemptions established in subpart E of this part shall be applicable to all Food and Drug Administration records, as provided in §§ 20.60 and 20.80. Accordingly, a record that is ordinarily available for public disclosure in accordance with this part or under other regulations is not available for such disclosure to the extent that it falls within an exemption contained in subpart D of this part except as provided by the limitations on exemptions specified in subpart E of this part.

(b) The Commissioner, on his own initiative or on the petition of any interested person, may amend this subpart or promulgate and cross-reference

additional regulations to state the status of additional categories of documents to settle pending questions or to reflect court decisions.

(c) In addition to the provisions of this part, rules on the availability of the following specific categories of Food and Drug Administration records are established by regulations in this chapter:

(1) Section 305 hearing records, in § 7.87(c) of this chapter.

(2) Flavor ingredient records and notes, in § 101.22(i)(4)(iv) of this chapter.

(3) Environmental assessments; finding of no significant impact, in § 25.51 of this chapter, or draft and final environmental impact statements, in § 25.52 of this chapter.

(4) Color additive petitions, in § 71.15 of this chapter.

(5) Food standard temporary permits, in § 130.17(k) of this chapter.

(6) Information on thermal processing of low-acid foods packaged in hermetically sealed containers, in §§ 108.25(k) and 108.35(l) of this chapter.

(7) Food additive petitions, in §§ 171.1(h) and 571.1(h) of this chapter.

(8) Action levels for natural and unavoidable defects in food for human use, in § 110.110(e) of this chapter.

(9) Drug establishment registrations and drug listings, in § 207.81 of this chapter.

(10) Investigational new animal drug notices, in § 514.12 of this chapter.

(11) New animal drug application files, in § 514.11 of this chapter.

(12) Investigational new animal drug notice and a new animal drug application file for an antibiotic drug, in § 514.10 of this chapter.

(13) Methadone patient records, in § 291.505(g) of this chapter.

(14) Investigational new drug notice, in § 312.130 of this chapter.

(15) Labeling for and lists of approved new drug applications, in § 314.430 of this chapter.

(16) Master file for a new drug application, in § 312.420 of this chapter.

(17) New drug application file, in § 314.430 of this chapter.

(18) Data and information submitted for in vitro diagnostic products, in § 809.4 of this chapter.

(19) Data and information submitted for OTC drug review, in § 330.10(a)(2) of this chapter.

(20)–(22) [Reserved]

(23) Investigational new drug notice for a biological product, in § 601.50 of this chapter.

(24) Applications for biologics licenses for biological products, in § 601.51 of this chapter.

(25) Cosmetic establishment registrations, in § 710.7 of this chapter.

(26) Cosmetic product ingredient and cosmetic raw material composition statements, § 720.8 of this chapter.

(27) Cosmetic product experience reports, in § 730.7 of this chapter.

(28) Device premarket notification submissions, in § 807.95 of this chapter.

(29) Electronic product information, in §§ 1002.4 and 1002.42 of this chapter.

(30) Data and information submitted to the Commissioner or to classification panels in connection with the classification or reclassification of devices intended for human use, in § 860.5 of this chapter.

(31) Data and information submitted in offers to develop a proposed performance standard for medical devices, in § 861.26 of this chapter.

(32) Investigational device exemptions in § 812.38 of this chapter.

(33) Health claims petitions, in § 101.70 of this chapter.

(34) Premarket approval application, in § 814.9 of this chapter.

(35) Report of certain adverse experiences with a medical device, in § 803.9 of this chapter.

(36) Disqualification determination of an institutional review board, in § 56.122 of this chapter.

(37) Disqualification determination of a nonclinical laboratory, in § 58.213 of this chapter.

(38) Minutes or records regarding a public advisory committee, in § 14.65(c) of this chapter.

(39) Data submitted regarding persons receiving an implanted pacemaker device or lead, in § 805.25 of this chapter.

(40) Humanitarian device exemption application, in § 814.122 of this chapter.

(41) Premarket notifications for food contact substances, in § 170.102 of this chapter.

(42) Registration of food facilities, in § 1.243 of this chapter.

(43) Minor-use or minor-species (MUMS) drug designations, in § 516.52 of this chapter.

