

requirements for service of process on individuals who are not governmental officials. The Office of the General Counsel is authorized but not required to accept process to be served on Departmental officials in their individual capacities if the suit relates to an employee's official duties.

§ 4.4 Acknowledgement of mailed process.

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

§ 4.5 Effect of regulations.

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

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

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

[67 FR 78990, Dec. 27, 2002]

§ 4.7 Congressional subpoenas directed to the Department or Secretary.

Notwithstanding the provisions of §§4.1, 4.2, and 4.3, service of Congressional subpoenas shall be delivered to the staff in the Office of the Assistant Secretary for Legislation, Department

of Health and Human Services, 200 Independence Avenue, SW., Washington, DC 20201.

[73 FR 48151, Aug. 18, 2008]

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AUTHORITY: 5 U.S.C. 552, 18 U.S.C. 1905, 31 U.S.C. 9701, 42 U.S.C. 1306(c), E.O. 12600, E.O.13392

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Subpart A—General Information About Freedom of Information Act Requests

§ 5.1 Purpose.

This part implements the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, for Department of Health and Human Services (HHS) records that are subject to the FOIA. This part should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget. This part contains the rules that we follow to process FOIA requests, such as the amount of time we have to make a determination regarding the release of records, who can decide to release records and who can decide not to release them, the fees we may charge, if applicable, the reasons why some records are exempt from disclosure under the FOIA, and the administrative and legal remedies available should a requester disagree with our initial disclosure determination.

(a) The FOIA provides a right of access to agency records, except to the extent that any portions of the records are protected from public disclosure by an exemption or exclusion in the statute. The FOIA does not require us to perform research for you or to answer your questions. The FOIA does not require agencies to create new records or to perform analysis of existing records; for example, by extrapolating information from existing agency records, reformatting publicly available information, preparing new electronic pro-

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grams or databases, or creating data through calculations of ratios, proportions, percentages, trends, frequency distributions, correlations, or comparisons. However, at our discretion and if it would conserve government resources, we may decide to supply requested information by consolidating information from various records.

(b) This part does not apply to data generated by an agency grant recipient under the provisions of 45 CFR part 75 to the extent the requirements of 45 CFR 75.322(e) do not apply to the data. We will not process your request under the FOIA or these regulations if that data is already available to the public through an archive or other source. In that situation, we will refer you to that other source. The procedures for requesting research data made available under the provisions of 45 CFR 75.322(e) are referenced in § 5.23(a).

§ 5.2 Presumption of openness and proactive disclosures.

(a) We will administer the FOIA with a presumption of openness. In accordance with 5 U.S.C. 552(a)(8) we will disclose records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption and disclosure is not prohibited by law. We also will consider whether partial disclosure of information is possible whenever we determine that a full disclosure of a requested record is not possible. This includes taking reasonable steps to segregate and release nonexempt information.

(b) Records that the FOIA requires agencies to make available for public inspection in an electronic format may be accessed through each OpDiv’s and Staff Div’s Web site. Each OpDiv and StaffDiv is responsible for determining which of its records must be made publicly available (including frequently requested records), for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each OpDiv and StaffDiv must ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. Each OpDiv and StaffDiv has a FOIA Requester Service Center or FOIA Public Liaison

who can assist individuals in locating records. A list of agency FOIA Public Liaisons is available at <http://www.foia.gov/report-makerequest.html>.

§ 5.3 Definitions.

The following definitions apply to this part:

Agency is defined at 5 U.S.C. 551(1). HHS is an agency. Private entities performing work under a contractual agreement with the government are not agencies for the purpose of this definition. However, information maintained on behalf of an agency under Government contract, for the purposes of records management, is considered an agency record.

Chief FOIA Officer means a senior official of HHS, at the Assistant Secretary or equivalent level, who has agency-wide responsibility for ensuring efficient and appropriate compliance with the FOIA, monitoring implementation of the FOIA throughout the agency, and making recommendations to the head of the agency to improve the agency's implementation of the FOIA. The Secretary of HHS has designated the Assistant Secretary, Office of the Assistant Secretary for Public Affairs (ASPA), as the Agency Chief FOIA Officer (ACFO); that official may be contacted at HHS.ACFO@hhs.gov.

Commercial use means a use or purpose that furthers a commercial, trade, or profit interest of the requester or the person or entity on whose behalf the request is made.

Department or HHS means the U.S. Department of Health and Human Services.

Deputy Agency Chief FOIA Officer (DACFO) means a designated official within the Office of the Assistant Secretary for Public Affairs, who has been authorized by the Chief FOIA Officer to act upon their behalf to implement compliance with the FOIA, as described above. This official is also the approving review authority for FOIA administrative appeals.

Direct costs mean those expenses that an agency incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee per-

forming the work (*i.e.*, the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

Duplication means the process of making a copy of a record and sending it to the requester, to the extent necessary to respond to the request. Such copies include both paper copies and electronic records. Fees for duplication are further explained within § 5.52.

Educational institution means any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. Agencies may seek assurance from the requester that the request is in furtherance of scholarly research.

Example 1. A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

Example 2. A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

Example 3. A student who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

Expedited processing means the process set forth in the FOIA that allows requesters to request faster processing of their FOIA request, if they can demonstrate a specific compelling need.

Fee category means one of the four categories established by the FOIA to determine whether a requester will be charged fees for search, review, and duplication. The categories are: commercial use requests; non-commercial scientific or educational institutions requests; news media requests; and all other requests. Fee categories are further explained within § 5.53.

