



# The Evolution of Privacy and Disclosure Policy in the Social Security Administration

by Sandy Crank\*

This special anniversary feature describes, from a historical perspective, the efforts of the Social Security Administration (SSA) to protect the confidentiality of personal information in its records. Significant changes in disclosure policy are cataloged and elements of the policy are outlined. The article traces the stages in policy development from the first

agency-initiated pledge of confidentiality, through the formative years 1940-60, and into the period of rapid policy change occasioned by legislation, passed in the mid-1960's and 1970's, that addressed government dissemination of information and established fair information practices in government. The thrust of this article is to demonstrate SSA's consistent and ongoing efforts to keep personal information strictly confidential. The discussion of the SSA policy decisions that were made while implementing the various disclosure-related laws helps to explain the agency's goals.

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The social security program is one in which confidentiality of information has been a central theme since its inception. The initial confidentiality policies grew from a sense of responsibility to the public. These policies would later coalesce during a period of relative tranquility and stability that lasted until the mid-1960's. Then, Social Security Administration (SSA) policy would undergo a metamorphosis in response to legislation directed to the public dissemination of information by the Federal Government.

The very life blood of the social security program is its records—information about virtually everyone in the country, all under the control of one agency of the Federal Government. Knowledge of this fact and concern about the Government's use and possible misuse of that information raised questions at the outset of the deliberations about the ultimate wisdom and desirability of the Social Security Act. A newspaper report<sup>1</sup> of a speech made at a political rally in 1936 illustrates the depth of concern. Talking of the Roosevelt Administration's proposal to issue social security numbers under the program, the speaker likened the "millions of cards to be carried by every worker . . ." and ". . . workers being required to report to a politically appointed clerk—every change in their residence, every change in their wages, every change in their employment" to the police cards required by European governments and to the police surveillance of their citizens. The speaker also charged that the Government planned a "regimentation of the country's 27 million workers so complete that everyone will be numbered with metal identity tags." In retrospect, these fears seem overstated. However, the threats to the rights of those covered by the program were sufficiently credible for the program's supporters to act to see that the prophesized excesses did not materialize. As a result, the openly declared commitment to the confidentiality of information collected for social security purposes became an integral part of that program.

The Social Security Board, charged with implementing the original legislation, sought to reassure the program's critics and the public at large. On November 23, 1936, the day before applications for social security numbers (SSN's) were distributed, the Board issued a press release stating:

. . . the information required of every worker on this form would be regarded as confidential within Government sources. Only the worker himself, or his immediate family, or Government employees having official responsibility in connection with the social security files will have access to this information.

Whether in response to continued criticism or from a

<sup>1</sup> "Hamilton Predicts Tags for Workers," *New York Times*, Sunday, November 1, 1936.

desire to underscore the earlier assurance, on December 10, 1936, the Board issued another press release, which stated in part:

The Board will at all times regard the information received from an employee as confidential. The files will be open only to those who have legitimate interest in the administration of the Social Security Act.

The Social Security Board took those pledges one step further when, on June 16, 1937, it published the first regulation under the authority of section 1102 of the Social Security Act. Regulation No. 1, entitled Disclosure of Official Records and Information, has become the cornerstone of SSA's disclosure policy. Today Regulation No. 1, as amended, is found in title 20, Chapter III, Part 401, **Code of Federal Regulations**.

The underlying principle embodied in that first regulation was set forth nearly 60 years ago in a famous statement of Supreme Court Justice Louis D. Brandeis: "The right to be let alone [is] the most comprehensive of rights and the right most valued by civilized man."<sup>2</sup> SSA's realization of this principle has required attention to two distinct aspects of confidentiality: first, control over the collection of data and, second, control over the disclosure or use of that data. To meet the first element of control, SSA has consistently requested only that bare minimum of information from any source—the individual, public records, medical sources, employers, other Government agencies—that is necessary for the efficient and equitable administration of the Social Security Act. As a result, SSA's records contain far less information than many people both inside and outside of the Federal Government appear to believe, and certainly far less than SSA, given its unique program, has the opportunity to collect. What information SSA does collect, however, includes much that is personal and sensitive, especially in the records compiled to support claims for entitlement under the several programs administered by SSA.