(44) Minor-species drug index listings, in § 516.171 of this chapter.

(45) Postmarket notifications of a permanent discontinuance or an interruption in manufacturing of certain drugs or biological products, in §§ 310.306, 314.81(b)(3)(iii), and 600.82 of this chapter.

(46) Generally recognized as safe (GRAS) notices, in part 170, subpart E and part 570, subpart E of this chapter.

(47) Requests to establish or amend import tolerances, in § 510.205 of this chapter.

(48) Status reports of postmarketing study commitments in §§ 314.81(b)(2)(vii)(b) and 601.70(e) of this chapter.

[42 FR 15616, Mar. 22, 1977, as amended at 42 FR 19989, Apr. 15, 1977; 42 FR 42526, Aug. 28, 1977; 42 FR 58889, Nov. 11, 1977; 43 FR 32993, July 28, 1978; 51 FR 22475, June 19, 1986; 54 FR 9038, Mar. 3, 1989; 58 FR 2533, Jan. 6, 1993; 59 FR 536, Jan. 5, 1994; 61 FR 33244, June 26, 1996; 62 FR 40592, July 29, 1997; 64 FR 56448, Oct. 20, 1999; 67 FR 13717, Mar. 26, 2002; 67 FR 35729, May 21, 2002; 68 FR 58965, Oct. 10, 2003; 72 FR 41017, July 26, 2007; 72 FR 69118, Dec. 6, 2007; 80 FR 38938, July 8, 2015; 81 FR 45409, July 14, 2016; 81 FR 55046, Aug. 17, 2016; 81 FR 60212, Aug. 31, 2016; 86 FR 52410, Sept. 21, 2021; 87 FR 55914, Sept. 13, 2022]

§ 20.101 Administrative enforcement records.

(a) All Food and Drug Administration records relating to administrative enforcement action disclosed to any member of the public, including the person who is the subject of such action, are available for public disclosure at the time such disclosure is first made. Such records include correspondence with companies following factory inspection, recall or detention requests, notice of refusal of admission of an imported product, regulatory letters, information letters, Forms FD–483 and FD–2275 furnished to companies after factory inspection, and similar records.

(b) To the extent that any of such records fall within the exemption for investigatory records established in § 20.64, the Commissioner determines that they are subject to discretionary release pursuant to § 20.82.

(c) Records relating to administrative enforcement action that are not disclosed to any member of the public constitute investigatory records that are subject to the rules for disclosure established in § 20.64. For example, an establishment inspection report is an investigatory record and thus subject to § 20.64 except insofar as the Commissioner exercises his discretion to release it pursuant to § 20.82.

§ 20.102 Court enforcement records.

(a) All records and documents filed in the courts are available for public disclosure unless the court orders otherwise. The Food and Drug Administration will make available for public disclosure such records or documents if the agency can determine that it has an accurate copy of the actual record or document filed in the court. If the Food and Drug Administration cannot determine whether it has an accurate copy of such a record or document, the person requesting a copy shall be referred to the court involved.

(b) After a recommendation for court action has been finally refused by a United States attorney, the correspondence with the United States attorney and the Department of Justice with respect to that recommendation, including the pleadings recommended for filing with the court, is available for public disclosure. Prior to disclosure of any record specifically reflecting consideration of possible criminal prosecution of any individual, all names and other information that would identify an individual who was considered for criminal prosecution but who was not prosecuted shall be deleted unless the Commissioner concludes that there is a compelling public interest in the disclosure of such names.

§ 20.103 Correspondence.

(a) All correspondence to and from members of the public, members of Congress, organization or company officials, or other persons, except members of the Executive Branch of the Federal Government and special government employees, is available for public disclosure.

(b) Any such correspondence is available for public disclosure at the time that it is sent or received by the Food and Drug Administration unless a different time for such disclosure is specified in other rules established or cross-referenced in this part, e.g., correspondence relating to an IND notice or an NDA in § 314.430 of this chapter.

[42 FR 15616, Mar. 22, 1977, as amended at 54 FR 9038, Mar. 3, 1989]

§ 20.104 Summaries of oral discussions.

(a) All written summaries of oral discussions, whether in person or by telephone, with members of the public, members of Congress, organization or company officials, or other persons, except members of the Executive Branch of the Federal government or special government employees, are available for public disclosure.