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Fee waiver means the waiver or reduction of fees if a requester is able to demonstrate that certain standards set forth in the FOIA and this part are satisfied, including that disclosure of the records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

First-party request means a request by an individual for records pertaining to that individual, or an authorized representative acting on such an individual's behalf.

FOIA Public Liaison means an agency official who reports to the agency Chief FOIA Officer and serves as a supervisory official to whom a requester can raise concerns about the service the requester has received from the FOIA Requester Service Center. This individual is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

FOIA request means a written request that reasonably describes the records sought.

FOIA library records are records that are required to be made available to the public without a specific request under 5 U.S.C. 552(a)(2). We make FOIA library records available to the public electronically through our Web pages (<http://www.hhs.gov/foia/reading/index.html>) and at certain physical locations. A list of the physical locations is available at <http://www.hhs.gov/foia/contacts/index.html>. Other records may also be made available at our discretion through our Web pages (<http://www.hhs.gov>).

Freedom of Information Act (FOIA) means the law codified at 5 U.S.C. 552 that provides the public with the right to request agency records from Federal executive branch agencies. A link to the text of the FOIA is at <https://www.justice.gov/oip/freedom-information-act-5-usc-552>.

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

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grant expedited processing. In that capacity, the Freedom of Information Act (FOIA) Officer has the authority to task agency organizational components to search for records in response to a FOIA request, and to provide records located in their offices. Apart from records subject to proactive disclosure pursuant to subsection (a)(2) of the FOIA, only FOIA Officers have the authority to release or withhold records or to waive fees in response to a FOIA request. Our FOIA operations are decentralized, and each FOIA Requester Service Center has a designated official with this authority; the contact information for each FOIA Requester Service Center is available at <http://www.hhs.gov/foia/contacts/index.html>.

(1) The *HHS Freedom of Information Act (FOIA) Officer in the Office of the Secretary* means the HHS official who in addition to overseeing the daily operations of the FOIA program in that office and having the authority of a *Freedom of Information Act (FOIA) Officer*, is also responsible for the Department-wide administration and coordination of the FOIA and its implementing regulations and policies as they pertain to the programs and activities of the Department. This individual serves as the principal resource with respect to the articulation of procedures designed to implement and ensure compliance with the FOIA and its implementing regulations and policies as they pertain to the Department. This individual reports through the DACFO to the ACFO to support oversight and compliance with the OPEN Government Act.

(2) [Reserved]

Frequently requested records means records, regardless of form or format, that have been released to any person under the FOIA and that have been requested 3 or more times or because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

Immediate Office of the Secretary (IOS) means offices within the Office of the Secretary, responsible for operations and work of the Secretary. It includes

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the Office of the Deputy Secretary, Office of the Chief of Staff, the Secretary's Counselors, the Executive Secretariat, the Office of Health Reform, and the Office of Intergovernmental and External Affairs.

Non-commercial scientific institution means an institution that is not operated to further a commercial, trade, or profit interest and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

Office of the Inspector General (OIG) means the Staff Division within the Office of the Secretary (OS), which is responsible for protecting the integrity of HHS programs and the health and welfare of the beneficiaries of those programs. OIG is responsible for processing FOIA requests for the records it maintains.

Office of the Secretary (OS) means the HHS's chief policy officer and general manager, who administers and oversees the organization, its programs and activities. The Deputy Secretary and a number of Assistant Secretaries and Staff Divisions support OS. The HHS FOIA Office within ASPA processes FOIA requests for records maintained by OS Staff Divisions other than the OIG. In certain circumstances and at the HHS FOIA Office's discretion, the HHS FOIA office may also process FOIA requests involving other HHS OpDivs, as further described in § 5.28(a).

Operating Division (OpDiv) means any of the following divisions within HHS which are subject to this regulation:

Office of the Secretary (OS)
Administration for Children and Families (ACF) Administration for Community Living (ACL)
Agency for Healthcare Research and Quality (AHRQ)
Agency for Toxic Substances and Disease Registry
(ATSDR) Centers for Disease Control and Prevention (CDC)
Centers for Medicare & Medicaid Services (CMS)
Food and Drug Administration (FDA)

Health Resources and Services Administration (HRSA)
Indian Health Service (IHS)
National Institutes of Health (NIH)
Substance Abuse and Mental Health Services Administration (SAMHSA).

Operating Division and Staff Division Freedom of Information Act (FOIA) Officers means the officials who are responsible for overseeing the daily operations of their FOIA programs in their respective Operating Divisions or Staff Divisions, with the full authority as described in the definition of *Freedom of Information Act (FOIA) Officer*. These individuals serve as the principal resource and authority for FOIA operations and implementation within their respective Operating Divisions or Staff Divisions.

Other requester means any individual or organization whose request does not qualify as a commercial-use request, representative of the news media request (including a request made by a freelance journalist), or an educational or non-commercial scientific institution request.

Record means any information that would be an agency record when maintained by an agency in any format, including an electronic format; and any information that is maintained for an agency by an entity under Government contract, for the purposes of records management.

Redact means delete or mark over.

Representative of the news media means any person or entity that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast news to the public at large and publishers of periodicals, including print and online publications that disseminate news and make their products available through a variety of means to the general public. We do not consider requests for records that support the news-dissemination function of the requester to be a commercial use. We consider "freelance" journalists who demonstrate a solid basis for

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expecting publication through a news media entity as working for that entity. A publishing contract provides the clearest evidence that a journalist expects publication; however, we also consider a requester's past publication record.

