

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

August 4, 2023

Office of Privacy and Disclosure  
Social Security Administration  
WHR G401  
6401 Social Security Blvd.  
Baltimore, MD 21235

Submitted via [www.regulations.gov](http://www.regulations.gov)

**Re: Notice of Proposed Rulemaking (NPRM) on Availability of Information and Records to the Public, 88 FR 36980 (June 6, 2023), Docket No. SSA-2021-0049**

Dear Acting Commissioner Kijakazi:

These comments are submitted on behalf of Justice in Aging. Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources.

We have decades of experience with Social Security and Supplemental Security Income (SSI) benefits, with a focus on the needs of low-income beneficiaries and populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency (LEP). Justice in Aging conducts training and advocacy regarding Social Security and SSI benefits, provides technical assistance to attorneys and others from across the country on how to address problems that arise under these programs, and advocates for strong protections to ensure that beneficiaries receive the benefits to which they are entitled promptly and without arbitrary denial or disruption.

Thank you for the opportunity to comment on these proposed regulations.

**We support SSA's proposal to revise, reorganize, and streamline its FOIA regulations.**

In this NPRM, the Social Security Administration (SSA) proposes updates to its existing Freedom of Information Act (FOIA) regulations to conform with the requirements of the FOIA Improvement Act of 2016. It also proposes the reorganization of its FOIA regulations to make them easier for the public to understand and use.

We support these efforts and commend SSA for updating and revising its FOIA regulations to make them better organized and easier to follow.

*Washington, DC*   ♦   *Los Angeles, CA*   ♦   *Oakland, CA*

## **SSA's application of its fee waiver regulations is inconsistent with the FOIA statute.**

In this NPRM, SSA is not proposing any extensive, substantive changes in its FOIA regulations regarding fee waivers. Instead, these changes reorganize, streamline, and clarify the existing process and rules for fee waivers. However, there are significant problems with the way SSA applies these regulations on FOIA fee waivers.

Over the past ten years, Justice in Aging has submitted almost twenty FOIA requests to SSA. Out of all of these FOIA requests, we had one fee waiver request granted in July 2014, after appealing the initial denial. Between 2014 and 2020, all of our fee waiver requests were denied for a variety of reasons, including after filing an appeal of the initial denial, and since 2020 we have stopped requesting fee waivers from SSA when submitting FOIA requests.

In 2017, we appealed an initial denial of a fee waiver request for FOIA request SSA-2018-000183. In our appeal, we provided an extensive explanation of how we provide trainings and distribute issue briefs to thousands of advocates each year on SSA's policies and procedures, which are publicly available on our website for no cost. In November 2017, we received a denial of that appeal because we had "not indicated how you will use this information to significantly advance the general public's understanding as distinguished from a narrow segment of interested persons."

In March 2018, we received an email from [ssafoia-donotreply@regulations.gov](mailto:ssafoia-donotreply@regulations.gov), that stated "Your request for Fee Waiver for the FOIA request SSA-2018-001740 has been denied. Additional details for this request are as follows: Fee Waiver Disposition Reason: Letisha, You are approving the fee waiver. In order to do so, please document the file of your rationale. I have sent you some DOJ material to consider for Fee waiver, particularly in reference to the General Public." No further information was provided on why our fee waiver request was denied or how to appeal the fee waiver denial. We did not receive any response to the correspondence we sent to [foia.public.liaison@ssa.gov](mailto:foia.public.liaison@ssa.gov) about the fee waiver denial. Ultimately, SSA responded to our FOIA request in September 2018 that the agency did not have any records that were responsive to our request.

In May 2019, we received a denial of a fee waiver request under section 1106 of the Social Security Act, because it "gives the agency the authority to charge full costs for responding to information requests that are for non-program related purposes, regardless of the fee provisions of FOIA. 42 U.S.C. § 1306(c). Because the agency is invoking its authority under section 1106 of the Act, your status as a FOIA requester is irrelevant and the agency will charge you full costs, regardless of your status." Because SSA continued to invoke section 1106 of the Social Security Act to deny subsequent fee waiver requests, we stopped including a fee waiver request with our FOIA requests to SSA after 2020.

Our experience is not unique. SSA's own data indicates that the agency usually denies almost all FOIA fee waiver requests. Over three years, from FY 2020 through FY 2022, SSA only approved 2 fee waivers out of 791 requests. This approval rate of 0.25% for FOIA fee waiver requests is

completely out of step with the approval rates of other federal agencies, which routinely approve 50 to 80% of FOIA fee waiver requests.