(b) Any such summary is available for public disclosure at the time that it is prepared by the Food and Drug Administration unless a different time for such disclosure is specified in other rules established or cross-referenced in this part, e.g., summaries of oral discussions relating to a food additive petition in § 171.1(h)(3) of this chapter.

(c) If more than one summary of an oral discussion exists in a Food and Drug Administration file, all such summaries shall be disclosed in response to any request for such summary.

§ 20.105 Testing and research conducted by or with funds provided by the Food and Drug Administration.

(a) Any list that may be prepared by the Food and Drug Administration of testing and research being conducted by or with funds provided by the Food and Drug Administration is available for public disclosure.

(b) Any contract relating to agency testing and research, and any progress report relating thereto, is available for public disclosure.

(c) The results of all testing or research conducted by or with funds provided by the Food and Drug Administration, such as toxicological testing, compliance assays, methodology studies, and product testing, are available for public disclosure when the final report is complete and accepted by the responsible Food and Drug Administration official, after deletion of any information that would reveal confidential investigative techniques and procedures, e.g., the use of ''markers'' to document adulteration of a product. If such results are disclosed in an authorized manner to any member of the public before the final report is available, they are immediately available for public disclosure to any member of the public who requests them.

(d) Access to all raw data, slides, worksheets, and other similar working materials shall be provided at the same time that the final report is disclosed.

§ 20.106 Studies and reports prepared by or with funds provided by the Food and Drug Administration.

(a) The following types of reports and studies prepared by or with funds provided by the Food and Drug Administration are available for public disclosure upon their acceptance by the responsible agency official:

(1) Quarterly and annual reports of the agency.

(2) External investigations or review of agency needs and performance.

(3) Surveys, compilations, and summaries of data and information.

(4) Consumer surveys.

(5) Compliance surveys.

(6) Compliance programs, except that names of specific firms, the location of specific activities, and details about sampling numbers or sizes shall be deleted until implementation of the program is completed.

(7) Work plans prepared by Food and Drug Administration centers, field offices, and other components, except that names of specific firms, the location of specific activities, and details about sampling numbers or sizes shall be deleted until implementation of the plan is completed.

(b) The following types of reports and studies prepared by or with funds provided by the Food and Drug Administration are not available for public disclosure:

(1) Internal audits of agency needs and performance.

(2) Records relating to the internal planning and budget process.

(3) Legislative proposals or comments prior to submission to Congress.

[42 FR 15616, Mar. 22, 1977, as amended at 50 FR 8995, Mar. 6, 1985]

§ 20.107 Food and Drug Administration manuals.

(a) Food and Drug Administration administrative staff manuals and instructions that affect a member of the public are available for public disclosure. An index of all such manuals is available by writing to the Division of Freedom of Informationat the address located on the agency's web site at *http://www.fda.gov*.; or by visiting the Division of Freedom of Information Public Reading Room, located in rm. 1050, at the same address. The index and all manuals created by the agency on or after November 1, 1996, will be made available through the Internet at *http://www.fda.gov*.

(b) Manuals relating solely to internal personnel rules and practices are not available for public disclosure except to the extent that the Commissioner determines that they should be disclosed pursuant to § 20.82.

(c) All Food and Drug Administration action levels which are used to determine when the agency will take regulatory action against a violative product, limits of sensitivity and variability of analytical methods which are used in determining whether a product violates the law, and direct reference levels above which Food and Drug Administration field offices may request legal action directly to the office of the General Counsel, are available for public disclosure.

[42 FR 15616, Mar. 22, 1977, as amended at 46 FR 8457, Jan. 27, 1981; 46 FR 14340, Feb. 27, 1981; 68 FR 25287, May 12, 2003; 76 FR 31469, June 1, 2011; 79 FR 68115, Nov. 14, 2014]

§ 20.108 Agreements between the Food and Drug Administration and other departments, agencies, and organizations.

(a) All written agreements and understandings signed by the Food and Drug Administration and other departments, agencies, and organizations are available for public disclosure.