Review means examining records responsive to a request to determine whether any portions are exempt from disclosure. Review time includes processing a record for disclosure (*i.e.*, doing all that is necessary to prepare the record for disclosure), including redacting the record and marking the appropriate FOIA exemptions.

Search means the process of identifying, locating, and retrieving records to find records responsive to a request, whether in hard copy or in electronic form or format.

Staff Division (StaffDiv) means an organization component that provides leadership, direction, and policy and management guidance to the Office of the Secretary and the Department. The following StaffDivs are subject to the regulations in this part:

Immediate Office of the Secretary (IOS)
Assistant Secretary for Administration (ASA)
Assistant Secretary for Financial Resources (ASFR)
Assistant Secretary for Health (OASH)
Assistant Secretary for Legislation (ASL)
Assistant Secretary for Planning and Evaluation (ASPE) Assistant Secretary for Public Affairs (ASPA)
Assistant Secretary for Preparedness and Response (ASPR)
Departmental Appeals Board (DAB)
Office for Civil Rights (OCR)
Office of the General Counsel (OGC) Office of Global Affairs (OGA)
Office of the Inspector General (OIG)
Office of Medicare Hearings and Appeals (OMHA)
Office of the National Coordinator for Health Information Technology (ONC)

Submitter means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides commercial or financial information, either directly or indirectly to the Federal Government.

Tolling means temporarily stopping the running of a time limit. We may toll a request to seek clarification or to address fee issues, as further described in § 5.24.

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§ 5.4 Regulatory scope.

The requirements in this part apply to all OpDivs and StaffDivs of HHS. Some OpDivs and StaffDivs may establish or continue to maintain additional rules because of unique program requirements, but such rules must be consistent with this part and the FOIA. If additional rules are issued, they must be published in the FEDERAL REGISTER and you may get copies online at <https://www.federalregister.gov/>, <http://www.regulations.gov/> or by contacting one of our FOIA Requester Service Centers.

§ 5.5 Interrelationship between the FOIA and the Privacy Act of 1974.

The FOIA allows any person (whether an individual or entity) to request access to records. The Privacy Act, at 5 U.S.C. 552a(d), provides an additional right of access, allowing individuals to request records about themselves, if the records are maintained in a system of records (defined in 5 U.S.C. 552a(a)(5)).

(a) *Requesting records about you.* If any part of your request includes records about yourself that are maintained within a system of records as defined by the Privacy Act at 5 U.S.C. 552a(a)(5), you should make your request in accordance with the Privacy Act and the Department's implementing regulations at 45 CFR part 5b. This includes requirements to verify your identity. We will process the request under the Privacy Act and, if it is not fully granted under the Privacy Act, we will process it under the FOIA. You may obtain, under the FOIA, information that is exempt from access under the Privacy Act, if the information is not excluded or exempt under the FOIA. If you request records about yourself that are not maintained within a system of records, we will process your request under the FOIA only.

(b) *Requesting records about another individual.* If you request records about another individual, we will process your request under the FOIA. You may receive greater access by following the procedures described in § 5.22(g).

Subpart B—How to Request Records under FOIA

§ 5.21 Who can file a FOIA request?

Any individual, partnership, corporation, association, or public or private organization other than a Federal agency, regardless of nationality, may submit a FOIA request to us. This includes state and local governments.

§ 5.22 What do I include in my FOIA request?

In your FOIA request:

(a) Provide a written description of the records you seek in sufficient detail to enable our staff to locate them with a reasonable amount of effort. The more information you provide, the better possibility we have of finding the records you are seeking. Information that will help us find the records would include:

- (1) The agencies, offices, or individuals involved;
- (2) The approximate date(s) when the records were created;
- (3) The subject, title, or description of the records sought; and
- (4) Author, recipient, case number, file designation, or other reference number, if available.

(b) Include your name, full mailing address, and phone number and if available, your email address. This information allows us to reach you faster if we have any questions about your request. It is your responsibility to keep your current mailing address up to date with the office where you have filed the FOIA request.

(c) State your willingness to pay all fees, or the maximum amount of fees you are willing to pay, and/or include a request for a fee waiver/reduction.

(d) Mark both your letter and envelope, or the subject line of your email, with the words “FOIA Request.”

(e) If you are unable to submit a written request to us due to circumstances such as disability or literacy, you may make a request orally to a FOIA Officer. FOIA Officers will put in writing an oral request made directly to them.

(f) If you are making a first-party request, you must comply with the verification of identity procedures set forth in 45 CFR part 5b.

(g) Where your request for records pertains to another individual, you may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (*e.g.*, a copy of a death certificate or an obituary). At our discretion, we may require you to supply additional information if necessary to verify that a particular individual has consented to disclosure of records about them.

(h) If you are requesting the medical records of an individual other than yourself from a government program that pays or provides for health care (*e.g.* Medicare, Indian Health Service) and you are not that individual’s legally authorized representative, you should submit a Health Insurance Portability and Accountability Act (HIPAA) compliant release authorization form signed by the subject of records or the individual’s legally authorized representative. The HIPAA Privacy Rule requires that an authorization form contain certain core elements and statements which are described in the Privacy Rule’s requirements at 45 CFR 164.508. If you are submitting a request for Medicare records to CMS, CMS has a release authorization form at the following link: <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/CMS10106.pdf>.