The wealth of sensitive data kept by SSA is very attractive to potential users outside SSA; therefore, the agency had to adopt a policy for meeting the second element—control over disclosure and use. Disclosures, insofar as possible, are limited to those necessary for administering the social security program.

The Social Security Board established a basic, underlying policy with regard to disclosure, and it remains largely in effect today. In the original (1937) Regulation No. 1, the Board established five essential conditions with respect to information obtained in the administration of the Social Security Act:

- (1) Information obtained in administering the Social Security Act was confidential and no information

<sup>2</sup> *Olmstead v. U.S.*, 277 U.S. 438 (1928), at 478.

would be disclosed except pursuant to the authorization of the individual or the individual's authorized representative or as authorized by the Board (or by the regulation).

- (2) Primarily, information would be disclosed only for administration of the Social Security Act.
- (3) Personally identifiable information also could be disclosed to the individual (or business) to whom it pertained.
- (4) Confidentiality would not apply to statistical or other information not relating to any particular person. Therefore, such information could be disclosed to those having a need therefor or to the public as an important public service.
- (5) Any member, officer, or employee of the Board should respectfully decline to furnish any information forbidden to be disclosed by Regulation No. 1, in response to a subpoena or otherwise, basing such refusal upon Regulation No. 1.

The first alteration of these principles occurred in 1938. The Board, in response to congressional interest in obtaining information from social security records, stated that it did not presume to withhold from Congress information required in connection with pending or proposed legislation. Such information, however, would be furnished in a way that would not violate its confidential character. Disclosure to Congress has remained, in one form or another, an element of SSA's disclosure policy.

By 1939, evidence of the wide acceptability of the disclosure policies enunciated in Regulation No. 1 was demonstrated by the enactment of the Social Security Amendments of 1939. Congress incorporated, essentially without change, the provisions of Regulation No. 1 into section 1106 of the Social Security Act.

In addition, Congress reinforced the provisions of confidentiality by subjecting the recipient of the disclosed information to the provisions of Regulation No. 1. Moreover, Congress included a criminal penalty for any unauthorized disclosure of information in social security files, making it a misdemeanor subject to a \$1,000 fine, a 1-year imprisonment, or both, and made all disclosure subject to regulations and the discretion of the Board (and its successor, the Secretary, Department of Health and Human Services).

After the initial birth pains, the social security program settled into a period of public acceptance and quiet growth. So, too, did the disclosure policies. Although for several years after 1939 no crisis of confidentiality occurred, it was not a period completely devoid of pressures to disclose information for more uses and to more users than originally anticipated by the Board.

Disclosure policies were subjected to a gentle evolution, responding to changing social needs, additional program responsibilities, and other material interests, just as the Board responded to Congress' need to use information. Characteristically, these changes originated

under a concept of disclosing information only as a service to the individual, as distinguished from providing such service for the benefit of the recipient agency or other third party under the concept of administrative efficiency. To do otherwise was believed to be erosive of the policy of inviolability of social security records.

Another characteristic disclosure policy evolved: SSA's reluctance to provide information for law enforcement purposes. This policy was based on two considerations. First, disclosures in these situations could make individuals reluctant to provide to SSA information needed to administer its programs and, second, individuals are required to give SSA specific information, some of which could be incriminating.

With four exceptions, the changes in the original regulation during the period 1939-79 were the result of strict adherence to the basic social security policy enunciated years before: disclosing confidential information only as a service to the individual about whom the information pertained and then only in those cases and for such purposes that the individual would, in all likelihood, want such information disclosed.

The four exceptions were information:

- (1) needed in a case involving national security;
- (2) concerning aliens and required by the Attorney General or the Immigration and Naturalization Service pursuant to section 290(c) of the Immigration and Nationality Act;
- (3) needed for administration of Federal income tax laws; and
- (4) needed about certain deserting parents whose children were receiving public assistance.

Each of these exceptions continues to be a part of SSA disclosure policy.

The 1960's brought social change and challenge; the public wanted to know more about what government was doing and why. In 1966, Congress passed the Freedom of Information Act (FOIA) to open the workings of Government to the public eye. Although the primary objective of the FOIA is to require Government agencies to disclose information, it is not opposed to the concept of confidentiality or privacy. The FOIA intends to make available rules, instructions, decisions, and other records relating to the administration of Government programs. It does not intend to intrude unduly on the privacy of individuals who participate in those programs.