Legislative history indicates that the fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” 132 Cong. Rec. S14,270-01 (daily ed. Sept. 30, 1986)(statement of Sen. Leahy). Courts have also applied a generous construction of the fee waiver provision as applied to requests from noncommercial requesters. “In 1974, Congress added the fee waiver provision in ‘an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ particularly journalists, scholars, and non-profit public interest groups.” *Community Legal Services, Inc. v. U.S. Dep't of Housing & Urban Dev.*, 405 F. Supp. 2d 553, 556 (E.D. Pa. 2005).

SSA proposes additional, introductory language to 20 CFR §402.85, to be titled “Waiver of fees in the public interest.” We strongly support SSA’s proposal to add this new language to this section of the regulations, because it clarifies that SSA considers waiver under this regulation whether the agency would charge fees under the FOIA’s fee schedule or section 1106(c) of the Social Security Act. We urge SSA to ensure that its application of the new fee waiver regulation is more consistent with the FOIA statute.

#### **SSA should not expand its definition of “commercial interest” as proposed.**

We urge SSA to revise its proposed language for its definition of “commercial interest” in 20 CFR §402.10. The new definition states “*Commercial interest* includes interests relating to business, trade, and profit, **as well as non-profit corporations, individuals, unions, and other associations**” with the bolded phrase being a new addition to the definition. As written, the proposed additional text suggests that interests related to non-profit corporations are commercial, but that does not accurately reflect the standard for a finding of a noncommercial use in the FOIA statute.

FOIA provides for fee waivers when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). SSA’s proposed definition of “commercial interest” suggests that an interest can be deemed commercial just because it relates to a non-profit corporation, individual, union, or other association. But relating to those topics does not make an interest commercial, unless it also relates to business, trade, or profit. SSA’s proposed definition of “commercial interest” fails to differentiate an entity’s financial interests from its educational or informational interests, as intended under the FOIA statute. **CASE?**

Other federal agencies do not conflate financial and informational interests in applying FOIA to requests for information. SSA’s proposed definition for “commercial interest” is inconsistent with other similar regulations from the other federal agencies. We encourage SSA to adopt a definition of “commercial interest” in its FOIA regulations that is similar to the definitions of “commercial interest” or “commercial use” that are found, for example, in the FOIA regulations

of the Department of Education (34 CFR § 5.31, Fee definitions), Department of Health and Human Services (45 CFR § 5.54, How may I request a fee waiver? at (b)(3)(i)), Department of Justice (28 CFR § 16.10, Fees at (b)(1)), and Equal Employment Opportunity Commission (29 CFR § 1610.15, Schedule of fees and method of payment for services rendered at (b)(1)).<sup>1</sup>

The final rule should remove the reference to non-profit corporations, individuals, unions, and other association from the definition of “commercial interest” and clarify that a request is only in the requester’s commercial interest if it furthers the requester’s business, trade, or profit interests.

**The proposed changes to 20 C.F.R. § 402.155 are essential to bring SSA into compliance with FOIA’s statutory requirement that proactive disclosures are available in an electronic format.**

FOIA requires proactive disclosure of certain documents, including statements of policy and administrative staff manuals. Under FOIA, agencies must proactively disclose certain documents, including “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,” 5 U.S.C. § 552(a)(2)(B), and “administrative staff manuals and instructions to staff that affect a member of the public,” *id.* § 552(a)(2)(C). These provisions embody one of the goals of FOIA: to prevent agencies from using “secret law,” which “cannot be withheld from the public.” *Cuneo v. Schlesinger*, 484 F.2d 1086, 1091 n. 13 (D.C. Cir. 1973) (citing 5 U.S.C. § 552(a)(2)); *see also Ginsburg, Feldman & Bress v. Fed. Energy Admin.*, 591 F.2d 717, 718 n.2 (D.C. Cir. 1978) (noting that the language of § 552(a)(2)(C) is specifically meant to address the problem of agencies’ “secret law”). To further the goal of preventing agencies from creating secret law, FOIA provides that “[e]ach agency shall also maintain and make available for public inspection in an electronic format current

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<sup>1</sup> **“Commercial use request** means a request from or on behalf of a FOIA requester seeking information for a use or purpose that furthers the requester’s commercial, trade, or profit interests, which can include furthering those interests through litigation. For the purpose of assessing fees under the Act, the Department determines, whenever reasonably possible, the use to which a requester will put the requested agency records.” 34 CFR § 5.31(a)

“The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, we will consider the following criteria:

- (i) We will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest.”