(b) All written agreements and memoranda of understanding between FDA and any entity, including, but not limited to other departments, Agencies, and organizations will be made available through the Food and Drug Administration Web site at *http://www.fda.gov* once finalized.

(c) Agreements and understandings signed by officials of FDA with respect to activities of the Office of Criminal Investigations are exempt from the requirements set forth in paragraph (b) of this section. Although such agreements and understandings will not be made available through the FDA Web site, these agreements will be available for disclosure in response to a request from the public after deletion of information that would disclose confidential investigative techniques or procedures, or information that would disclose guidelines for law enforcement investigations if such disclosure could reasonably be expected to risk circumvention of the law.

[42 FR 15616, Mar. 22, 1977, as amended at 46 FR 8457, Jan. 27, 1981; 58 FR 48794, 48796, Sept. 20, 1993; 76 FR 31470, June 1, 2011; 77 FR 50591, Aug. 22, 2012]

§ 20.109 Data and information obtained by contract.

(a) All data and information obtained by the Food and Drug Administration by contract, including all progress reports pursuant to a contract, are available for public disclosure when accepted by the responsible agency official except to the extent that they remain subject to an exemption established in subpart D of this part, e.g., they relate to law enforcement matters as provided in § 20.88(b).

(b) Upon the awarding of a contract by the Food and Drug Administration, the technical proposal submitted by the successful offeror will be available for public disclosure. All cost proposals and the technical proposals of unsuccessful offerors submitted in response to a request for proposals are exempt from disclosure as confidential commercial or financial information pursuant to § 20.61.

§ 20.110 Data and information about Food and Drug Administration employees.

(a) The name, title, grade, position description, salary, work address, and work telephone number for every Food

and Drug Administration employee are available for public disclosure. The home address and home telephone number of any such employee are not available for public disclosure.

(b) Statistics on the prior employment experience of present agency employees, and subsequent employment of past agency employees, are available for public disclosure.

§ 20.111 Data and information submitted voluntarily to the Food and Drug Administration.

(a) The provisions of this section shall apply only to data and information submitted voluntarily to the Food and Drug Administration, whether in the course of a factory inspection or at any other time, and not as a part of any petition, application, master file, or other required submission or request for action. Data and information that may be required to be submitted to the Food and Drug Administration but that are submitted voluntarily instead are not subject to the provisions of this section and will be handled as if they had been required to be submitted.

(b) A determination that data or information submitted voluntarily will be held in confidence and will not be available for public disclosure shall be made only in the form of a regulation published or cross-referenced in this part.

(c) The following data and information submitted voluntarily to the Food and Drug Administration are available for public disclosure unless extraordinary circumstances are shown:

(1) All safety, effectiveness, and functionality data and information for a marketed ingredient or product, except as provided in § 330.10(a)(2) of this chapter for OTC drugs.

(2) A protocol for a test or study, unless it is shown to fall within the exemption established in § 20.61 for trade secrets and confidential commercial or financial information.

(3) Adverse reaction reports, product experience reports, consumer complaints, and other similar data and information shall be disclosed as follows:

(i) If submitted by a consumer or user of the product, the record is available for public disclosure after deletion of names and other information that would identify the person submitting the information.

(ii) If submitted by the manufacturer of the product, the record is available for public disclosure after deletion of:

(*a*) Names and any information that would identify the person using the product.

(*b*) Names and any information that would identify any third party involved with the report, such as a physician or hospital or other institution.

(*c*) Names and any other information that would identify the manufacturer or the brand designation of the product, but not the type of product or its ingredients.

(iii) If submitted by a third party, such as a physician or hospital or other institution, the record is available for public disclosure after deletion of:

(*a*) Names and any information that would identify the person using the product.

(*b*) Names and any information that would identify any third party involved with the report, such as a physician or hospital or other institution.

(iv) If obtained through a Food and Drug Administration investigation, the record shall have the same status as the initial report which led to the investigation, i.e., it shall be disclosed in accordance with paragraph (c)(3)(i) through (iii) of this section.

(v) Any compilation of data, information, and reports prepared in a way that does not reveal data or information which is not available for public disclosure under this section is available for public disclosure.

