

Material Transmitted:

Department of Health and Human Services (HHS) Instruction 297-1, Privacy Procedures for Personnel Records, dated April 25, 2008.

Material Superseded:

HHS Instruction 297-1, Policy Procedures for Personnel Records, dated August 14, 1997.

Background:

This Instruction was revised to reflect the establishment of the new titles, roles and responsibilities within ASAM, effective October, 2001. In addition, this Instruction was revised to incorporate input from a broader segment of the Equal Employment Opportunity community, the Office of the General Counsel and the Human Resources community. Changes were minor, but involved clarification of issues.

This issuance is effective immediately. Implementation under this issuance must be carried out in accordance with applicable laws, regulations, bargaining agreements, and Departmental policy.

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SUBJECT: PRIVACY PROCEDURES FOR PERSONNEL RECORDS

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297-1-00 PURPOSE

The purpose of this Instruction is to state the Department's policies and requirements for the maintenance, protection, disclosure, and amendment of personnel records within the systems of records, as defined by the Privacy Act of 1974 (5 USC § 552a), Public Law 93-579.

297-1-10 REFERENCES

- A. 5 USC § 552 (law-public information; agency rules, opinions, orders, records and proceedings).
- B. 5 USC § 552 (a) (law- records maintained on individuals)
- C. 5 USC § 553 (law- rule making)
- D. 31 USC § 3701 (a) (3) (Federal Claims Collection Act of 1966)
- E. 42 USC § 653 (law- Parent Locator Service)
- F. 45 CFR, Parts 5 and 5b (regulations-Freedom of Information Regulations (FOIA and the Privacy Act))
- G. 29 CFR § 1614 (regulations-Equal Employment Opportunity)
- H. 42 CFR, Part 2 (regulations-confidentiality of alcohol and drug abuse patient records)
- I. HHS Public Affairs Management Manual, Chapter 12 (Privacy Act- basic requirements and relationships)
- J. HHS Public Affairs Management Manual, Chapter 11-00 (Freedom of Information Act)

- K. HHS Records Management Manual, Appendix B (general records schedules)
- L. PHS Commissioned Corps Personnel Manual, Subchapter 26.1 (Commissioned Corps personnel records)

297-1-20 COVERAGE AND EXCLUSIONS

- A. Coverage: This Instruction applies to all civil service employees and Commissioned Corps Officers of the Department.
- B. Exclusions: None.

297-1-30 DISCLOSURES OF INFORMATION IN PERSONNEL RECORD SYSTEMS

- A. Disclosure with Subject Individual's Consent with Exceptions

Disclosure of personal information concerning an individual must be made with the written consent of the subject individual. Exceptions to this requirement are listed in 45 CFR, Part 5b.9(b).

- B. Accounting of Disclosure

1. A record of disclosure is required in cases where records about the individual are disclosed from an office system of records.
2. The accounting of disclosures will be retained for at least 5 years or for the life of the record, whichever is longer. Part 5b.9 (c) (2) states the type of information the accounting will contain (the date, nature and purpose of each disclosure; and the name and address of the person or entity to whom the disclosure is made).

297-1-40 AMENDMENT OF RECORDS BY INDIVIDUALS

- A. Requests for Amendment

1. Individuals may request that their records be corrected or amended, if they believe that the record is not accurate, timely, complete, relevant or necessary to accomplish a Department function.
2. Individuals making a request to amend their records shall address their requests to the responsible Department official in writing, unless the individual makes the request in person and the responsible Department official amends the record at that time. This request for amendment shall specify:

- a. The system of records from which the record is retrieved;
 - b. The particular record sought to be amended;
 - c. The specific wording to be deleted, substituted or added and;
 - d. A statement of the basis for the requested amendment, with all available supporting documents and materials to show why the material is inaccurate, untimely, irrelevant, incomplete, or unnecessary.
3. The processing of requests submitted by mail will be facilitated with the words "Privacy Act Request" appearing on the face of the envelope with the letter of inquiry.
 4. Any request which is not properly addressed and which is not marked as specified above will be properly addressed or marked by the organization that received the request and forwarded immediately to the responsible Department official. A request not properly addressed by the individual will not be deemed as being "received" for measuring response times until the responsible Department official receives it. In each instance when a forwarded request is received, the responsible Department official shall notify the individual that the request was improperly addressed and the date when the request was received at the proper address.
 5. If a statutory appeal procedure or other administrative review procedure exists for changing a record, or for reviewing the decision reflected by the record, then, regardless of whether the existing procedure has or has not been used, an individual may not use the amendment procedures of the Privacy Act for these purposes. (Examples of such statutory appeal procedures or other administrative review procedures are: reconsideration of level of competence determinations, adverse action appeals, grievance procedure, etc.) Thus, individuals may not challenge the management decisions or actions under the Privacy Act amendment procedures, although they may challenge the fact that the decision or action has been inaccurately recorded in their records.

