

CMS Freedom of Information Act (FOIA) Policy and Procedural Instructions

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10 - Purpose

(Rev.)

This instruction describes the Centers for Medicare & Medicaid Services' (CMS) policies and procedures for administering the Freedom of Information Act (FOIA) (5 U.S.C. 552). It also conforms to and delineates the Department of Health and Human Services (DHHS or Department) FOIA regulations published in the Federal Register by the Office of the Assistant Secretary for Public Affairs on November 25, 1988.

20 - Policy

(Rev.)

This instruction represents CMS' policy and procedures for administering and implementing FOIA. It supplements and is in full compliance with the Department's FOIA Regulations (45 CFR Part 5) and the CMS FOIA Regulations at 42 CFR 401.101 et seq. (Please see Internet links below at Section 30.1).

Any instructions to CMS components not in compliance with this issuance are hereby superseded. All supplements to this issuance must be cleared with the Director, Division of Freedom of Information (DFOI), in order to ensure uniformity of procedures, as well as consistency with the law and regulations.

30 - General Information

30.1 - AUTHORITIES

- A.** Freedom of Information Act (FOIA), 5 U.S.C. 552
<http://www.usdoj.gov/oip/foiastat.htm>
- B.** Electronic Freedom of Information Act Amendments of 1996 (EFOIA), Pub. L. No. 104-231, 110 Stat. 3048 (codified throughout 5 U.S.C. 552)
- C.** Open Government Act of 2007 and Open FOIA Act of 2009
<http://www.justice.gov/oip/amended-foia-redlined-2010.pdf>
- D.** Office of Management and Budget (OMB), December 8, 2009 Memorandum M-10-06, Open Government Directive
http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf
- E.** Executive Order No. 12600, "Predisclosure Notification Procedures for Confidential Commercial Information" (July 23, 1987)
<http://www.archives.gov/federal-register/codification/executive-order/12600.html>
- F.** Department of Health and Human Services FOIA Regulations, 45 CFR, Part 5
<http://www.hhs.gov/foia/45cfr5.html> (Section 5.31 of the regulation defines the authority of the FOIA Officers within the HHS agencies).
- G.** CMS FOIA Regulations at
http://www.access.gpo.gov/nara/cfr/waisidx_10/42cfr401_10.html

REFERENCES

- A.** CMS FOIA Internet Web Site: <http://www.cms.gov/foia/>
- B.** "Freedom of Information Act Guide & Privacy Act Overview," U.S. Department of Justice, 2009 edition, http://www.justice.gov/oip/foia_guide09.htm
- C.** U.S. Department of Justice Web Site: www.foia.gov

30.2 – Scope of the FOIA (Rev.)

The FOIA gives the public the right to request existing records held by the Executive branch of the Federal government, subject to the nine Exemptions to disclosure. Historically, CMS has only invoked six of those Exemptions, which are listed and described in Section 30.9.

The FOIA pertains to records (paper or electronic) only. It does not cover information which may be requested and imparted orally or in writing.

The FOIA does not require an agency to perform research to answer questions, when an agency record or document does not exist that contains the requested information. For example, requests for dates, addresses, or statistics such as the Medicare enrollment for a State, which need not be responded to with the production of a document, should not be handled as FOIA requests. Such requests should be directed to the proper public inquiries office.

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

Materials Not Subject to the FOIA: The FOIA does not apply to materials specifically prepared for public distribution or sale, e.g., press releases, speeches, fact sheets, information brochures, or any publication which has been assigned a CMS, DHHS, Government Printing Office, or National Technical Information Service (NTIS), publication number, etc.

The Department FOIA regulations at 45 CFR § 5.22, state that the Department will not handle a request under their FOIA regulations “to the extent it asks for records that are currently available, either from HHS or from another part of the Federal government, under a statute that provides for charging fees for those records.” Under the Social Security Act, Section 1106(b) (42 U.S.C. § 1306(b)), the agency may charge the cost for furnishing information. Additionally, the Freedom of Information Act at 5 U.S.C. § 552 (a)(2) states that an agency is not required to make certain records available for public inspection and copying, specifically records which have been promptly published and offered for sale.

Written/Oral Requests

(Rev.)

FOIA requests should be submitted in writing, for copies of existing records. Requests must "reasonably" describe the requested records. Requests do not have to be designated or labeled as a “FOIA request.” In highly unusual circumstances, the CMS FOIA Officer may accept oral FOIA requests, which subsequently must be put in writing by the CMS FOIA officer or his designee, and confirmed by the requestor.

30.3 - Required Signatures and Requestor Contact Information

Although it is not always necessary for a FOIA request to bear an actual signature, the name of the individual submitting and sending the request must be provided. The name of a business entity alone is not sufficient; CMS requires that we have the contact information of an individual at the requestor's organization. If a FOIA request does not contain the name of an individual who may be contacted regarding the request, do not process the request and close the request out. Send a letter to the requestor, advising that he/she may resubmit a new request to CMS which provides the required contact information.

