

Material Transmitted:

HHS Instruction 293-3, Employee Performance File System Records

Material Superseded:

HHS Instruction 293-3 (all)

Background:

This Instruction has been revised consistent with recent changes in the organization of HHS, and in support of HHS administrative initiatives calling for more streamlined rules and greater delegations of authority.

This issuance streamlines the rules and updates the Instruction's contents.

Any reference to "OPDIV" in this Instruction now includes AHCPR, ATSDR, CDC, FDA, HRSA, IHS, NIH, SAMHSA, the Office of the Secretary, the Program Support Center, HCFA, ACF, and AOA.

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

Filing Instructions:

Remove superseded material and file new material. Post receipt of this transmittal to the HHS Check List of Transmittals and file this transmittal in sequential order after the check list.

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INSTRUCTION 293-3

HHS PERSONNEL INSTRUCTION 293-3
EMPLOYEE PERFORMANCE FILE (EPF) SYSTEM RECORDS

- 293-3-00 Purpose
- 10 References
- 20 Coverage
- 30 Departmental Requirements
- 40 Privacy and Freedom of Information Act Considerations
- 50 Access to the EPF Record System
- 60 Disposition Requirements

Exhibit 293-3-A, Access to Employee Performance File System Records

293-3-00 PURPOSE

This Instruction states the policies and requirements of this Department relative to the establishment, maintenance, retention, disposal, and safeguarding of EPF system records.

293-3-10 REFERENCES

- A. 5 U.S. Code 552a (law - Privacy Act - records maintained on individuals)
- B. 5 CFR, Part 293 (regulations - personnel records)
- C. 5 CFR, Part 294 (regulations - availability of official information)
- D. 5 CFR, Part 297 (regulations - privacy procedures for personnel records)
- E. 5 CFR, Part 430.209 (regulations - disposition of records)
- F. 45 CFR, Part 5b (regulations - HHS Privacy Act regulations)
- G. The Guide for Personnel Recordkeeping (Office of Personnel Management (OPM) Operating Manual, dated November 30, 1994, and March 15, 1996)
- H. HHS Personnel Instruction 293-1 (personnel and equal employment records disposal)
- I. HHS Personnel Instruction 297-1 (protection of privacy in personnel records systems)
- J. HHS Performance Management Plan (dated April 26, 1993)
- K. HHS Personnel Instruction 430-6 (performance management for members of the senior executive service)
- L. HHS Personnel Instruction 430-7 (performance appraisal system)

293-3-20 COVERAGE

This Instruction applies to all employees of this Department, regardless of pay plan, grade, or occupational group, except Commissioned Corps officers and Senior Biomedical Research Service members

293-3-30 DEPARTMENTAL REQUIREMENTS

- A. Each personnel office must establish an EPF record system for each employee for whom it maintains an Official Personnel Folder (OPF), including members of the Senior Executive Service (SES). These records may be maintained either in an envelope kept in the employee's OPF or in a separate file maintained in either the personnel office or other office as authorized by regulation.
- B. The EPF system established for non-SES employees must contain the following records or any other supporting documents for the period indicated:

<u>Record</u>	<u>Retention Period</u>
1. Annual rating of record issued under a performance appraisal program within the HHS performance appraisal system.	4 years
2. After the final appraisal is issued, any form which identifies job elements and the standards for those elements, with any changes thereto, including appraisal information on those elements, if recorded.	4 years

- C. The EPF system established for SES members must contain the following records or any other supporting documents for the period indicated:

<u>Record</u>	<u>Retention Period</u>
1. Annual rating of record issued under an SES appraisal system.	5 years
2. After the final rating of record is issued, any SES performance appraisal form which identifies job elements and standards for those elements, with any changes thereto, including appraisal information on those elements, if recorded.	5 years

3. Documented progress reviews and narrative description of performance. 5 years
4. Any supporting documentation for a particular evaluation that is submitted with the performance appraisal form (including written statements of the employee). 5 years
5. Records pertaining to SES appraisals which support recommendations made by Performance Review Boards. 5 years
6. Any form or other document regarding performance-related decisions or recommendations of an Executive Resources Board. 5 years
7. Any form or other document used to recommend an individual for Meritorious or Distinguished Executive Rank and records supporting the recommendation. 5 years

293-3-40 PRIVACY AND FREEDOM OF INFORMATION ACT CONSIDERATIONS

- A. Performance-related records designated as EPF system records are Privacy Act records and are covered by 5 U.S. Code 552a, 5 CFR, Part 293, and "The Guide to Personnel Recordkeeping" (OPM Operating Manual).
- B. Individuals responsible for maintaining EPF system records must insure that their maintenance, retention, and disposal are in accordance with the requirements of the Privacy Act (5 U.S. Code 552a), OPM's applicable regulations (5 CFR, Part 293 and 297), the Department's Privacy Act regulations (45 CFR, Part 5b), and HHS Personnel Instructions 293-1 and 297-1.

293-3-50 ACCESS TO THE EPF RECORD SYSTEM

Individuals whose records are maintained (whether in a manual, automated, or microform mode) in the Privacy Act system of records have the very broad rights relative to them granted by the Privacy Act and the Department regulations implementing that statute. These include a right of access to the records, a right to request amendment and/or correction of a record, a right to request a review of any refusal to amend or correct a record, a

right to have included in the record a statement of reasons for the employee's disagreement with any refusal to amend or correct, and a right to have that statement included in any disclosure of the disputed portion of the record. Information and guidance on providing these rights to employees are contained in 5 CFR, Part 297 and HHS Personnel Instruction 297-1. (See Exhibit 293-3-A for detailed information on the release of records in the EPF record system under the Privacy Act.)