(i) Before filing your request, you may find it helpful to consult the HHS FOIA Requester Service Centers online at <http://www.hhs.gov/foia/contacts/index.html>, which provides additional guidance to assist in submitting a FOIA request to a specific OpDiv or StaffDiv or to regional offices or divisions within an OpDiv or StaffDiv. You may also wish to check in the agency’s electronic FOIA libraries available online at <http://www.hhs.gov/foia/reading/index.html>, to see if the information you wish to obtain is already available.

§ 5.23 Where do I send my FOIA request?

We have several FOIA Requester Service Centers (FOIA offices) that

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process FOIA requests. You should send your FOIA request to the appropriate FOIA Requester Service Center that you believe would have the records you seek. An up-to-date listing is maintained online at <http://www.hhs.gov/foia/contacts/index.html>.

You also may submit your request electronically by emailing it to the appropriate FOIA Requester Service Center or by submitting it to the Department's web portal located at <https://requests.publiclink.hhs.gov/palMain.aspx>.

(a) If you are requesting research data made available under the provisions of 45 CFR 75.322(e), requests for such data should be addressed to the OpDiv that made the award under which the data were first produced. That OpDiv will process your request in accordance with established procedures consistent with the FOIA and 45 CFR 75.322(e).

(b) We officially receive your request when it reaches the FOIA Requester Service Center with responsibility for the OpDiv or StaffDiv where requested records are likely to be located, but no later than 10 working days after the request first arrives at any of our FOIA Requester Service Centers.

(c) If you have questions concerning the processing of your FOIA request, you may contact the FOIA Requester Service Center processing your request. If that initial contact does not resolve your concerns, you may wish to contact the designated FOIA Public Liaison for the OpDiv or StaffDiv processing your request. You can find a list of our FOIA Requester Service Centers and Public Liaisons at <http://www.hhs.gov/foia/contacts/index.html>.

§ 5.24 How does HHS process my FOIA request?

(a) *Acknowledgement.* We acknowledge all FOIA requests in writing within 10 working days after receipt by the appropriate office. The acknowledgement letter or email informs you of your request tracking number, provides contact information, and informs you of any complexity we are aware of in processing that may lengthen the time required to reach a final decision on the release of the records. In addition, the acknowledgement letter or email or a subsequent communication may

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also seek additional information to clarify your request.

(b) *Perfected requests.* (1) A request is considered to be perfected (*i.e.*, the 20 working day statutory response time begins to run) when—

(i) The request either has been received by the responsible FOIA office, or, in any event, not later than 10 working days after the request has been received by any HHS FOIA office;

(ii) The requested records are reasonably described; and

(iii) The request contains sufficient information to enable the FOIA office to contact you and transmit records to you.

(2) We provide at least 20 working days for you to respond to a request to perfect your request, after notification. Requests must reasonably describe the records sought and contain sufficient information to enable the FOIA office to contact you and transmit records to you. If we determine that a request does not meet these requirements, we will attempt to contact you if possible. Should you not answer any correspondence, or should the correspondence be returned as undeliverable, we reserve the right to administratively close the FOIA request.

(c) *Stops in processing time (tolling).* We may stop the processing of your request one time if we require additional information regarding the specifics of the request. The processing time resumes upon our receipt of your response. We also may stop the processing of your request if we require clarification regarding fee assessments. If additional information or clarification is required, we will attempt to contact you using the contact information you have provided. The processing time will resume upon our receipt of your response. We will provide at least 20 working days after notification for you to respond to a request for additional information or clarification regarding the specifics of your request or fee assessment. Should you not answer any correspondence, or should the correspondence be returned as undeliverable, we may administratively close the FOIA request.

(d) *Search cut-off date.* As the end or cut-off date for a records search, we use the date on which we first begin our

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search for documents responsive to your request, unless you specify an earlier cut-off date, or a specific date range for the records search. We will use the date of the first search in those cases when you request records “through the present,” “through today,” or similar language. The FOIA allows you to request existing agency records. The FOIA cannot be used to request records which the agency may create in the future in the course of carrying out its mission.

(e) *Processing queues.* We place FOIA requests in simple or complex processing queues to be processed in the order received, on a first-in, first-out basis, absent approval for expedited processing based upon a compelling need, as further explained and defined in § 5.27. We will place your request in the simple or complex processing queue based on the estimated amount of work or time needed to process the request. Among the factors we may consider are the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. We will advise requesters of potential complicating factors in our acknowledgement letter or email, or in subsequent communications regarding your request and, when appropriate, we will offer requesters an opportunity to narrow or modify their request so that it can be placed in the simple processing track.

(f) *Unusual Circumstances.* Whenever we cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and we extend the time limit on that basis, we will notify you, before expiration of the 20-day period to respond and in writing of the unusual circumstances involved and of the date by which we estimate processing of the request will be completed. Where the extension exceeds 10 working days, we will provide you, as described by the FOIA, with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. We will make available a designated FOIA contact in the appropriate FOIA Requester Service Center or the appropriate FOIA Public Liaison for this purpose. In addition, we will

inform you of the right to seek dispute resolution services from the Office of Government Information Services (OGIS).

(g) *Aggregating requests.* For the purposes of satisfying unusual circumstances, we may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request, involving clearly related matters, that would otherwise involve unusual circumstances. In the event that requests are aggregated, they will be treated as one request for the purposes of calculating both response time and fees.

§ 5.25 How does HHS handle requests that involve more than one OpDiv, StaffDiv, or Federal agency?

