

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### 45 CFR Part 2

#### Testimony by Employees and the Production of Documents in Proceedings Where the United States Is Not a Party

**AGENCY:** Department of Health and Human Services.

**ACTION:** Final rule.

**SUMMARY:** This rule amends regulations which provide that employees and former employees of the Department of Health and Human Services may not provide testimony as part of their official duties in litigation where the United States or a Federal agency is not a party, without the approval of the head of the agency. The purpose of these amendments is to modify provisions which provide that subpoenas *duces tecum* and other requests for documents from third parties shall be treated as requests for documents under the Freedom of Information Act ("FOIA"). Under these amendments, the FOIA shall not apply to a subpoena when the Department is subject to the jurisdiction of the issuing Federal court or other Federal tribunal and the subpoena is properly served. The regulation provides that where there is no jurisdiction over the Department, as in the case of subpoenas issuing out of State, local and tribal courts, the FOIA will apply to such subpoenas.

**EFFECTIVE DATE:** June 13, 2003.

**FOR FURTHER INFORMATION CONTACT:** Katherine M. Drews, Associate General Counsel, General Law Division, Office of the General Counsel, at (202) 619-0150.

**SUPPLEMENTARY INFORMATION:** In 1987, the Department of Health and Human Services published regulations which addressed the issue of the increasing number of requests for the testimony of Department employees in litigation involving only private parties and not the United States. The regulation addresses this matter by generally prohibiting both voluntary appearances and compliance with subpoenas for testimony as part of an employee's official duties, except where the relevant agency head or his or her designee determines that the appearance would promote the objectives of the Department. In addition, the regulation provides that subpoenas for the production of documents would be

processed under the Freedom of Information Act, 5 U.S.C. 552.

These amendments are designed to address cases in which a Federal court has jurisdiction to issue a subpoena for DHHS documents. In such cases, the current regulation may infringe on the power of the court by allowing greater authority to withhold a document under the FOIA than would be the case under the rules governing disclosure of documents in court. *See FTC versus Grolier, Inc.*, 462 U.S. 19, 27-28 (1983). Because it is not the intention of the Department to create or broaden a Federal litigation privilege through this part, we are amending the regulation to limit the applicability of the FOIA to situations in which the issuing tribunal has no jurisdiction over the Department.

Accordingly, we are amending §§ 2.1, 2.3, and 2.5 to provide that when the Office of the General Counsel determines that a subpoena is "legally sufficient," including when the issuing court has jurisdiction over the Department or its employee(s), the Department will follow the applicable procedural and substantive rules relating to the production of information and documents by a non-party. In cases of informal requests for documents, and where the tribunal issuing the subpoena does not have jurisdiction over the Department—such as is the case in most subpoenas issuing out of State, local and tribal courts, *see, e.g., Boron Oil Co. versus Downie*, 873 F.2d 67, 70 (4th Cir. 1989); *Environmental Enterprises, Inc. versus EPA*, 664 F. Supp. 585, 586 (D.D.C. 1987); *Reynolds Metals Co. versus Crowther*, 572 F. Supp. 288, 290-91 (D. Mass. 1982)—the regulation provides that we will continue to treat the request as a request made pursuant to the FOIA.

The amendments also include examples following the text of § 2.1 which illustrate the applicability of this regulation to situations in which the regulation may or may not apply.

The amendments also reflect changes in the organizational structure in the Department. The references in § 2.2 to the Assistant Secretary for Human Development Services and the Assistant Secretary for Family Support are deleted and replaced by references to the Assistant Secretary for Children and Families as the Agency Head for requests involving the Administration for Children and Families and by the Assistant Secretary for Aging for requests involving the Administration on Aging. In addition, reference to the Commissioner of Social Security is deleted, due to the March 31, 1995, independence of the Social Security Administration.

These amendments also modify § 2.6 to delete the reference to the Freedom of Information Act regulations, 45 CFR part 5, to reflect the policy that the Department will certify any disclosed documents upon request, not just those disclosed pursuant to part 5.

**Public Participation:** This rule is published as a final rule. It is exempt from public comment, pursuant to 5 U.S.C. 553(b)(A) as a rule of "agency organization, procedure, or practice."

**Paperwork Reduction Act:** This regulation is not subject to the Paperwork Reduction Act because it deals solely with internal rules governing Department of Health and Human Services personnel.

**Cost/Regulatory Analysis:** In accordance with Executive Order 12291, the Secretary has determined that these amendments will not constitute a "major" rule and therefore are not subject to the regulatory impact and analysis requirements of the Order. Major rules are those which impose a cost on the economy of \$100 million or more a year and have certain other economic impacts.

These amendments will not have a significant impact on small businesses; therefore, preparation of a regulatory flexibility analysis is not required.

#### List of Subjects in 45 CFR Part 2

Administrative practice and procedure, Freedom of Information, Government employees.

■ Accordingly, for the reasons set forth in the preamble, 45 CFR part 2 is amended as follows:

#### PART 2—[AMENDED]

■ 1. The authority citation continues to read as follows:

**Authority:** 5 U.S.C. 301, 5 U.S.C. 552.

■ 2. Section 2.1 is amended by revising paragraphs (a), (b), (c), (d)(4), (d)(6), and adding Examples (1) through (5) to paragraph (d)(7) to read as follows:

#### § 2.1 Scope, purpose, and applicability.

(a) This part sets forth rules to be followed when an employee or former employee of the Department of Health and Human Services ("DHHS" or "Department"), other than an employee of the Food and Drug Administration, is requested or subpoenaed to provide testimony in a deposition, trial, or other similar proceeding concerning information acquired in the course of performing official duties or because of such person's official capacity with DHHS. This part also sets forth procedures for the handling of subpoenas *duces tecum* and other requests for any document in the