Of prime importance to the interests of preserving confidentiality of records are those sections of the FOIA that provide exemptions to the general requirement for disclosure of information. While these exemptions are not mandatory, they provide to the Government the means to protect certain categories of information from public scrutiny and dissemination. The exemptions cover a variety of information—trade secrets, predecisional memoranda, and active investigative records, to

name a few. Two exemptions were of particular interest to SSA and its disclosure policy. One allows a Government agency to refuse to disclose information if disclosure is prohibited by a specific statute. For SSA, section 1106 of the Social Security Act qualifies as such a statute. A second exemption provides that a Government agency may withhold information if disclosure would constitute a "clearly unwarranted invasion of personal privacy." With these two exemptions, SSA was able to continue its policy of protection of sensitive personal information in its records.

While those who advocated openness in Government were promoting the FOIA, others were equally concerned about the privacy of individuals whose data were housed in ever-expanding records systems. Although many types of records are maintained, the greatest perceived threat to privacy came from the proliferation of computerized data bases with their instantaneous updating capabilities, their ability to be linked with other data bases, and the occasional—but persistent—stories of the impossibility of correcting data found to be in error.

The Privacy Act (PA) of 1974 was to provide some relief to the public from the more invasive aspects of computerized recordkeeping. The law permits the public to examine and question Federal records and to have a limited say in how information should be disseminated among Government agencies. The law also sets out requirements that Federal agencies must follow in recognition of the individuals' right to privacy. The PA does not cover all records maintained by Federal agencies; its sole concern is personal data in systems of records. A system of records is a collection of personal information that is retrieved by a particular personal identifier, such as the SSN. Thus, the emphasis is on computerized systems, although noncomputerized systems are also covered. Federal agencies were given broad rules for the collection and maintenance of data and were required to publish notices of the systems of records in effect at the time of the enactment and all new systems of records established thereafter. Also, while the Act forbade disclosure of information from these systems of records without the subject individual's consent, this law provided for 11 exceptions that allow disclosure without consent (a twelfth exception was added by a later amendment).

Since the exceptions allowing disclosure without consent were permissive and not mandatory and the allowed disclosures generally paralleled SSA disclosure policies and practice, the PA did not require drastic changes in SSA's basic disclosure philosophy. It did, however, require SSA to look at its recordkeeping practices and disclosure policy from a different perspective. The types of data and the individual recipients of disclosure became more important in SSA's determinations of what could be disclosed and what would require publication in the **Federal Register** under the PA.

Two PA exceptions from disclosure with consent are more important to SSA policy than any of the others. One provides for disclosure as required by the FOIA. It allows SSA to continue most of the disclosures it has been committed to by policy and regulation. The other especially important PA exception provides for disclosures to a third party only for purposes compatible with the purpose for which the agency collected the information. The latter provision caused SSA to curtail disclosures to some long-term recipients of information. Under this PA provision, disclosures can be made only if the purpose is compatible and notice of the disclosure is published in the **Federal Register**. This exception in the PA is commonly referred to as disclosures for "routine use." To determine a routine user of SSA information, it was necessary to screen all disclosures in progress and measure their use of the data against the yardstick of compatibility.

All in all, the PA had a positive effect on SSA disclosure policy because it required careful evaluation of disclosure standards that had become policy over the years. As subsequent events unfolded, this evaluation was to prove a boon. In 1976, Congress passed legislation that was to have a profound impact on SSA's disclosure policy. For the first time in decades, SSA would have to completely revise Regulation No. 1 and revamp its policies.

The Government in the Sunshine Act<sup>3</sup> passed by Congress on September 13, 1976, was intended to give the public the "fullest practicable information regarding the decisionmaking processes of the Federal Government." This goal was to be accomplished by having meetings open and making transcripts of proceedings available. However, the Government in the Sunshine Act contained among its provisions a section that amended the FOIA. This amendment to the FOIA defined the kind of statute that could be relied upon as a basis to exempt information from disclosure. The wording was changed to provide that:

- (1) the statute could not allow discretion in deciding what could be held from the public; and
- (2) alternatively, the statute stipulates particular criteria for withholding or the particular matters to be withheld.