(a) *Re-routing of misdirected requests.* When a FOIA Requester Service Center determines that a request was misdirected within HHS, the receiving FOIA Requester Service Center must route the request to the FOIA Requester Service Center of the proper OpDiv or StaffDiv within HHS.

(b) *Consultation, referral, and coordination.* When reviewing records located by an OpDiv or StaffDiv in response to a request, the OpDiv or StaffDiv will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the OpDiv or StaffDiv must proceed in one of the following ways:

(1) *Consultation.* When records originated with an OpDiv or StaffDiv processing the request, but contain within them information of interest to another OpDiv, StaffDiv, agency or other Federal Government office, the OpDiv or StaffDiv processing the request should typically consult with that other entity prior to making a release determination.

(2) *Referral.* (i) When the OpDiv or StaffDiv processing the request believes that a different OpDiv, StaffDiv, or agency is best able to determine whether to disclose the record, the OpDiv or StaffDiv typically should refer the responsibility for responding to the request regarding that record to

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that other entity. Ordinarily, the entity that originated the record is presumed to be the best entity to make the disclosure determination. However, if the OpDiv or StaffDiv processing the request and the originating entity jointly agree that the OpDiv or StaffDiv processing the request is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever an OpDiv or StaffDiv refers any part of the responsibility for responding to a request to another OpDiv, StaffDiv, or federal agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral; informing the requester of the name(s) of the entity to which the record was referred, including that entity's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the OpDiv, StaffDiv, or federal agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the OpDiv or StaffDiv that received the request should coordinate with the originating entity to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the OpDiv or StaffDiv that originally received the request.

(c) *Classified information.* On receipt of any request involving classified information, the OpDiv or StaffDiv must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the OpDiv or StaffDiv must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or which should consider

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the information for classification. Whenever an OpDiv's or StaffDiv's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the OpDiv or StaffDiv must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(d) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Department will be handled according to the date that the FOIA request initially was received by the first OpDiv, StaffDiv, or federal agency.

(e) *Agreements regarding consultations and referrals.* OpDivs or StaffDivs may establish agreements with other OpDivs, StaffDivs, or federal agencies to eliminate the need for consultations or referrals with respect to particular types of records.

§ 5.26 How does HHS determine estimated completion dates for FOIA requests?

(a) When we provide an estimated completion date, in accordance with § 5.24(f) and upon request, for the processing of records that do not require consultation with another agency, we estimate the completion date on the basis of our reasonable judgment as to how long it will take to complete the request. Given the uncertainty inherent in establishing any estimate, the estimated completion date is subject to change at any time.

(b) When we provide an estimated completion date, in accordance with § 5.24(f) and upon request, for records that must be reviewed by another agency, our estimate may also be based on information from the other agency.

§ 5.27 How do I request expedited processing?

(a) To request expedited processing, you must submit a statement, certified to be true and correct, explaining the basis for your need for expedited processing. You must send the request to the appropriate FOIA Officer at the address listed at <http://www.hhs.gov/foia/contacts/index.html>. You may request

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expedited processing when you first request records or at any time during our processing of your request or appeal.

(b) We process requests on an expedited basis whenever we determine that one or more of the following criteria exist:

(1) That 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) There is an urgent need to inform the public about an actual or alleged Federal Government activity (this criterion applies only to those requests made by a person primarily engaged in disseminating information to the public).

(c) We will respond to your request for expedited processing within 10 calendar days of our receipt of your request to expedite. If we grant your request, the OpDiv or StaffDiv responsible for the review of the requested records will process your request as a priority, and it will be processed as soon as practicable. We will inform you if we deny your request for expedited processing and provide you with appeal rights. If you decide to appeal that denial, we will expedite our review of your appeal.

(d) If we must refer records to another agency, we will inform you and suggest that you seek expedited review from that agency.

§ 5.28 How does HHS respond to my request?

(a) The appropriate FOIA Officer will send you a response informing you of our release determination, including whether any responsive records were located, how much responsive material was located, whether the records are being released in full or withheld in full or in part, any fees you must pay for processing of the request, and your right to seek assistance from the appropriate FOIA Public Liaison.

(b) If we deny any part of your request, our response will explain the reasons for the denial, which FOIA exemptions apply to the withheld records, your right to appeal that determination, and your right to seek dispute resolution services from the appropriate FOIA Public Liaison or the

Office of Government Information Services (OGIS). We will advise you of the number of pages withheld or the estimated volume of withheld records, unless providing such information would harm an interest protected by an applicable FOIA exemption.

(c) Records may be withheld in full or in part if any of the nine FOIA exemptions apply. If we determine to withhold part of a record pursuant to an exemption, we will provide access to reasonably segregable non-exempt information contained in the record. On the released portion of the record, we indicate where the information has been redacted and the exemption(s) we applied, unless including that indication would harm an interest the exemption protects. In Subpart C of this part, we list the exemptions to disclosure that may apply to agency records.

(d) We also may deny your request for other reasons, including that a request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested records do not exist, cannot be located, or have been destroyed; or that the requested records are not readily reproducible in the form or format requested.

(e) If a request involves a voluminous amount of material or searches in multiple locations, we may provide you with interim responses if feasible and reasonably possible, releasing the records on a rolling basis.

(f) Copies of records in the format you request will be provided if the records already exist in that format or if they are reasonably and readily reproducible in the format you request.

§ 5.29 How may I request assistance with the FOIA process?