For requests that seek records of individuals which are contained in Privacy Act systems of records, CMS requires a signature on the request letter.

30.4 - Creation of Records

(Rev.)

As stated previously in Section 30.2, the FOIA allows the public to request existing agency records. The FOIA does not require that new records or documents be created to respond to requests.

However, the FOIA does require that agencies search for existing discrete records, whether those records are in electronic form or hardcopy. In the case of conducting an electronic records search, it is not considered creating a new record if a program is created by the agency to search the electronic records in its possession.

Additionally, deleting non-releasable data, or data not within the scope of the request, from an existing record is not considered creating a record. This applies even if, for the agency's administrative convenience, CMS chooses to write a new program to edit the existing record, rather than editing the record manually.

Should CMS issue a response informing a requester that a requested record does not exist within the agency, such a response is not a denial, but still is considered an adverse determination. Therefore, all such "No Records" responses should include notification of appeal rights within the body of the letter. (Please see Section 30.11, Administrative Appeals).

30.5 - Time Frames for FOIA Processing

(Rev.)

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

A. CMS must make an initial determination as to whether to make requested records available within 20 working days after receipt of the request by DFOI, or the appropriate office (if that office is authorized to respond directly).

B. CMS must make a determination on an appeal of a decision within 20 working days after receipt in DFOI. The CMS appeal official is the Principal Deputy Administrator, CMS, Room C5-16-03, 7500 Security Boulevard, Baltimore, Maryland 21244.

C. An extension of these time limits is authorized only in unusual circumstances, as specified in the Act. For example, should CMS need to do any of the following to process a FOIA request, processing time may be extended an additional ten working days:

(1) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) search for, collect, and review a voluminous amount of records which are responsive to a single request; or

(3) consult with another agency which has a substantial interest in the disclosure determination of the request, or among two or more components of the agency having a substantial subject matter interest in the request.

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

30.6 - Authority to Release/Deny

(Rev.)

With the exception of the documents listed in Section 30.7, which may be released directly at the appropriate designated level of authority, all requests for records which are received anywhere in CMS will be forwarded immediately to DFOI, by the FOIA Coordinator, in the manner described in Sections 40 and 50, Processing Guidance to CMS Components and CMS Regional Offices, and Processing Guidance to CMS Contractors.

As stated in the Department's FOIA regulation at 45 CFR §5.31, only the Freedom of Information Officers have the authority to release or deny records. Only the Director, DFOI, or his authorized designee, DFOI, can decide on release of non-excepted CMS records, or the full or partial denial of any request. Therefore, all records provided by the CMS program areas and Medicare contractors to DFOI in response to a FOIA request must be unedited, original copies of agency records.

Requestors may appeal a CMS decision to withhold all or part of the records requested. Only the Administrator or Principal Deputy Administrator of CMS can rule on appeals of denials made under FOIA. Please see the Administrative Appeals Section at 30.11.

30.7 - Direct Release of Routine Records

(Rev.)

CMS and Department Policy permit certain categories of agency records to be directly released by CMS contractors and CMS components and Regional Offices, in accordance with three levels of designated authority (Exhibit A):

- (1) Releases which may be made by any CMS component, CMS Regional Office or Medicare contractor;
- (2) Releases which may be made by Medicare contractors upon the instructions of the responsible CMS Regional Office; and
- (3) Releases which may be made by the heads of CMS Centers and Offices and by Regional Administrators, or their designees.

30.8 – Non-CMS Records

Department Records

If records requested and/or located during a search are not exclusively records of CMS but, rather, include records of the Office of the Secretary (OS) or any OS Staff Division or any other organizational element of OS (such as the Office of the General Counsel or "OGC"), or records of the Office of Human Development Services and the Family Services Administration, or of any other Operational Divisions (OPDIVs) of DHHS, the FOIA Coordinator should provide all such records to DFOI, and label all such records. DFOI will be responsible for forwarding such records to the Department's FOIA Officer for a disclosure determination, in accordance with the Department's FOIA regulations at 45 CFR §5.31(b).

Other Non-CMS Records

State Medicaid Claim Records: CMS frequently receives requests for payment and other information relating to state Medicaid claims. Although the Medicaid program is jointly funded by the Federal government and the states, each individual state is responsible for administering the operations of their Medicaid program. A list of state Medicaid program web sites is available at <http://www.cms.gov/MedicaidEligibility/> . When DFOI or the Regional Offices receive a request for Medicaid-only records, in order to assist the requestor, our response should include contact information for the appropriate state Medicaid agency.