293-3-60 DISPOSITION REQUIREMENTS

- A. When the OPF of a non-SES employee is sent to another servicing personnel office within the Department, another Federal agency or to the National Personnel Records Center, the EPF shall accompany the OPF and include all performance ratings of record that are 4 years old or less, including the performance plan on which the most recent rating of record was based, and the summary rating prepared when the employee changes positions. Prior to its transfer, the EPF will be purged of all performance ratings and performance plans that are more than 4 years old, and other performance-related records. These purged records are to be disposed of in accordance with "The Guide to Personnel Recordkeeping" (OPM Operating Manual) and 5 CFR, Part 293.
- B. When an SES member moves to another SES position, all appropriate performance-related documents five years old or less shall be forwarded in the EPF along with the individual's OPF.

Personnel Manual
HHS Transmittal 96.30

Exhibit 293-3-A, Access to Employee Performance File System Records

A. Access Under the Privacy Act

1. Employee Performance File (EPF) system records are records within a system of records for purposes of the Privacy Act. Therefore, all of the rights and limitations conferred by that statute, and Office of Personnel Management (OPM) and Department regulations and "The Guide to Personnel Recordkeeping" (OPM Operating Manual, dated November 30, 1994, and March 15, 1996) apply to them (see HHS Personnel Instruction 297-1, Protection of Privacy in Personnel Records Systems).
2. Instruction 293-3-60A details the rights of individuals whose records are maintained in the Privacy Act system of records. In addition, it is Department policy that employees receive from their supervisors copies of performance plans, progress reviews, and performance appraisals. Supporting documentation used in whole or in part as a basis for a performance appraisal, or performance-based action, is covered by the Privacy Act and must be released to the employee to whom it pertains, if and when a proper Privacy Act request is made by the employee. This includes personal "supervisory" notes (memory joggers), unless:
 - a. the Department and any of its components exercise no control over them, and
 - b. their maintenance is not required under the applicable performance appraisal system, and
 - c. they remain for the personal use of the author and are not provided to any other persons, and
 - d. they are prepared, retained or discarded at the author's sole discretion, and
 - e. they are not used in appraising an employee or in determining any rights, benefits, or privileges of an employee.

If all of the above conditions are met, then such notes

Personnel Manual
HHS Transmittal 96.30

are considered to be merely an extension of the supervisor's memory, not records or documents subject to either the Freedom of Information Act (FOIA) or the Privacy Act.

3. The only other conditions under which EPF records may be disclosed, under the Privacy Act, are the statutory conditions of disclosure in the Privacy Act, codified at 5 U.S. Code 552a(b). The three most significant of these allow the disclosure of EPF system records:
 - a. to Department employees who need to have access to the records in order to do their jobs;
 - b. when their release is required under the FOIA; and
 - c. for an established routine use. This is limited to those routine uses established by OPM in the record system notice for EPF records.

B. Access Under the FOIA

1. The Privacy Act provides no authority to withhold information that must be released under the FOIA.
2. The FOIA (5 U.S. Code 552) and the Department regulations implementing that statute (45 CFR, Part 5) require the release of records and information maintained in the Department unless one of the nine discretionary exceptions in the Acts (5 U.S. Code 552(b)(1)-(9)) or any other statutory provision against disclosure can properly be claimed as a basis for denying release.
3. The principal FOIA exemption applicable to requests for EPF system records is the (b)(6) exemption. This exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (5 U.S. Code 552(b)(6)). This exemption may be invoked only where there is an invasion of personal privacy that is clearly unwarranted. In making this determination a balancing of interests is undertaken. This balancing involves on one side the potential severity of the privacy invasion to the individuals mentioned in the records and on the other the public interest to be served by disclosure.

Personnel Manual
HHS Transmittal 96.30

4. Only officials designated at 45 CFR, Part 5.32 are authorized to make a determination to release or deny records requested under the FOIA (see 45 CFR, Part 5.53).
5. Release of any of the documents or information listed below is not a clearly unwarranted invasion of the privacy of any individual. Therefore, the (b)(6) FOIA exemption cannot be claimed as a basis to withhold:
 - a. information released in a form that is not personally identifiable;
 - b. the gross salary of an employee and, if requested, each element of the gross (i.e., base and comparability increase);
 - c. performance objectives and plans (except actual evaluations recorded on the same form);
 - d. justification/nomination of employees who receive SES rank awards and bonuses, and/or cash awards (except performance appraisal documents); and
 - e. the amount of SES bonuses and performance-based cash awards.

In certain limited circumstances, consideration may be given to withholding certain EPF system documents or information if their release would have an adverse impact on a Department component's programs or mission and if one of the other eight discretionary exemptions in the Act can be claimed as a basis for the withholding.

6. Performance evaluation information on EPF system records and documents is not to be released under the FOIA in a personally identifiable form. The authority for this withholding is the (b)(6) exemption discussed above. This authority would not apply to other information on performance appraisal records and documents to which the (b)(6) exemption does not apply. Remember that only a very limited number of Department officials have the authority to release or deny information requested under the FOIA. You must ensure that the procedures for

Personnel Manual
HHS Transmittal 96.30

responding to FOIA requests established within your
component or region are followed.