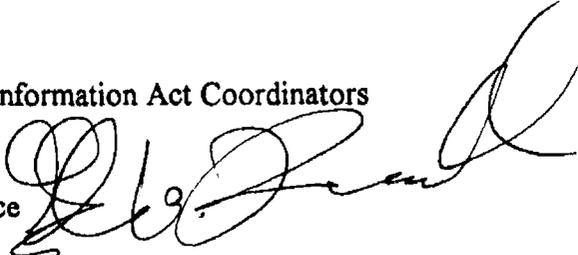


**Memorandum**

APR 24 1997

REISSUANCE

TO: Central and Regional Office Freedom of Information Act Coordinators

FROM: Glenn W. Kendall, Acting Director
Freedom of Information and Privacy Office 

SUBJECT: Electronic Freedom of Information Act Amendments Effective on March 31, 1997

As you know, the Electronic Freedom of Information Act (EFOIA) Amendments of 1996 were signed into law by the President on October 2, 1996. The amendments establish new responsibilities for Federal agencies within the executive branch of government and change FOIA administration in several significant ways. This is to furnish notice that certain of the EFOIA amendments became effective on March 31, 1997 and, to provide, where applicable, general guidance concerning how this agency will carry out these measures.

5 U.S.C. § 552(a)(3)(B) - This provision addresses two requirements related to format of disclosure, and maintenance of records in multiple formats.

Format of Records: Previously, an agency could determine the format of released records. However, the amendments require that an agency provide a record in any form or format requested if the record is readily reproducible in that form or format, regardless of whether the agency has ever maintained it or intended to maintain it in that format. Specifically, this means that: 1) the requester, not the agency, will be entitled to choose the form of disclosure when multiple forms of a record already exist, and 2) when a requester wants a record to be disclosed in a new form or format, HCFA will have to determine whether the record is "readily reproducible" in that form or format with "reasonable efforts."

Implementation of the first aspect of this provision requires no additional action on HCFA's part since it has been the agency's practice to provide records to a requester in the desired form, if the records already exist in that form. This practice will continue. However, regarding the second aspect, we provide the following "interim" guidance to you. We emphasize that this guidance is subject to change based upon policy issuances of either the Office of Information and Privacy, Department of Justice or the Office of the Assistant Secretary for Public Affairs, Department of Health and Human Services, or upon precedent-setting court decisions that interpret the phrase "readily reproducible."

When Format Refers to Disclosure Medium: In those situations where the agency maintains a record in one format (i.e., hard copy, floppy disks, tapes, etc.) and the requester wants the record

to be disclosed in a new format, if there are existing resources and expertise within the responding unit to readily convert the record into the desired format, and if the conversion process can be accomplished with reasonable effort, i.e., not an extraordinary effort, then we will convert the record. We will consider a record to be "readily reproducible" to a new format if not more than a combined total of "two hours" of agency resources are expended to make the conversion. Agency resources include manual operator time, systems operator time, computer resource time, etc. Conversions that will exceed the stated amount of time will not be considered within the scope of the cited provision.

When Format Refers to Organization/Arrangement of Information: The term "form" or "format" also can be interpreted to mean the organization or arrangement of information within a record. It has been our practice in the past to reproduce computerized records only in the form or format in which we normally extract the record from our system. However, in line with this provision, the following guidance will assist you when responding to requests for computerized records in a form or format other than that normally extracted from an automated database:

- o produce the record in the format the requester wants if programming already exists to generate the record in that format and not more than "two hours" of computer resource time will be expended to make the conversion.
- o produce the record in the format the requester wants if minimal computer instructions are necessary to produce the record and not more than "two hours" of computer resource time will be expended to make the conversion.
- o produce the record in the format the requester wants if less than two hours of programming (i.e., writing program design, coding and testing specifications) are required to generate the record and such production will not consume more than two hours of the searching unit's computer operations systems resources.¹

With respect to any record produced in accord with the above guidance, apply routine FOIA procedures.

Maintenance of Records in Multiple Formats - EFOIA requires that the agency must make "reasonable efforts" to maintain its records in forms or formats that are reproducible for the purpose of responding to requests in a specified format. We note that this provision does not alter this agency's records-maintenance and records-disposition practices, and we are not providing implementation guidance at this time.