U.S. Railroad Retirement Board: The U.S. Railroad Retirement Board is an independent agency in the executive branch of the Federal Government. The Board's primary function is to administer comprehensive retirement-survivor and unemployment-sickness benefit programs for the nation's railroad workers and their families, under the Railroad Retirement and Railroad Unemployment Insurance Acts. In connection with the retirement program, the Board has administrative responsibilities for railroad workers' Medicare coverage. The Board's Bureau of Retirement Claims maintains the authority to provide or deny release of information in its files under FOIA. Requests for information received by CMS or any of its Regional Offices or contractors concerning Board Medicare program responsibilities or railroad retirement beneficiaries should be forwarded to:

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

30.9 – Disclosure Policy and FOIA Exemptions to Disclosure

It is CMS' policy to adhere to the provisions of Open Government and transparency, and to make the fullest possible disclosure of agency records. CMS, in accordance with the U. S. Department of Justice Attorney General's March 19, 2009 memorandum, operates under a presumption in favor of disclosure when processing FOIA requests. Please see the Attorney General's memo at <http://www.justice.gov/ag/foia-memo-march2009.pdf> .

However, records may be withheld or redacted, if they fall within one of nine FOIA exemptions. The FOIA requires that a record must be released only to the extent that none of the FOIA exemptions, as interpreted by HHS's implementing regulations, apply. Historically, CMS has used only six of the nine FOIA exemptions, which are described below:

Exemption 2 - Internal Personnel Rules and Practices

Prior to a March 7, 2011 Supreme Court decision, the scope of this Exemption had been interpreted by the courts to allow the withholding of a variety of internal rules, procedures and guidelines. Previously, the courts had held that two different categories of information fell under the protection of this Exemption (“low two” and “high two” categories of information). Specifically, the “low two” category applied to relatively low level internal agency information, that which might be characterized as being of a relatively trivial nature. The “high two” category of information encompassed internal information on a far more substantial level, the disclosure of which "significantly risks circumvention of agency regulations or statutes."

The Supreme Court opined in the March 7, 2011 decision referenced above that Exemption 2, and the language contained with the Exemption, specifically the term “personnel rules and practices,” is substantially narrowed to only encompass records relating to issues of employee relations and human resources. This decision requires a significant departure from our previous application of this Exemption.

Exemption 3 - Records Exempted by Other Federal Laws

This Exemption allows an agency to withhold records which may be specifically withheld under another statute, or withheld under criteria provided in another statute, which sufficiently describes the information or records at issue.

Exemption 4: Trade Secrets and Confidential Commercial or Financial Information

This Exemption allows an agency to withhold information such as trade secrets, and proprietary and confidential business financial information. Trade secrets are found in records containing secret, commercially valuable plans, formulas, processes, or devices used for making, preparing, compounding or processing trade commodities that are the end product of either innovation or substantial effort. Confidential commercial or financial information is found in records containing valuable, non-public data or information relating to businesses, commerce, trade, employment, profits, or finances.

Exemption 5 – Inter-agency and Intra-agency Internal Memoranda

This Exemption allows an agency to withhold certain inter-agency or intra-agency communications that fall within a generally recognized evidentiary privilege (e.g., deliberative process memoranda and other pre-decisional information; attorney work product documents prepared in anticipation of litigation or for trial; and attorney-client communications). In accordance with the emphasis on disclosure within the Open Government Act, when invoking the deliberative process privilege, an agency should only invoke this privilege when the release of the information would cause a foreseeable harm to the agency.

Exemption 6 - Clearly Unwarranted Invasion of Personal Privacy

This Exemption allows an agency to withhold information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy (e.g., names and other identifying information about individuals), which are contained in “personnel and medical files and similar files”. The definition of “similar files” has historically been broadly interpreted to include a wide variety of files. The United States Supreme Court has held that Congress intended the term "similar files" to be interpreted broadly, rather than narrowly. United States Department of State v. Washington Post Co, 456 U.S. 595 (1982). The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information" and opined that information that "applies to a particular individual" meets the threshold requirement for Exemption (b)(6) protection.

Exemption 7 - Law Enforcement

This Exemption allows an agency to withhold records or information compiled for law enforcement purposes (for both civil and criminal matters), when disclosure of that information:

- (a) Could reasonably be expected to interfere with prospective or ongoing law enforcement proceedings; or
- (b) Would deprive any person of the right to a fair trial or an impartial adjudication, such as because of prejudicial publicity; or
- (c) Could reasonably be expected to constitute an unwarranted invasion of personal privacy; or
- (d) Could reasonably be expected to disclose the identity of a confidential source (including an individual, a State, local, or foreign government agency, or any private organization) which furnished information on either an expressed or reasonably inferred confidential basis, or disclose information furnished by a confidential source where a record or information in it has been compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security investigation; or
- (e) Would disclose special techniques, guidelines, and procedures for investigations or prosecutions, not otherwise generally known to the public, if such disclosure could reasonably be expected to risk circumvention of the law; or
- (f) Could reasonably be expected to endanger the life or physical safety of any individual.

