

possession of DHHS, other than the Food and Drug Administration, and for the processing of requests for certification of copies of documents. Separate regulations, 21 CFR part 20, govern the Food and Drug Administration, and those regulations are not affected by this part.

(b) It is the policy of the DHHS to provide information, data, and records to non-federal litigants to the same extent and in the same manner that they are made available to the general public and, when subject to the jurisdiction of a court or other tribunal presiding over non-federal party litigation, to follow all applicable procedural and substantive rules relating to the production of information, data, and records by a non-party. The availability of Department employees to testify in litigation not involving federal parties is governed by the Department's policy to maintain strict impartiality with respect to private litigants and to minimize the disruption of official duties.

(c) This part applies to state, local and tribal judicial, administrative, and legislative proceedings, and to federal judicial and administrative proceedings.

(d) This part does not apply to:

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(4) Employees serving as expert witnesses in connection with professional and consultative services as approved outside activities in accordance with 5 CFR 2635.805 and 5 CFR 5501.106. (In cases where employees are providing such outside services, they must state for the record that the testimony represents their own views and does not necessarily represent the official position of the DHHS.)

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(6) Any matters covered in 21 CFR part 20, involving the Food and Drug Administration.

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Example (1): While on duty, an employee of the Department witnesses an incident in which a fellow employee trips on a loose piece of carpeting and sustains an injury. The injured employee brings a private tort action against the contractor installing the carpeting and the private landlord maintaining the building. The employee/witness is served with a subpoena to appear at a deposition to testify about the incident. The person seeking the testimony would not be required to obtain Agency head approval prior to requesting the testimony, because the subject of the testimony does not "relate to" the Department, within the meaning of § 2.1(d)(5).

Example (2): While on duty, an employee of the Department witnesses a mugging while looking out the window to check the weather, and then notifies the local police of

what she observed. She is subsequently subpoenaed to testify in a criminal proceeding. The local prosecutor would not be required to obtain Agency head approval prior to requiring the employee to testify, because the subject of the testimony does not "relate to" the Department, within the meaning of § 2.1(d)(5).

Example (3): A nurse on duty at an Indian Health Service hospital emergency room treats a child who is brought in following a report of domestic violence. The nurse is subsequently served with a subpoena to testify in a criminal proceeding against one of the child's parents concerning the injuries to the child which he observed. The local prosecutor would be required to obtain Agency head approval prior to requiring the nurse to testify, because the subject of the testimony involves "information acquired in the course of performing official duties or because of the person's official capacity," within the meaning of § 2.1(a).

Example (4): A personnel specialist working for the Department is subpoenaed to testify concerning the meaning of entries on time and attendance records of an employee, which the requesting party received from the employee pursuant to discovery in a personal injury action brought by the employee. The party requesting the personnel specialist to appear would be required to obtain Agency head approval prior to compelling the personnel specialist to testify, because the testimony sought involves "information acquired in the course of performing official duties or because of the person's official capacity," within the meaning of § 2.1(a).

Example (5): A National Institutes of Health physician is subpoenaed in a private medical malpractice action to provide expert testimony in her specialty. The party requesting her testimony would be required to obtain Agency head approval prior to her testifying in response to the subpoena, because the expert testimony sought involves "information acquired in the course of performing official duties or because of the person's official capacity," within the meaning of § 2.1(a).

■ 3. Section 2.2 is revised to read as follows:

§ 2.2 Definitions.

Agency head refers to the head of the relevant operating division or other major component of the DHHS, or his or her delegatee. *Agency head* for the purposes of this part means the following officials for the components indicated:

(1) Office of the Secretary—Assistant Secretary for Administration and Management;

(2) Administration on Aging—Assistant Secretary for Aging;

(3) Administration for Children and Families—Assistant Secretary for Children and Families;

(4) Agency for Healthcare Research and Quality—Administrator;

(5) Agency for Toxic Substances and Disease Registry—Administrator;

(6) Centers for Disease Control and Prevention—Director;

(7) Centers for Medicare and Medicaid Services—Administrator;

(8) Health Resources and Services Administration—Administrator;

(9) Indian Health Service—Director;

(10) National Institutes of Health—Director;

(11) Substance Abuse and Mental Health Services Administration—Administrator;

(12) Office of Inspector General—Inspector General.

Employee includes:

(1) Commissioned officers in the Public Health Service Commissioned Corps, as well as regular and special DHHS employees (except employees of the Food and Drug Administration), when they are performing the duties of their regular positions, as well as when they are performing duties in a temporary assignment at DHHS or another organization.

(2) Any employees of health insurance intermediaries and carriers performing functions under agreements entered into pursuant to sections 1816 and 1842 of the Social Security Act, 42 U.S.C. 1395h, 1395u; and

(3) Current and former employees and contractors of entities covered under the Federally Supported Health Centers Assistance Act of 1992, as amended, 42 U.S.C § 233 (FSHCAA), provided that the requested testimony or information relates to the performance of medical, surgical, dental or related functions which were performed at a time when the DHHS deemed the entity to be covered by the FSHCAA.

Certify means to authenticate under seal, pursuant to 42 U.S.C 3505, official documents of the Department.

Testify and testimony includes both in-person, oral statements before a court, legislative or administrative body and statements made pursuant to depositions, interrogatories, declarations, affidavits, or other formal participation.

■ 4. Section 2.3 is revised to read as follows:

§ 2.3 Policy on Presentation of testimony and production of documents.

No employee or former employee of the DHHS may provide testimony or produce documents in any proceedings to which this part applies concerning information acquired in the course of performing official duties or because of the person's official relationship with the Department unless authorized by the Agency head pursuant to this part based on a determination by the Agency head, after consultation with the Office of the General Counsel, that compliance with