(vi) If a person requests a copy of any such record relating to a specific individual or a specific incident, such request will be denied unless accompanied by the written consent to such disclosure of the person who submitted the report to the Food and Drug Administration and the individual who is the subject of the report. The record will be disclosed to the individual who is the subject of the report upon request.

(4) A list of all ingredients contained in a food or cosmetic, whether or not it is in descending order of predominance, or a list of all active ingredients and any inactive ingredients previously disclosed to the public as defined in

§ 20.81 contained in a drug, or a list of all ingredients or components in a device.

(5) An assay method or other analytical method, unless it serves no regulatory or compliance purpose and is shown to fall within the exemption established in § 20.61.

(d) The following data and information submitted voluntarily to the Food and Drug Administration are not available for public disclosure unless they have been previously disclosed to the public as defined in § 20.81 or they relate to a product or ingredient that has been abandoned and they no longer represent a trade secret or confidential commercial or financial information as defined in § 20.61:

(1) All safety, effectiveness, and functionality data and information for a developmental ingredient or product that has not previously been disclosed to the public as defined in § 20.81.

(2) Manufacturing methods or processes, including quality control procedures.

(3) Production, sales, distribution, and similar data and information, except that any compilation of such data and information aggregated and prepared in a way that does not reveal data or information which is not available for public disclosure under this provision is available for public disclosure.

(4) Quantitative or semiquantitative formulas.

(e) For purposes of this regulation, safety, effectiveness, and functionality data include all studies and tests of an ingredient or a product on animals and humans and all studies and tests on the ingredient or product for identity, stability, purity, potency, bioavailability, performance, and usefulness.

[42 FR 15616, Mar. 22, 1977, as amended at 68 FR 25287, May 12, 2003]

§ 20.112 Voluntary drug experience reports submitted by physicians and hospitals.

(a) A voluntary drug experience report to the Food and Drug Administration on FDA Form 3500 shall be handled in accordance with the rules established in § 20.111(c)(3)(iii).

(b) If a person requests a copy of any such record relating to a specific individual or a specific incident, such request will be denied unless accompanied by the written consent to such disclosure of the person who submitted the report to the Food and Drug Administration and the individual who is the subject of the report.

[42 FR 15616, Mar. 22, 1977, as amended at 54 FR 9038, Mar. 3, 1989; 62 FR 52249, Oct. 7, 1997]

§ 20.113 Voluntary product defect reports.

Voluntary reports of defects in products subject to the jurisdiction of the Food and Drug Administration are available for public disclosure:

(a) If the report is submitted by the manufacturer, after deletion of data and information falling within the exemptions established in § 20.61 for trade secrets and confidential commercial or financial information and in § 20.63 for personal privacy.

(b) If the report is submitted by any person other than the manufacturer, after deletion of names and other information that would identify the person submitting the report and any data or information falling within the exemption established in § 20.63 for personal privacy.

§ 20.114 Data and information submitted pursuant to cooperative quality assurance agreements.

Data and information submitted to the Food and Drug Administration pursuant to a cooperative quality assurance agreement shall be handled in accordance with the rules established in § 20.111.

§ 20.115 Product codes for manufacturing or sales dates.

Data or information in Food and Drug Administration files which provide a means for deciphering or decoding a manufacturing date or sales date or use date contained on the label or in labeling or otherwise used in connection with a product subject to the jurisdiction of the Food and Drug Administration are available for public disclosure.

§ 20.116 Drug and device registration and listing information.

Information submitted to the Food and Drug Administration pursuant to

section 510(a) through (j) of the Federal Food, Drug, and Cosmetic Act shall be subject only to the special disclosure provisions established in §§ 207.81 and 807.37 of this chapter.

[81 FR 60212, Aug. 31, 2016]

§ 20.117 New drug information.

(a) The following computer printouts are available for public inspection in the Food and Drug Administration's Freedom of Information Public Room:

(1) A numerical listing of all new drug applications and abbreviated new drug applications approved since 1938, showing the NDA number, the trade name, the applicant, the approval date, and, where applicable, the date the approval was withdrawn and the date the Food and Drug Administration was notified that marketing of the product was discontinued.

(2) A numerical listing of all new drug applications and abbreviated new drug applications approved since 1938 which are still approved, showing the same information as is specified in paragraph (a)(1) of this section except that it does not show a withdrawal date.