For a description of all the nine FOIA Exemptions, please see HHS FOIA regulations at <http://www.hhs.gov/foia/45cfr5.html>, Subpart F. As previously mentioned on page 9, CMS does not routinely invoke Exemptions 1, 8, and 9 in the agency's FOIA decisions. The reason for this is that CMS does not customarily maintain records relating to the subject matter of these Exemptions, which are, respectively, classified records involving national security, bank examination reports, and "geological and geophysical information and data, including maps, concerning wells".

30.10 – Fee Related Issues

User/Requestor Categories and Applicable Fees

Commercial Users: Fees should be assessed for search, duplication, and review of records.

News Media, including the Trade Press, and Educational and non-commercial Scientific Institutions:

Fees may be charged only for duplication. The first 100 pages of records are free.

All Others, including Public Interest Groups, Nonprofit Organizations, and Consumers:

Fees are limited to duplication and search costs only. There is no charge for the first 2 hours of search time and the first 100 pages of duplication.

Fee Schedule

Fees are set by the Department. Fees are rounded up to the nearest 15-minute increment. When employees are involved at more than one level, the appropriate rate for each is charged.

Fees are charged on a three-tiered scale, based on the grade levels of the employees processing the request, as follows (these fees represent the FOIA fee schedule as of 2011), and should be utilized on the fee invoice (Form CMS-633):

GS-1 through GS-8:	\$23
GS-9 through 14:	\$46
GS-15 or above:	\$83

Any increase in the fee schedule must first be authorized by the Department. This fee schedule may be subject to annual increases at the beginning of each January – please check the Department's FOIA site for the current schedule, which is currently available at <http://www.hhs.gov/foia/fees/index.html>

Chargeable Services

CMS charges fees for a number of activities: searching for records, and reviewing the records located; certifying records; and sending records by special methods when responding to a FOIA request. Search fees may be charged, even if the responsive records are exempt from disclosure, or if no records are found. Although CMS does not charge for photocopying time, the agency does currently charge \$.10 per page for records released.

Computer Searching and Printing

Charges are for actual costs of operating the computer to obtain records, plus charges for the time of computer programmers, operators, or other employees at the rates in the Fee Schedule.

Certifying Records

CMS currently charges \$10.00, as of September 2011, to certify that records are "true copies". CMS will only certify records as true copies that have not left the agency's chain of custody. To further explain the definition of chain of custody as pertaining to CMS, CMS' Medicare contractors and state survey agencies are considered to be an extension of the agency while performing activities in support of the Federal Medicare program and under Section 1864 of the Social Security Act. Therefore, this allows CMS to certify records held or generated by these entities which relate to these specific federally mandated agency responsibilities, and are provided directly by those contractors and authorized agents to CMS within this chain.

Only CMS may certify agency records with the Department seal. If CMS contractors receive requests for certified records, they are to forward the records to the CMS Regional Office FOIA Coordinator, who will provide the records to the CMS Regional Office official authorized to certify records.

Examples of CMS certification verbiage to be utilized are at the CMS intranet web site at http://cmsnet.cms.hhs.gov/hpages/osora/records/INSTRUCTIONS_Seal.pdf .

Mailing

Charges are not assessed for regular mail. The Agency may use special carriers (e.g., Fed Ex, DHL, and UPS), express mail, or other special methods, if charges are billed directly to the FOIA requester (using the requester's account number). Under certain circumstances, in which it is to the benefit of the agency to utilize special mailing services (either to expedite delivery and/or track receipt of delivery), special mailing services such as overnight mail may be utilized, in accordance with CMS' established policies regarding use of overnight mail at <http://cmsnet.cms.hhs.gov/hpages/oics/overmail/overnightmailprocedures.pdf> .

Fee Waivers: In certain cases, requestors may ask for a full or partial waiver of the processing fees for their FOIA request. It is the responsibility of the requestor to provide a written substantiation for a fee waiver to the CMS FOIA Director. Requests for fee waivers are reviewed in accordance with Department's FOIA regulation at 45 CFR, § 5.45, which may be accessed online at http://edocket.access.gpo.gov/cfr_2010/octqtr/pdf/45cfr5.45.pdf or at the Department FOIA regulations at <http://www.hhs.gov/foia/45cfr5.html>, Subpart D. Should a Regional Office or a Medicare contractor FOIA Coordinator receive a request for a fee waiver, that fee waiver request should be forwarded to the CMS FOIA Director, preferably via electronic mail, with the requestor's written substantiation in support of the fee waiver request attached.

Delinquent Fee Invoices: The CMS Office of Financial Management (OFM) provides DFOI and the FOIA Coordinators with a monthly delinquency list of FOIA requestors who are currently overdue and owe the agency money for FOIA processing fees. All FOIA Coordinators and DFOI staff should check this delinquency list upon receipt of a new FOIA request. CMS will not process any new FOIA requests received from an individual or entity with an overdue fee invoice. Upon receiving a FOIA request from a delinquent requestor, a denial letter should be sent to the requestor, advising that the request is being closed and will not be processed (please see Exhibit B). The denial letter also advises the requestor that they may submit a new request to the agency after they have paid their overdue invoice(s).