B. Processing Requests for Amendment

1. Within 10 working days of the receipt of a request for amendment, the responsible Department official shall acknowledge the request. Until a final agency decision is made on the request to amend the record, no disclosure should normally be made of the record, nor should any determination with respect to a right, benefit, or privilege normally be made based on the record. Two exceptions to these normal procedures are where the failure to disclose or to make the determination would harm the individual or would unreasonably interfere with the normal course of the agency's function.
2. If the responsible Department official agrees that the record should be amended, the record shall be amended as promptly as possible and the individual shall be informed in writing of the action taken. The individual will be provided with a copy of the amended record at no charge. In cases where a copy cannot be provided, the individual will be informed of how

the amendment was effected (e.g., erasure of information from a record maintained only in an electronic data bank).

3. If the responsible Department official determines that the disputed material is not relevant and necessary for the purpose for which it was obtained, the material shall be deleted without regard to its accuracy and the individual shall be informed in writing of the action taken.
4. If the record is amended or deleted, all previous recipients of the record for whom an accounting was made will be notified of the corrective action taken. If another agency was a recipient, the notification shall suggest that the recipient agency consider amending its own record and sending notice of the amendment to persons to whom it has disclosed in the record.
5. If the responsible Department official does not deem it appropriate to amend a record, the individual shall be notified of the decision. The notification to the individual shall include:
 - a. The name and title or position of the responsible Department official who is refusing the request for amendment;
 - b. The date of the refusal and the reason for not amending the record, including citation of sections of the Act or the Civil Service regulations, where appropriate, and
 - c. The procedures by which the individual can appeal the refusal to amend the record and the name, title, and business address of the appropriate appeal authority.
6. A request for the amendment of a record should be granted or refused within 30 working days from the receipt of the request. If the decision cannot be made within 30 days, the individual will be advised in writing of the reason and of the estimated date by which the decision will be made.
7. When the organization detects erroneous data in an individual's personnel records or a third party source provides corrected information, the record shall be corrected and the corrected information provided to the subject individual and to all recipients of the record to the extent that it is relevant to the recipient's uses and deemed feasible to do so.

297-1-50 APPEALS OF REFUSALS TO AMEND RECORDS

A. Appeal Requests

1. Individuals who disagree with a refusal to amend their records may request an appeal, in writing. The appeal must occur within 30 days after the date of the refusal. The individual's request for review of the refusal should include:
 - a. A copy of the original request for amendment;
 - b. A copy of the initial refusal;

- c. A statement of the reasons why the initial refusal is believed to be in error; and
 - d. The individual's signature.
2. The processing of requests will be facilitated if the words "Privacy Act Request" appear on both the envelope on both the envelope and the top of the appeal letter.
 3. Any appeal which is not properly addressed and which is not marked "Privacy Act Request" will be properly addressed or marked by the organization that received the appeal and forwarded immediately to the appropriate appeal authority. A request not properly addressed by the individual will not be deemed as having been "received" for purposes of measuring response times until the appeal authority has received it. In each instance when a request so forwarded is received, the appeal authority shall notify the individual that the request was improperly addressed and the date when the request was received at the proper address.

B. Appeal Authorities

Appeals shall be made to the following appeal authorities:

1. For personnel records in a system of records under the authority of the Office of Personnel Management, the appeal authority is the:

Assistant Director for Workforce Information
Office of Personnel Management
1900 E Street, N.W.
Washington, DC 20145

2. For records under the authority of the Department, appeal authorities are the following (or their designees, or successors in function):
 - a. The Assistant Secretary for Administration and Management is responsible for the records of the Office of the Secretary, (including records covered by the Office of the Secretary Privacy Act records systems notices) or when the initial refusal to amend was by another HHS appeal authority.
 - b. Operating Division (OPDIV) Heads for records of the respective OPDIVs.

C. Processing Appeals

1. The responsible Department official who issued the initial refusal will supply the appeal authority with the record that the individual requested be amended and any other pertinent material requested by the appeal authority. The subject individual's request to amend the

record, the responsible Department official's refusal to amend, and any other pertinent material relating to the appeal will be reviewed. No hearing will be held.

2. An appeal will be completed within 30 working days from its receipt by the appeal authority, except that the appeal authority may for good cause, extend this period for up to an additional 30 workdays. If the appeal period is extended, the individual will be informed in writing of the extension and of the circumstances for the delay.
3. If the appeal authority agrees with the requester that the record should be amended, the record will be amended and the individual will be informed in writing of the amendment. The individual will be provided with a copy of the amended record at no charge or will be informed of how the amendment was effected if a copy can not be provided (e.g., erasure of information from a record maintained only in an electronic data bank). Previous recipients of the record will be notified in accordance with above.
4. If the appeal authority denies the appeal, the denial shall be in writing, and the requester will be informed:
 - a. Of the reasons for the denial.
 - b. Of the right to seek judicial review of the denial; and
 - c. That he/she may submit a statement of the reasons for disagreeing with the denial.
5. If the individual submits a statement, the agency must, whenever it discloses the contested portion of the record, note the disagreement and provide a copy of the statement. It can also include a concise statement of the reason for denying the amendment.