45 CFR § 5.54(b)(3)

**“Commercial use request** is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. A component’s decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester’s intended use of the information.” 28 CFR § 16.10(b)(1)

**“Commercial use request** refers to a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. An agency’s decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester’s intended use of the information. The Commission will notify requesters of their placement in this category.” 29 CFR § 1610.15(b)(1)

indexes providing identifying information for the public as to any matter issued, adopted, or promulgated . . . and required . . . to be made available or published.” 5 U.S.C. § 552(a)(2)(E).

We support SSA’s proposed changes to 20 C.F.R. § 402.155 to the extent that it requires that the records SSA must proactively disclose be “available for public inspection in an electronic format.” FOIA requires that all documents required to be proactively disclosed be made available “in an electronic format.” 5 U.S.C. § 552(a)(2). SSA’s proposed change brings its regulations into compliance with the amendments in the 2016 FOIA Improvement Act. SSA’s proposed language is an important improvement from SSA’s current regulations, which do not explicitly state that § 552(a)(2) records must be made available in an electronic format and only specify that such records are available at district offices and branch offices. See 20 C.F.R. §§ 402.45, 402.55. In particular, we support SSA’s proposed revisions to 20 C.F.R. § 402.155 that clarify that SSA will now make the four § 552(a)(2) categories “available for public inspection in an electronic format . . . through [www.ssa.gov](http://www.ssa.gov) free of charge.”

Justice in Aging relies on these records—which include final opinions, instructional manuals issued to SSA employees, general statements of policy, and other materials which are used in processing claims and which are not published in the Federal Register—when providing free training to thousands of advocates in our network who represent clients on matters relating to SSI and Social Security benefits. If these essential records are not available electronically, they are virtually inaccessible to Justice in Aging and the many advocates we train, and this may prevent us from understanding SSA’s processes and ensuring that those who are eligible are able to access their government benefits.

**SSA should revise the proposed 20 C.F.R. § 402.155 to specify that the Program Operations Manual System (“POMS”) must be proactively disclosed in its entirety and indexed.**

As SSA has stated, the POMS is “a primary source of information used by Social Security employees to process claims for Social Security benefits.” *POMS Home*, Soc. Sec. Admin., <https://secure.ssa.gov/apps10>. Justice in Aging relies on access to the POMS to provide free assistance to thousands of individuals in accessing their benefits. As SSA has acknowledged, the POMS is a record that must be proactively disclosed under FOIA. It constitutes both (1) “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,” and (2) “administrative staff manuals and instructions to staff that affect a member of the public.” 5 U.S.C. § 552(a)(2)(B), (C).

SSA’s current regulations state that the POMS must be proactively disclosed under FOIA. See 20 C.F.R. §§ 402.45, 402.55. We support SSA’s proposed revisions to 20 C.F.R. § 402.155 that clarify that SSA will make the POMS “available for public inspection in an electronic format . . . through [www.ssa.gov](http://www.ssa.gov) free of charge.” As a practical matter, SSA already makes some of the POMS available through [www.ssa.gov](http://www.ssa.gov). However, SSA does not currently make the entirety of the POMS available because many sections are omitted from the public electronic version. There is no indication of their deletion. Instead, Justice in Aging is only able to learn incidentally that some essential sections of the POMS exist, such as when an SSA staff member refers to a

particular section or when a nonpublic portion is cited to in a public portion. Yet we likely remain unaware of many other POMS sections that remain hidden.

For example, POMS GN 00303.300, *Establishing U.S. Citizenship for All SSA Programs*, is referenced in other sections of the POMS, including [GN 00303.120](#), [GN 00303.200](#), [RS 02640.001](#), and [RM 10210.500](#). However, no text from GN 00303.300 is publicly available on [www.ssa.gov](http://www.ssa.gov), it is not listed in the POMS [Table of Contents](#), and there is no legal basis given for why the entire section is hidden. This is just one example of an unknown number of hidden sections that occur throughout the POMS.