(3) A listing of new drug applications, abbreviated new drug applications, which were approved since 1938 and which are still approved, covering marketed prescription drug products except prescription drug products covered by applications deemed approved under the Drug Amendments of 1962 and not yet determined to be effective in the Drug Efficacy Study Implementation program. The listing includes the name of the active ingredient, the type of dosage form, the route of administration, the trade name of the product, the name of the application holder, and the strength or potency of the product. The listing also includes, for each active ingredient in a particular dosage form for which there is more than one approved application, an evaluation of the therapeutic equivalence of the drug products covered by such applications.

(b) Other computer printouts containing IND and NDA information are available to the extent that they do not reveal data or information prohibited from disclosure under §§ 20.61, 312.130, and 314.430 of this chapter.

[42 FR 15616, Mar. 22, 1977, as amended at 45 FR 72608, Oct. 31, 1980; 46 FR 8457, Jan. 27, 1981; 54 FR 9038, Mar. 3, 1989; 64 FR 399, Jan. 5, 1999]

§ 20.118 Advisory committee records.

All advisory committee records shall be handled in accordance with the rules established in parts 10, 12, 13, 14, 15, 16, and 19 of this chapter.

§ 20.119 Lists of names and addresses.

Names and addresses of individuals in Food and Drug Administration records shall not be sold or rented. Names and addresses shall not be disclosed if disclosure is prohibited as a clearly unwarranted invasion of personal privacy, e.g., lists of names and home addresses of Food and Drug Administration employees, which shall not be disclosed under § 20.110.

§ 20.120 Records available in Food and Drug Administration Public Reading Rooms.

(a) The Freedom of Information Staff and the Dockets Management Staff Public Reading Room are located at the same address. Both are located in Rm. 1061, 5630 Fishers Lane, Rockville, MD 20852. The telephone number for the Docket Management Staff is 240–402–7500; the telephone number for the Freedom of Information Staff's Public Reading Room is located at the address on the Agency's website at *https://www.fda.gov*. Both public reading rooms are open from 9 a.m. to 4 p.m., Monday through Friday, excluding legal public holidays.

(b) The following records are available at the Division of Freedom of Information Public Reading Room:

(1) A guide for making requests for records or information from the Food and Drug Administration;

(2) Administrative staff manuals and instructions to staff that affect a member of the public;

(3) Food and Drug Administration records which have been released to any person in response to a Freedom of Information request and which the agency has determined have become or

are likely to become the subject of subsequent requests for substantially the same records;

(4) Indexes of records maintained in the Division of Freedom of Information Public Reading Room; and

(5) Such other records and information as the agency determines are appropriate for inclusion in the public reading room.

(c) The following records are available in the Dockets Management Staff's Public Reading Room:

(1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(2) Statements of policy and interpretation adopted by the agency that are still in force and not published in the FEDERAL REGISTER;

(3) Indexes of records maintained in the Dockets Management Staff's Public Reading Room; and

(4) Such other records and information as the agency determines are appropriate for inclusion in the public reading room.

(d) The agency will make reading room records created by the Food and Drug Administration on or after November 1, 1996, available electronically through the Internet at the agency's World Wide Web site which can be found at *http://www.fda.gov*. At the agency's discretion, the Food and Drug Administration may also make available through the Internet such additional records and information it believes will be useful to the public.

[68 FR 25287, May 12, 2003; 68 FR 65392, Nov. 20, 2003, as amended at 76 FR 31470, June 1, 2011; 79 FR 68115, Nov. 14, 2014; 87 FR 55914, Sept. 13, 2022; 88 FR 45065, July 14, 2023]

PART 21—PROTECTION OF PRIVACY

Subpart A—General Provisions

Subpart B—Food and Drug Administration Privacy Act Record Systems

Subpart C—Requirements for Specific Categories of Records

Subpart D—Procedures for Notification of and Access to Records in Privacy Act Record Systems

Subpart E—Procedures for Requests for Amendment of Records

Subpart F—Exemptions

Subpart G—Disclosure of Records in Privacy Act Record Systems to Persons Other Than the Subject Individual

AUTHORITY: 21 U.S.C. 371; 5 U.S.C. 552, 552a.