297-1-60 FEES

Fees for copying records will be charged in accordance with 45 CFR, Part 5b.13:

- A. Fees may only be charged where an individual requests that a copy be made of the record to which he or she is granted access.
- B. No fee may be charged for making a search of the system of records whether the search is manual, mechanical or electronic. Where a copy of the record must be made in order to provide access to the record (e.g., computer printout where no screen reading is available), the copy will be made available to the individual without cost.
- C. Where a medical record is made available to a representative designated by the individual, a physician or a health professional designated by a parent/guardian, no fee will be charged.

297-1-70 RELATIONSHIP TO FREEDOM OF INFORMATION ACT

- A. The Privacy Act is intended to prevent invasions of the privacy of individuals. It permits individuals to have some control over the accuracy and disclosure of records pertaining to them maintained by Federal agencies. On the other hand, the Freedom of Information Act (FOIA) is intended to permit the public to be informed of the activities undertaken by its government. The FOIA provides that all records, which are maintained by Government agencies, excluding nine exemptions are made available to the public. One of these exemptions is for records in which the disclosure would constitute a clear unwarranted invasion of privacy. In exercising this exemption, agencies must balance the public interest in disclosure against the privacy interests of the individual to whom the record pertains. The FOIA does not protect the individual from all invasions of privacy but only those that are clearly warranted. The Privacy Act maintains this concept and allows disclosure without the consent of the subject individual when the record is required to be made available under the FOIA. In addition to the information below, see the HHS Public Affairs Management Manual, Chapter 12-00-40 for further discussion of the relationship between the Privacy Act and the Freedom of Information Act.
- B. The FOIA is contained in Title 5 USC 552. The applicable regulations are in 45 CFR, Part 5. Department policies and procedures on the FOIA are contained in Chapter 11-00 of the HHS Public Affairs Manual. These references contain information on the time limits for response to an FOI request, the officials authorized to deny an FOI request, the officials to whom the denial of an FOI request may be appealed, etc.
- C. If an individual requests information about himself/herself and the information is in a system of records (and retrieved by his/her identifier), all such records must be released to the individual except those the Department could withhold under *both* statutes. This is whether the requester mentions the Privacy Act, the FOIA, both or neither. In addition, this paragraph applies to requests by a parent or guardian for information about a minor or incompetent. Fees for such requests will be charged as provided by the Privacy Act and 297-1-60. Such requests will be processed under the procedures of the Privacy Act, the Department's Privacy Act regulation and (45 CFR, Part 5b) and 297-1-30. If a request cites the Freedom of Information Act, for reasons stated above, the office receiving it should forward it to the appropriate Privacy Act system of records manager.
- D. If a person requests information that would come from a system of records, but the requester is not an individual, or the information is not in a record about the requester, then FOIA procedures will apply to the request. The only records that may be released are those for which disclosure is required under the FOIA or by others allowed by 297-1-30 A.

297-1-80 RELATIONS TO EQUAL EMPLOYMENT OPPORTUNITY (EEO) REGULATIONS

- A. Discrimination complaint files containing correspondence and investigatory material on EEO complaints are retrieved by either the name of the complainant or the Complaint File Number only and the complainants are the only subjects of the files.
- B. If a witness cites the FOIA as a basis for his/her request to see any portion of the EEO file, whether he/she makes the request during the EEO process or after a final decision on the complaint, the EEO office should not respond to the request except to indicate that the request has been referred to the appropriate FOI Office.
 - 1. At any stage in the process (informal counseling or investigative stage), the EEO Office or investigator may inform a witness who is currently an employee of HHS about the complaint only to the extent necessary to obtain information from that witness. Likewise, at any stage of the process, the EEO office or investigatory may show such a witness documents that are from the complaint file or are pertinent to the complaint only to the extent necessary to obtain from that witness information needed for the EEO process.
 - 2. When showing documents to a witness, the EEO Office or investigator may delete information identifying individuals. In making determinations whether to delete information and, if so, what information to delete, the EEO Office or investigator should consider both the individuals' privacies and the extent to which deletion would diminish the witness' ability to provide information needed for the EEO process.
- C. Following issuance of a final decision on the discrimination complaint, the witness has a right of access to portions of the EEO file, only if, because of a final agency decision, an adverse or disciplinary action is proposed by his/her supervisor or manager. In addition, the witness (and now subject of a proposed adverse action) may have a right of discovery to the extent allowed by routine use in the EEO system.
- D. Other requesters, such as the public or the media, may request access to EEO files under the FOIA. Any request should be referred to the appropriate FOI Office, which will determine how to respond.

297-1-90 RELATIONSHIP TO PARENT LOCATOR SERVICE REGULATIONS

42 USC § 653 states that upon receipt of a proper, official request, Department employees who have custody of relevant records must turn over to the Parent Locator Service the address and place of employment of any absent parent if that information is in their records or can be obtained by them.