(a) If you have questions concerning the processing of your FOIA request, you should first contact the FOIA Requester Service Center processing your request. Additionally, for assistance at any point in the FOIA process, you may contact the FOIA Public Liaison at the FOIA Requester Service Center processing your request. The FOIA Public Liaison is responsible for assisting you to reduce delays, increasing transparency and understanding of the

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status of requests, and assisting to resolve any FOIA disputes. Some FOIA Requester Service Centers allow you to check the status of your request online. You can find a list of our FOIA Requester Service Centers and Public Liaisons at <http://www.hhs.gov/foia/contacts/index.html>.

(b) The Office of Government Information Services (OGIS), which is part of the National Archives and Records Administration, serves as the Federal FOIA ombudsman and assists requesters and agencies to prevent and resolve FOIA disputes through mediation. Mediation is a voluntary process. If we participate in the dispute resolution services provided by OGIS, we will actively engage as a partner to the process in an attempt to resolve the dispute and will follow the principles of confidentiality in accordance with the Administrative Dispute Resolution Act, 5 U.S.C. 571-8. You may contact OGIS at the following address: National Archives and Records Administration, Office of Government Information Services, 8601 Adelphi Road—OGIS, College Park, MD 20740-6001, or by email at ogis@nara.gov, or by telephone at 202-741-5770 or 1-877-684-6448 (toll free).

Subpart C—Exemptions to Disclosure

§ 5.31 What are the reasons records may be withheld?

While we are committed to providing public access to as many of our records as possible, there are instances in which information falls within one or more of the FOIA's nine exemptions and disclosure would either foreseeably harm an interest protected by a FOIA exemption or disclosure is prohibited by law. We review all records and weigh and assess all legal and policy requirements prior to making a final disclosure determination. A description of the nine FOIA exemptions is provided in paragraphs (a) through (i) of this section.

(a) *Exemption 1.* Exemption 1 protects from disclosure information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact

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properly classified pursuant to such Executive order.

(b) *Exemption 2.* Exemption 2 authorizes our agency to withhold records that are related solely to the internal personnel rules and practices of an agency.

(c) *Exemption 3.* Exemption 3 authorizes our agency to withhold records which are specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)) provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009, October 28, 2009, specifically cites to 5 U.S.C. 552(b)(3).

(d) *Exemption 4.* Exemption 4 authorizes our agency to withhold trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(e) *Exemption 5.* Exemption 5 authorizes our agency to withhold inter-agency or intra agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

(f) *Exemption 6.* Exemption 6 authorizes our agency to protect information in personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

(g) *Exemption 7.* Exemption 7 authorizes our agency to withhold records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information would cause the following harm(s):

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

(2) Would deprive a person of 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, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting lawful national security intelligence investigation, information furnished by a confidential source;

(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.

(h) *Exemption 8.* Exemption 8 authorizes our agency to withhold records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(i) *Exemption 9.* Exemption 9 authorizes our agency to withhold geological and geophysical information and data, including maps, concerning wells.

§ 5.32 Records not subject to the requirements of the FOIA—law enforcement exclusions.

Under the FOIA, there is special protection for narrow categories of law enforcement and national security records. The provisions protecting those records are known as “exclusions” and are described in 5 U.S.C. 552(c). These exclusions expressly authorize Federal law enforcement agencies, under these exceptional circumstances, to treat the records as not subject to the requirements of the FOIA.

(a) Should an HHS OpDiv or StaffDiv maintain records which are subject to a FOIA exclusion, and consider employing an exclusion or have a question as

to the implementation of an exclusion, the OpDiv or StaffDiv will consult with the Office of Information Policy, U.S. Department of Justice.

(b) Because records falling within an exclusion are not subject to the requirements of the FOIA, should any HHS OpDiv or StaffDiv maintain such excluded records, the OpDiv or StaffDiv will limit its response to those records that are subject to the FOIA.

Subpart D—Confidential Commercial Information

§ 5.41 How does a submitter identify records containing confidential commercial information?

A person who submits records to the government may designate part or all of the information in such records that they may consider to be exempt from disclosure under Exemption 4 of the FOIA. The person may make this designation either at the time the records are submitted to the government or within a reasonable time thereafter. The designation must be in writing. Any such designation will expire 10 years after the records were submitted to the government.

§ 5.42 How does HHS process FOIA requests for confidential commercial information?

(a) *Predisclosure notification.* The procedures in this section apply to records on which the submitter has designated information as provided in § 5.41. They also apply to records that were submitted to the government where we have substantial reason to believe that information in the records could reasonably be considered exempt under Exemption 4. Certain exceptions to these procedures are stated in paragraph (b) of this section.

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

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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. FOIA Offices in HHS and its organizational components may extend this period as appropriate and necessary.

(3) We review and consider all objections to release that we receive within the time limit. If a submitter fails to respond within the time period specified in the notice, we will consider the submitter to have no objection to disclosure of the information. If we decide to release the records, we inform the submitter in writing, along with our reasons for the decision to release. We include with the notice a description of the information to be disclosed or copies of the records as we intend to release them. We also provide the submitter with a specific date that we intend to disclose the records, which must be at least 5 working days after the date of the notice. We do not consider any information we receive after the date of a disclosure decision.

(4) If the requester files a lawsuit under the FOIA for access to records submitted to HHS, we promptly notify the submitter.

(5) We will notify the requester in these circumstances:

(i) When we notify a submitter that we may be required to disclose information under the FOIA, we will also notify the requester that notice and opportunity to comment are being provided to the submitter;

(ii) When the agency notifies a submitter of a final disclosure decision under the FOIA,

and;

(iii) When a submitter files a lawsuit to prevent the disclosure of the information.