However, should a FOIA coordinator receive notification that a requestor has become delinquent after a FOIA request is already being processed, CMS may complete processing that specific FOIA request. Please see the guidance in the memorandum dated August 3, 2011 from CMS FOIA Director Michael Marquis, which addresses this issue (Exhibit C).

30.11 – Administrative Appeals

Requestors may administratively appeal CMS' decision to withhold all or part of the records requested, or may appeal on other bases. All administrative appeals of FOIA requests must be submitted to the CMS Principal Deputy Administrator, at the following address: Principal Deputy Administrator, Centers for Medicare & Medicaid Services, C5-16-03, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

Requestors must mail their appeal of CMS' decision to the above address within 30 (calendar) days of the date of the agency's decision letter. Appeals are submitted to the agency on the following bases:

- Constructive denial, when the agency has not responded to a FOIA request within statutory timelines;
- Denial of a request for a full or partial waiver of fees;
- Full or partial withholding of agency records under any of the FOIA Exemptions, and;
- Adequacy of search, and "No Records" responses.

30.12 – Electronic Workfolder Management

Since 2009, the Strategic Work Information Folder Transfer (SWIFT) system has been the official system of record for processing FOIA requests for all CMS offices, and must be used to process and track all FOIA requests handled by CMS and its Regional Offices. The CMS Central Office and the CMS Regional Offices all utilize the SWIFT system to input relevant data and track FOIA requests. The function of SWIFT is to create an electronic administrative file for each request, which documents actions performed by the agency in processing requests, including search activities, background information and notes, and responses to requestors. (Currently, the CMS contractors do not have access to this system and use their own tracking system(s).)

It is expected and required that all incoming FOIA requests received by CMS and our contractors will be logged into the appropriate tracking system within 24 hours of receipt.

Each significant action taken anywhere in CMS relative to a FOIA request, e.g., calls from component coordinators, reports of contact with the requester, notification of problems in conducting or completing the search, etc., must be noted on the SWIFT tracking system by date, to provide a total record of activity relative to that request. The "Notes" section of the SWIFT workfolder is customarily utilized to track relevant processing actions and issues with a FOIA request.

The SWIFT FOIA Users Guide is currently available on the CMS intranet at <http://cmsnet.cms.hhs.gov/hpages/osora/projects/FOIAUserGuide.pdf>

30.13 – Responsibilities of All Agency Staff and Contractors

CMS receives the highest number of FOIA requests of any agency within the Department. During fiscal year 2010, CMS received over 46,000 FOIA requests. For reference, please see the Department's FOIA report at http://www.hhs.gov/foia/reports/10anlrpt.html#v_foia_requests.

With such a high volume of FOIA requests, it is likely that almost all CMS employees and contractors will be involved in processing a FOIA request at some time, and will need to search for agency records.

The FOIA requires the following: CMS must make a reasonable search for any requested records, in that the agency properly determines where responsive records are likely to be found, and agency employees and/or agency Medicare contractors search those locations for responsive records. A reasonable search requires that locations be searched where responsive hardcopy records and/or electronic records are believed to be maintained.

When requests are sent from DFOI to CMS components and CMS Regional Offices for records search via the SWIFT system, the searching component(s) or offices(s) are given 10 working days to conduct and complete their search, and reply to DFOI. When a FOIA request is transferred to a contractor for a directly reply, the contractor has 20 working days to complete and respond to the request, after receipt of the request.

30.14 – Processing Requirements for All Agency Staff and Contractors – High Priority Issues

A. Organizing Responsive Records by Item (labeling and bundling): FOIA requests frequently contain lists of multiple categories of records being requested. When providing responsive records to multi-item FOIA requests, the providing office/s must organize the records in relation to the separate items of the request and label them accordingly, for ease of reference and analysis.

B. Document Search Activities: The office providing the responsive records must document their search activities and be able to describe the locations where they searched for records, and the names and locations of any electronic files and/or databases. To meet the requirements of performing a reasonable search required under the FOIA, a comprehensive search is necessary, in that Regional Offices and CMS program areas must make the effort to search in all areas where responsive documents would be likely to be maintained. Please refer to Section 30.5 (Time Frames for FOIA Processing) and Section 30.13 (Responsibilities of All Agency Staff and Contractors) for the timelines established to complete searches for records.

C. Document Search Time: Each staff member conducting a search for responsive records to a FOIA request must document their search time, and advise their office FOIA Coordinator of that information. The FOIA Coordinator will compile that information on a Form CMS-632, which is used to compile the costs for responding to FOIA requests (Exhibit D). SWIFT users may do this electronically within the system.

When it is necessary for state survey agency employees to search for Federal records in response to a FOIA request, that search time should also be reflected in the cost/fee compilation. This could be listed on the Form CMS-632 either under search time, or under the “Other” category, with a brief accompanying explanation and/or annotation.