SSA should revise proposed 20 C.F.R. § 402.155 regulations to specify that SSA will make the entirety of the POMS available to the public in an electronic format. Because these hidden sections “create[] or provide[] a way of determining the extent of substantive rights and liabilities,” they essentially function as “secret law” prohibited by FOIA. *Cuneo*, 484 F.2d at 1091 n.13. By not providing the entirety of the POMS to the public, the Administration is not complying with requirements that it disclose statements of policy, administrative staff manuals, and instructions to staff that affect the members of the public. 5 U.S.C. § 552(a)(2). We urge SSA to specify in its regulations that it will proactively disclose the entirety of the POMS and thus ensure that its regulations conform with FOIA.

In the alternative, to the extent that SSA maintains that some sections of the POMS are not required to be affirmatively disclosed, SSA should revise proposed 20 C.F.R. § 402.155 to specify that an index of the entirety of the POMS will be made public which lists any sections of the POMS which SSA has withheld from the public and the reason for such withholding. SSA already maintains such an index, called the “POMS Comprehensive Index,” for its employees. See POMS GN [03360.040](#).C.5. Without producing an index of the entirety of the POMS and stating the legal basis for withholding, the public has no way of knowing what sections of the POMS are not publicly disclosed. Such revisions would ensure that SSA’s regulations conform with FOIA’s provisions requiring indexing of proactive disclosures and clarify that SSA is not using “secret law.” 5 U.S.C. § 552(a)(2)(E).

**SSA should revise the proposed 20 C.F.R. § 402.155 to specifically include that SSA will proactively disclose Emergency Messages and Administrative Messages.**

The Emergency Messages (EMs) and Administrative Messages (AMs) issued by SSA are also subject to proactive disclosure under FOIA, and SSA should revise proposed 20 C.F.R. § 402.155, to provide for their proactive disclosure.

Much like the POMS, EMs and AMs constitute a “source of information used by Social Security employees to process claims for Social Security benefits.” *Cf. POMS Home*, Soc. Sec. Admin., <https://secure.ssa.gov/apps10>. Justice in Aging relies on EMs and AMs to provide free training for advocates on how to assist low-income older adult with accessing their essential benefits, and continued access to EMs and AMs is important for ensuring that beneficiaries and their representatives understand what policies and procedures SSA has applied. As a result, EMs and

AMs fall under two of the FOIA categories subject to proactive disclosure: they constitute “statements of policy and interpretations which have been adopted by the agency,” 5 U.S.C. § 552(a)(2)(B), and “instructions to staff that affect a member of the public,” id. § 552(a)(2)(C).

While SSA makes at least some EMs and AMs publicly available on [www.ssa.gov](http://www.ssa.gov), SSA does not maintain all EMs and AMs publicly, and SSA regularly remove EMs and AMs that, by their terms, have expired. But even after expiration, EMs and AMs still constitute “information which either creates or provides a way of determining the extent of substantive rights and liabilities” and “cannot be withheld from the public” under FOIA. *Cuneo*, 484 F.2d at 1091 n.13. When a claimant has a post-eligibility issue that arises after the expiration of the EM, the individual’s appeal would benefit if the EM could be reviewed along with the appeal. For example, [EM-21050](#) relates to Supplemental Security Income and resource exclusions during the pandemic, currently scheduled to expire after September 3, 2023. If an individual files a waiver for an overpayment that arose from pandemic benefits after the relevant EM has expired, because EM-21050 is no longer publicly available, the claimant cannot provide the EM as authority for the policy that those pandemic benefits should not have been counted as income or resources. SSA should revise its regulations to include EMs and AMs in the proposed revision of 20 C.F.R. § 402.155, in the list of records that SSA will “available for public inspection in an electronic format . . . through [www.ssa.gov](http://www.ssa.gov) free of charge,” and should continue to provide EMs and AMs in an archive on its website even after expiration.

We welcome SSA’s revisions to its regulations that clarify the electronic availability of proactively disclosed records. But to ensure that its regulations conform with the substantive requirements of FOIA, SSA should also revise its regulations to provide for the proactive disclosure of the entirety of the POMS, indexing of the POMS, and EMs and AMs. We urge SSA to make these revisions in its final rules to comply with FOIA.

Thank you for the opportunity to provide these comments. If there are questions concerning this submission, please contact Kathryn Lang at [klang@justiceinaging.org](mailto:klang@justiceinaging.org).

Respectfully submitted,

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Justice in Aging