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

(1) We determine that we should withhold the information under a FOIA exemption;

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(2) The information has been lawfully published or made available to the public

(3) We are required by a statute (other than the FOIA), or by a regulation issued in accordance with the requirements of Executive Order 12600, to disclose the information; or

(4) The designation made by the submitter appears obviously frivolous. However, in such a case, the agency must provide the submitter with written notice of any final disclosure determination and intent to release, at least 5 working days prior to the specified disclosure date. We will notify the submitter as referenced in § 5.42(a)(3).

Subpart E—Fees

§ 5.51 General information on fees for all FOIA requests.

(a) We generally assume that when you request records you are willing to pay the fees we charge for services associated with your request. You may specify a limit on the amount you are willing to spend. We will notify you if it appears that the fees will exceed \$25.00 or your specified limit and ask whether you nevertheless want us to proceed with the search.

(b) If you have failed to pay FOIA fees in the past, we will require you to pay your past due bill and we may also require you to pay the anticipated fee before we begin processing your current request. If we estimate that your fees may be greater than \$250.00, we also may require advance payment or a deposit before we begin processing your request. If you fail to make an advance payment within 20 working days after the date of our fee letter, we will close the request.

(c) We may charge interest on unpaid bills beginning on the 31st calendar day following the day the FOIA fee invoice was sent. We may assess interest, administrative costs, and penalties for overdue FOIA fee costs.

(d) If we determine that you (either acting alone or with a group of requesters) are breaking down a single request into a series of requests in order to avoid or reduce fees, we may aggregate all of these requests when calculating the fees. In aggregating requests, we may consider the subject matter of the

requests and whether the requests were filed close in time to one another.

(e) If, in the course of negotiating fees, you do not respond to the agency within 20 working days of our last communication, your request will be closed.

(f) We may stop the processing of your request, if necessary, to clarify fee issues with you, and to confirm your willingness to pay applicable fees. Fee related issues may arise sequentially over the course of processing a request, and the FOIA allows agencies to stop the processing time as many times as necessary in order to clarify issues regarding fee assessment and willingness to pay fees.

(g) We may charge search fees even if the records are exempt from disclosure, or if we do not find any responsive records during our search.

(h) We do not send an invoice to requesters if assessable processing fees are less than \$25.00.

§ 5.52 What is the FOIA fee schedule for obtaining records?

In responding to FOIA requests for records, we charge the following fees, where applicable, unless we have given you a reduction or waiver of fees. The fees we charge for search and review are three-tiered, and the hourly charge is determined by the classification and grade level of the employee performing the search or review. When the search or review is performed by employees at grade GS-1 through GS-8 (or equivalent), an hourly rate will be charged 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 will be charged 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 will be charged 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 listed 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% of that rate to cover benefits, and rounding to the nearest whole dollar.

(a) *Search fees*—(1) *Manual searches*. Fees will be assessed to search agency files and records in both hardcopy and electronic format. Such fees will be at the rate or rates for the classification of the employee(s) performing the search, as established in this section.

(2) *Computer searches*. We base the fees for computer searches on the actual cost to our agency of operating the computer and the salary of the operator.

(b) *Review fees*. (1) We charge review fees for time we spend examining documents that are responsive to a request to determine whether we must apply any FOIA exemptions to withhold information. Review time includes processing any record for disclosure (*i.e.*, doing all that is necessary to prepare the record for disclosure), including redacting the record and marking the appropriate FOIA exemptions. We charge review fees even if we ultimately are unable to disclose a record.

(2) We do not charge review fees for time we spend resolving general legal or policy issues regarding the application of exemptions. However, we do charge review fees for time we spend obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter.

(c) *Duplication fees*—(1) *Photocopying standard-sized pages*. The current charge for photocopying records is \$0.10 per page.

(2) *Reproduction of electronic records*. We will attempt to provide records in the format you sought, if the records are reasonably and readily reproducible in the requested format. We charge you for our direct costs for staff time and to organize, convert, and format data for release, per requester instructions, and for printouts or electronic media necessary to reproduce electronic records requested under the FOIA.

(3) *Copying other media*. We will charge you the direct cost of copying other media.

(d) *Mailing and special delivery fees*. We release records by United States Postal Service or, when appropriate, by electronic means, such as electronic mail or web portal. If a requester seeks special delivery, such as overnight

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shipping, we reserve the right to pass on the actual costs of special delivery to the requester. Requesters may provide their mailing account and billing information to the agency, so that they may pay directly for special delivery options.

(e) *Certification of records.* The FOIA does not require agencies to certify records as true copies. We may elect, as a matter of administrative discretion, to certify records upon request; however, such a request must be submitted in writing. Further, we will only certify as true copies records that have not left the agency's chain of custody. The charge for certification is \$25.00 per record certified.

(f) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an OpDiv or StaffDiv to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the OpDiv or StaffDiv must inform the requester of the contact information for that program.

§ 5.53 How does HHS calculate FOIA fees for different categories of requesters?

(a) If you are a commercial use requester, we charge you fees for searching, reviewing, and duplicating responsive records.

(b) If you are an educational or non-commercial scientific institution requester, or a member of the news media, you are entitled to search time, review time, and up to 100 pages of duplication (or the cost equivalent for other media) without charge. We charge duplication fees after the first 100 pages (or its cost equivalent).