D. “No Records” Responses: If the component or office searching was unable to locate responsive records, the searching entity should provide the reason for the “No Records” response: e.g., records believed to be maintained by another agency component (please identify the specific component where records are believed to be maintained); records sought not customarily maintained by the agency; records destroyed or transferred to the National Archives and Records Administration in accordance with agency’s records retention schedule; or other reason(s) the requested records could not be located.

CMS’ records retention guidelines are available at <http://cmsnet.cms.hhs.gov/hpages/osora/records/default.asp> , under the CMS Records Schedule and the CMS Master File Plan.

30.15 – Subpoenas

In accordance with HHS regulations, subpoenas which are deemed to be legally insufficient and not from a court of competent jurisdiction will be treated as FOIA requests. Please see the relevant HHS regulation at:

http://edocket.access.gpo.gov/cfr_2009/octqtr/pdf/45cfr2.5.pdf (Exhibit E)

For state survey related records, please refer to the October 2, 2009 memorandum from the Center for Medicaid and State Operations/Survey & Certification Group at http://www.cms.gov/SurveyCertificationGenInfo/downloads/SCLetter10_01.pdf, which provides guidance to staff regarding how to respond to subpoenas for survey related records.

For purposes of the Privacy Act, this agency considers a court of competent jurisdiction to be a Federal court, only. When a non-Federal court subpoena is for personal records contained in a Privacy Act System, unless accompanied by a signed release authorization which is compliant with the requirements of the Health Insurance Portability and Accountability Act (HIPAA), as described in Exhibit G on the following page, Medicare contractors are to decline to produce the records based upon standing DFOI instructions, and use the standard subpoena denial response letter (Exhibit F).

Subpoenas from a Federal Court should be forwarded to the Office of General Counsel (OGC) for review. Additionally, any subpoena asking for the appearance and testimony of agency employees should be sent to OGC for review and response.

30.16 – Frequently Requested Beneficiary Records

This instruction provides guidance concerning how CMS Central Office and CMS Regional Office components, Medicare Administrative Contractors (MACs) and other CMS contractors are to process FOIA requests for records on Medicare beneficiaries, as retrieved from Privacy Act Systems of Records. The instruction complies with both FOIA and the HIPAA Privacy rules.

Document(s) responsive to FOIA requests for claims/medical records of beneficiaries can be released directly from CMS Central Office and CMS Regional Offices, the MAC's, and other CMS contractors, by their respective FOIA Coordinators, if a signed HIPAA compliant release authorization is provided.

A. Requirements for a HIPAA Compliant Authorization (Exhibit G). The document in this Exhibit lists all the required elements and statements which must be included within a HIPAA compliant authorization, and may also be found online at <http://www.medicare.gov/MedicareOnlineForms> .

B. First Party Requests for Beneficiary Records: Medicare claims records are maintained within systems of records covered by the Privacy Act. An individual may request his/her own Medicare records by submitting a signed, written request containing sufficient information (name, address, social security number, and the time frame of the records being requested) to identify the Medicare records being requested. A Medicare beneficiary may also choose to submit a request for his/her own records by submitting a HIPAA compliant release authorization.

C. Third Party Requests for Beneficiary Records: The request must be made in writing, and must be accompanied by a valid authorization signed by the Medicare beneficiary. The authorization must include all the core elements and required statements of a valid privacy authorization as referenced in Exhibit G. If the third party is acting in a representative capacity such as a Power of Attorney, a copy of the Power of Attorney documents should be included.

D. Requests for Deceased Beneficiary Records: Document(s) responsive to FOIA requests for claims/medical records of deceased beneficiaries can be released directly from CMS Central Office and CMS Regional Offices, MAC's, and other CMS contractors, by their respective FOIA Coordinators, if the following conditions are met:

1. The FOIA request is made in writing by an authorized personal representative of the deceased, such as an executor, administrator, or other person who under applicable law has authority to act on behalf of a deceased individual or of the individual's estate, and the representative of the estate has provided written documentation authenticating his authority to represent the estate, or
2. The request is made in writing by a third party (such as an attorney) and is accompanied by a valid authorization signed by an authorized representative of the deceased, and includes documentation authenticating the authority of the signatory on the release authorization to represent the decedent's estate.

40 – Processing Guidance to Central Office Components and Regional Offices

General Information

A. The DFOI is responsible for administering, implementing, and monitoring CMS FOIA requirements. As previously referenced in Section 30.6, the Department's FOIA regulations at 45 CFR §5.31 state that only the Freedom of Information Officers within the Department have the authority to release or deny records for their respective agencies.

B. Each CMS Regional Office and Central Office Center and Office shall designate a FOIA Coordinator who shall be the contact point for that component. All FOIA requests received by the CMS Central Office and the Regional Offices must be entered into the SWIFT FOIA tracking system, within 24 hours of receipt. All FOIA requests received anywhere in the CMS Baltimore Central Office must be forwarded immediately to DFOI, within 24 hours of receipt, to be entered into the SWIFT system.