¹ The attachment to this memorandum contains the text of a letter that should be used to respond to a FOIA request when the agency determines that generation of the record from a computer database will involve more than two hours of computer development time.

5 U.S.C. § 552(a)(3)(C) - This amendment provides that an agency shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency or the agency's use of its computers. In essence, EFOIA codifies existing FOIA case law by making the statute explicit on this point. This agency has, in practice, always searched electronic databases when in the judgement of a knowledgeable professional, such databases could contain responsive records. In response to certain FOIA requests, we also have searched for "E-mail" records when doing so was possible. These practices will continue. In addition, the agency is developing and will soon disseminate policy that addresses retention and destruction of E-mail. Such policy will also reiterate that E-mail records are not excluded from FOIA searches.

Regarding the second aspect of this provision (i.e., "... except when such efforts would significantly interfere with the operation of the agency's automated information system."), this office will determine on a case-by-case basis whether a particular search of an electronic database is either unreasonable or will significantly interfere with computer systems' operations. In the past, our position has been that the standards that govern the reasonableness and adequacy of a search for records within manual files also govern the reasonableness and adequacy of the search for records within electronic files. However, since FOIA case law has not established an exact standard specifying the extent of searches that agencies must pursue for hard-copy records, we have relied on the searching unit's written demonstration that a given manual search was unreasonable. We will rely on such written demonstrations with respect to automated searches. Moreover, on a case-by-case basis, the searching unit must now also present to this office its written position regarding how a particular search "would significantly interfere with the operation of the agency automated information system."

5 U.S.C. § 552(a)(3)(D) - This amendment states that the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request. Under FOIA, an agency need not create documents that do not exist. However, EFOIA recognizes that computer records found in a database may require the application of codes or some form of programming to retrieve the information. Under the definition of "search" in the statute, the search for and retrieval of computerized records would not amount to the creation of records. However, in light of 5 U.S.C. § 552(a)(3)(C), this office will determine on a case-by-case basis whether new programming and database-retrieval efforts are reasonable. Again, we will rely upon the searching unit's written evaluation of the circumstances involved in the search and the agency resources to be expended in doing the search.

Questions or concerns related to this memorandum should be directed to Ms. Melodye Hardy of my staff at (410) 786-5358.

Please distribute this document to FOIA contacts within your respective units and Medicare contractors. We appreciate your cooperation.

Attachment

Refer to:

Dear _____:

This is in response to your request dated _____, seeking access to _____. Because you seek access to one or more agency records, or information contained in such records, we have considered your request under the Freedom of Information Act (FOIA) (5 U.S.C. § 552).

We are unable to comply with your request because the agency does not maintain a record that is responsive to your request and because, under FOIA, we are not required either to create records or to furnish information in a particular form or format when a record in such form or format is not readily reproducible employing reasonable efforts. We will not reproduce a record in a form or format that would be responsive to your request because we cannot readily do so with reasonable effort.

You may request an informal review of our response by submitting a written request for an informal review within 45 days of the date of this letter. If you make a timely request, you will retain the right to pursue a formal administrative appeal. If you fail to make a timely written request for either an informal review or a formal administrative appeal, you will have forfeited your rights to both. A request for informal review should be labeled a "Request For Review," should be accompanied by a copy of this letter, and must be directed to:

Director, Freedom of Information
Health Care Financing Administration
7500 Security Boulevard, *N2-20-16*
Baltimore, Maryland 21244-1850

You may appeal this decision instead of requesting an informal review. To file an appeal, you must appeal in writing within 45 days of the date of this letter. Both your appeal letter and the envelope in which it is sent should be labeled "Freedom of Information Act Appeal." Enclosing a copy of this letter or referring to the "Refer to" number at the top of the first page of this letter will help to expedite matters. To file an appeal, mail your appeal to:

Deputy Administrator
Health Care Financing Administration
7500 Security Boulevard, Room C5-16-03
Baltimore, Maryland 21244-1850

Sincerely,

Signature of Authorized Official

cc: FOI OFFICER, Baltimore