(c) If you do not fall into either of the categories in paragraphs (a) and (b) of this section (*i.e.* you are an "other requester"), you are entitled to two hours of free search time, up to 100 pages of duplication (or the cost equivalent of other media) without charge, and you will not be charged for review time. We may charge for search time beyond the first two hours and for duplication beyond the first 100 pages (or its cost equivalent).

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(d)(1) If we fail to comply with the FOIA's time limits in which to respond to a request, we may not charge search fees, or, in the instances of the requester categories referenced in paragraph (b) of this section, may not charge duplication fees, except as described in (d)(2)-(4).

(2) If we have determined that unusual circumstances as defined by the FOIA apply and we provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(3) If we have determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, we may charge search fees, or, in the instances of requests from requesters described in paragraph (b) of this section, may charge duplication fees if the following steps are taken: we must have provided timely written notice to the requester in accordance with the FOIA and must have discussed with the requester via written mail, email, 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 in accordance with 5. U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, we may charge all applicable fees incurred in the processing of the request.

(4) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

§ 5.54 How may I request a fee waiver?

(a) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(b) We must furnish records responsive to a request without charge or at a reduced rate when we determine, based on all available information,

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that the following three factors are satisfied:

(1) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(2) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(i) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(ii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. We will presume that a representative of the news media will satisfy this consideration.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, we will consider the following criteria:

(i) We will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters will be given an opportunity to provide explanatory information regarding this consideration.

(ii) If there is an identified commercial interest, we will determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the

requirements of paragraphs (b)(1) and (2) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. We ordinarily will presume that when a news media requester has satisfied factors (b)(1) and (2) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(c) You should ask for waiver or reduction of fees when you first submit your request to HHS, and should address the criteria referenced in this section.

Subpart F—Appeals

§ 5.61 When may I appeal HHS's FOIA determination?

In order to fully exhaust all of your administrative remedies, you must file an appeal of an adverse agency determination in writing, and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted within 90 calendar days from the date of such determination. Any electronic transmission made after normal business hours will be considered to have been transmitted on the next calendar day. If a postmark is not legible, the timeliness of a submission will be based on the date that we receive the appeal. Adverse determinations include:

(a) Refusal to release a record, either in whole or in part;

(b) Determination that a record does not exist or cannot be found;

(c) Determination that a request does not reasonably describe the records sought;

(d) Determination that the record you sought was not subject to the FOIA;

(e) Denial of a request for expedited processing;

(f) Denial of a fee waiver request; or

(g) Fee category determination.

§ 5.62 How do I file an appeal?

(a) You have the right to appeal an adverse agency determination of your FOIA request.

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(b) You may submit your appeal via mail or electronically.

(1) Please send your appeal to the review official at the address provided in your denial letter. If you are unsure who is the appropriate review official, please contact the FOIA Requester Service Center that processed your request to obtain that information.

(2) The addresses to mail FOIA appeals for CMS and OS are, respectively: Centers for Medicare & Medicaid Services, Attn: Principal Deputy Administrator, Room C5-16-03, 7500 Security Boulevard, Baltimore, MD 21244; and U.S. Department of Health and Human Services, Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, Room 729H, 200 Independence Avenue SW., Washington, DC 20201. Additionally, information, including how to submit a FOIA appeal electronically, can be found at the following online locations for CMS and OS: <https://www.cms.gov/Regulations-and-Guidance/Legislation/FOIA/filehow.html> and <https://requests.publiclink.hhs.gov/palMain.aspx>.

(3) When submitting an appeal, you should mark both your letter and envelope with the words “FOIA Appeal” or include the words “FOIA Appeal” in the subject line of your email. You should also include your FOIA request tracking number, a copy of your initial request, and a copy of our final determination letter.

(c) Your appeal should clearly identify the agency determination that is being appealed. It would be helpful if you provide specific reasons explaining why you believe the agency’s adverse determination should be reconsidered.

§ 5.63 How does HHS process appeals?

(a) We respond to your appeal within 20 working days after the appeal official designated in your appeal letter receives it. If, however, your appeal is based on a denial of a request for expedited processing, we will act on your appeal of that decision expeditiously. Before making a decision on an appeal of an adverse determination, the designated review official will consult with the Office of the General Counsel. Also, the concurrence of the Office of the Assistant Secretary for Public Affairs is required in all appeal decisions,

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including those on fees. When the review official responds to an appeal, that constitutes the Department’s final action on the request.

(b) If we reverse or modify the initial decision, we will inform you in writing and, if applicable, reprocess your request. If we do not change our initial decision, we will respond in writing to you, explain the reasons for the decision, set out any FOIA exemptions that apply, and inform you of the provisions for judicial review. If a requester files a FOIA lawsuit in reference to an appeal, we will cease processing the appeal.

§ 5.64 What avenues are available to me if I disagree with HHS’s appeal decision?

(a) In our response letter, we notify you of your right to seek judicial review of an adverse determination as set forth in the FOIA at 5 U.S.C. 552(a)(4)(B). Before seeking review by a court of an adverse determination, you generally must first submit a timely administrative appeal.

(b) We also inform you that the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. As referenced in § 5.29(b) you may contact OGIS via mail, email, or telephone for assistance.

Subpart G—Records Retention

§ 5.71 How does HHS retain FOIA records?

We will preserve records created in administering the Department’s Freedom of Information program until disposition is authorized under an applicable General Records Schedule or other records schedule duly approved by the Archivist of the United States.

PART 5a [RESERVED]

PART 5b—PRIVACY ACT REGULATIONS

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- 5b.2 Purpose and scope.
- 5b.3 Policy.