C. When a Central Office component receives a FOIA request for records which are not releasable except by DFOI, either directly from a requester or referred by a subcomponent, a copy of the request shall be made and a search for the requested documents begun, within 24 hours of receipt. The original copy of the request must be forwarded immediately to the DFOI.

REGIONAL OFFICES

When a FOIA request is received directly by a CMS Regional Office, the Regional Office FOIA Coordinator shall log the request into the SWIFT system, within 24 hours of receipt. The Regional Office must determine whether the requested records may be directly released, in accordance with their designated authority, or if the records must be forwarded to DFOI. If the request may be responded to directly, it shall be forwarded to the appropriate contractor for response, or the response prepared for the Regional Administrator. If a portion of the responsive records may be released directly, a partial reply to the requester may be made, and the requestor must be notified that the remaining records have been sent to the FOIA Officer for a disclosure determination. A copy of the partial reply, and/or an explanation of what documentation was released directly should be transferred to DFOI, and the SWIFT workfolder must be annotated, and the documents uploaded to the system accordingly.

A. If the request cannot be responded to directly, a copy of the request shall be made and forwarded to DFOI within 24 hours of receipt, and a search for the documents initiated.

B. In those instances when the material requested is available for forwarding to DFOI on the same or the next day, please include a copy of the incoming request with the records being forwarded to DFOI.

C. When a CMS Regional Office is aware that the documents requested are held in Central Office, and it would be more expedient for a Central Office component to respond (more timely, less costly, etc.), a note to that effect must be placed in the SWIFT workfolder, and the Regional Office should transfer the request in SWIFT to DFOI.

D. When a request is received, either by DFOI or the Regional Offices, which appears to require a multiple-region search, that request should be coordinated to minimize duplication of efforts. Should a Regional Office receive such a request, the FOIA Coordinator should notify DFOI immediately. DFOI will then consult with Regional Office contacts to determine which CMS business line and consortium would have control over the subject matter and related responsive records, and establish a central contact to oversee and coordinate the search process.

Please refer to the Standard Operating Procedures (SOP), as defined within the 2010 SOP for CMS Regional Offices, which in conjunction with this chapter, provide additional operational guidance on FOIA processing policies and procedures for CMS Regional Offices: <http://cmsnet.cms.hhs.gov/hpages/osora/projects/FOIASOP.docx>

Additionally, the SWIFT Document Management System FOIA Module Regional Office How-To is available at <http://cmsnet.cms.hhs.gov/hpages/osora/projects/RegionsHowTo.pdf>.

DFOI ACTIONS

When DFOI receives a FOIA request directly from a requester for material not on the direct release list, DFOI will:

A. Within 24 hours of receipt, time/date stamp the request, and input the request data and copies of the related documents into the electronic SWIFT FOIA Tracking system, which will assign the FOIA request a unique case tracking number. When inputting a new FOIA request into the SWIFT system, always check to ensure that a request is not a duplicate of a FOIA request already in the system. DFOI staff will then immediately forward the request to the CMS component(s) most likely to hold the requested documents. (A request for directly releasable material will be forwarded to the appropriate office via SWIFT, with an annotation identifying it as a direct release.)

B. The SWIFT system will show all components to which the request has been referred, so that all FOIA Coordinators will be aware of which counterparts are also involved in each document search.

C. Components are encouraged to suggest to DFOI other CMS components which might appropriately be contacted as a source of responsive records for a FOIA request.

D. When DFOI receives a request which was originally received by any CMS component or FOIA Coordinator in the Baltimore Central Office, in most instances, the request will be referred back to the component originally receiving the request via the SWIFT system (as well as to others likely to hold responsive documents), unless it is obvious that the referring component does not maintain the requested records. The SWIFT system allows the responding component(s) 10 business days to complete their records search, and return the responsive records located to DFOI. Responsive records up to 1,000 pages should be uploaded to the SWIFT system FOIA workfolder.

E. When the FOIA request requiring DFOI review of the responsive records is finalized, and a response issued, DFOI will upload a copy of the response letter into the SWIFT system.

40.1 – Organization and Provision of Responsive Records

DFOI utilizes electronic redaction technology to process agency records requested under the FOIA. Therefore, it is incumbent upon all program offices to provide responsive records in an electronic form or format. Responsive records up to 1,000 pages should be uploaded to the SWIFT system FOIA workfolder.

A. When a request is for more than one item or subject, include a cover sheet listing those items for which responsive agency records have been located, and also list those items for which no records have been located. Please provide this listing in the order of the requested records as stated in the incoming FOIA request.

B. Important - Please organize the responsive records in accordance with the item number of the request to which the records correspond. If the request seeks documents for more than one item of information, organize the documents according to the specific item to which they respond **and** clearly identify the item associated with each group of records.

C. If the responsive records being provided for a request are of poor quality, but are the best available records in possession of the agency, please note that for the records.

D. When DFOI receives mail delivery of responsive records from the Regional Offices, DFOI staff will annotate the SWIFT workfolder with the receipt date of the records, and a brief description of the records (e.g. the approximate volume of the records, and the format of the records, such as disk or hardcopy).

40.2 – Disclosure Concerns

A. CMS program areas and Regional Offices should send one complete set of all responsive records to DFOI in response to the search referral, along with a completed Form CMS-632. Medicare contractors should send one complete set of responsive records to the FOIA Coordinator in the appropriate Regional Office, accompanied by a completed Form CMS-632. If you recommend that the records or a portion thereof should be withheld, indicate your reason(s) on the Form CMS- 632, or in a separate note or memorandum. Be certain to explain the specific harm that would likely ensue from disclosure. A formal memorandum is not necessarily required, but the component or contractor must inform DFOI in writing of its reason for recommending denial. A summary of the six FOIA Exemptions applying to CMS is listed in Section 30.9 of this chapter (Disclosure Policy and Exemptions).

B. Please annotate the records with any disclosure recommendations, or provide a list and description of the records for which either full or partial denial is recommended. If certain portions of a document are recommended for withholding, you may highlight those areas.

C. If any non-CMS records are included in the responsive records (OS, DHHS, other agencies), those records should be separated and clearly marked.

40.3 – General Fee Processing Information

The Department’s fee schedule allows processing a request without charge when the cost of collecting a fee would exceed the amount of the fee. CMS has established that charges of less than \$25.00 should not be billed. Exception: when an individual or organization submits multiple FOIA requests within 90 calendar days which individually do not meet the minimum charge level, the charges for those requests may be aggregated and invoiced. Please see Section 5.42 of the DHHS FOIA Regulations, available online at <http://www.hhs.gov/foia/45cfr5.html>, Subpart D. When invoicing aggregate charges for two or more requests, please be sure to advise the requester that the invoice is for aggregate charges.

A. All checks or money orders for the payment of FOIA services are to be made payable to the “Centers for Medicare & Medicaid Services.”

B. Waivers or reduction of fees in the public interest will be made only by the Director, DFOI, based on justification submitted by the requester. As previously referenced above, the Department’s FOIA fee regulations, including the criteria for fee waivers, are available online at <http://www.hhs.gov/foia/45cfr5.html>, Subpart D. If the material for which the fee waiver is requested is directly releasable, DFOI will inform the releasing component of the waiver decision. In such cases the materials involved are not to be forwarded to DFOI for release, but the releasing component will be asked to verify the costs which are involved in the waiver and for its recommendation regarding the waiver request.

C. When a requester asks to be advised of the cost of processing a request, or places a limit on the charges he is willing to accept, a good-faith estimate should be made prior to full processing of the request.

D. Advance payment may be requested in two instances:

1. When costs of \$250 or more are involved, or
2. Where the requester has been delinquent in paying FOIA fees in the past.

Please refer to Exhibit H, Fee Invoicing Guidance and Instructions, for information regarding the compilation of the fee invoice (CMS-633 form).

50 - Guidance and Instructions to CMS Contractors

The DFOI is responsible for administering, implementing, and monitoring CMS FOIA requirements. The instructions and guidance in this chapter are intended to assist CMS contractors in the performance of their FOIA responsibilities.

Each CMS contractor shall designate a FOIA Coordinator who shall be the contact point for that contractor.

CMS contractors may directly release the records described in Exhibit A (CMS List of Authorized Direct Release Categories of Records), as specified as being within their “direct release” authority.

50.1 – Reporting Requirements for CMS Contractors

Contractors are responsible for accurately reporting their FOIA processing activity to CMS. CMS has outlined its monthly contractor reporting requirements for FOIA activities in the Joint Signature Memorandums issued May 19, 2010, and March 23, 2011. (Exhibit I).

Contractor Accounting for Processing Costs

A. Fill out, completely and accurately, a Form CMS-632 for each direct release. Form CMS-632 for direct responses should be filled out by the individual(s) processing the request. This form must be prepared if measurable search time was expended, whether or not the responsive records were located, or if the requestor was charged.

B. Maintain a “Freedom of Information” log or spreadsheet on a daily basis.

C. Retain copies of all completed Form CMS-632s in your files until DFOI provides a written directive to you to destroy them. The 632s serve as documentation of resources expended for FOIA processing. Please do not submit copies of CMS-632 forms for direct responses (for those requests which are fully satisfied by the contractor’s response) to the Regional Office or DFOI. However, if a portion of the requested records are not within the Medicare contractor’s authority to directly release, please forward the records to the appropriate CMS Regional Office and enclose a copy of the 632 form detailing the hours expended by the contractor in responding to the FOIA request.

D. For requests which seek records which are outside the designated authority of the Medicare contractor, forward those records to the appropriate CMS Regional Office FOIA Coordinator. Enclose a Form CMS-632 with the records reflecting the search time expended, and the number of pages (or electronic files, or disks) being forwarded.