The impact for SSA was that section 1106<sup>4</sup> of the Social Security Act did not meet either criterion and could not be invoked as a statute to support a denial for information requested under the FOIA.

The other noteworthy disclosure statute passed in the same year was the Tax Reform Act of 1976.<sup>5</sup> This law, which Congress passed on October 4, 1976, strengthened the rules on confidentiality and disclosure of tax

<sup>3</sup> Public Law 94-409, now: 5 U.S.C. 552b.

<sup>4</sup> 42 U.S.C. 1306.

<sup>5</sup> Public Law 94-455.

returns and tax return information. Apropos of SSA's interests, this law limited the uses and disclosure of tax return information given to SSA to those necessary for the agency's administration of the Social Security Act.

Thus, by these two Acts, Congress made some information in SSA records more available while making other information unobtainable to outside requestors. As a result, SSA was faced with a regulation unsupported by statutory authority and a disclosure policy that was obsolete in many ways.

At this point, SSA could have adopted a disclosure policy that did no more than embrace the provisions of the FOIA and the PA. To further facilitate this course, Departmental regulations, which could fill in any gaps left by the statutes, were in place for both the FOIA and the PA. However, that choice would have meant abandoning much of the philosophy of disclosure, SSA's heritage of confidentiality, that had been so carefully guarded over the years. Therefore, SSA opted to develop a policy that would deal with the realities of the statutory climate and yet preserve, as far as possible, the basic philosophy of confidentiality.

Because SSA was not prepared to issue a comprehensive regulation that would respond to the problems presented by the Government in the Sunshine Act, it was necessary to take a stopgap measure to buy time for development of an ordered and considered regulation. To fill the void in its disclosure policy, SSA issued an interim regulation that allowed the agency to operate until a satisfactory comprehensive regulation could be fashioned.

The interim regulation, Regulation No. 1, published March 16, 1977,<sup>6</sup> presented a drastically simplified disclosure policy. The general rule of disclosure was that FOIA rules would apply to every proposed disclosure of information. If, considering the circumstances of disclosure, the information could be made available in accordance with the FOIA rules, then the information would be disclosed regardless of whether the requestor or recipient of the information had a statutory right to request the information under the FOIA, or whether a request had been made. The regulation explained the application of the general rule as follows:

- (1) Information shall be disclosed to—
  - (a) an individual, who is the subject of the record, when required by the access provisions of the PA.
  - (b) a person upon request, when required by the FOIA.
- (2) Unless prohibited by any other statute, information may be disclosed to any requestor or recipient of information (including Federal agencies or State and Federal Courts) when the information would not be exempt from disclosure under FOIA rules or when information would be made

available under HHS public information regulations' criteria for disclosures<sup>7</sup> which are found to be in the public interest and consistent with obligations of confidentiality and administrative necessity.

Since the foundation of the interim regulation was FOIA principles of disclosure, SSA looked to exemption 6 for justification to not disclose personal information. As stated earlier, exemption 6 allows withholding information if disclosure would be a "... clearly unwarranted invasion of personal privacy." On the surface, this invasion-of-privacy criterion may appear similar to the principle of confidentiality that anchored section 1106 of the Social Security Act and Regulation No. 1 throughout SSA's 40-year history, but the effect in practice has been vastly different, for three reasons:

- (1) The criterion is very subjective: those who seek information and those whose information is sought have very different ideas of what is a "clearly unwarranted invasion of privacy." (Indeed, the Government's perception may be at odds with both requestor and subject.)
- (2) Under section 1106, the burden of proof was on the requestor to justify the disclosure; under the FOIA, the burden is on SSA to justify privacy.
- (3) In trying to protect individual privacy, SSA is constrained by what the Department of Justice (DOJ) will or will not defend in court. The DOJ indicated a reluctance to defend Federal agencies in FOIA exemption 6 suits except in clear-cut cases of invasion of privacy.

Exemption 6 of the FOIA does not provide an unassailable statutory basis by which SSA could protect the confidentiality of personal information in its records. To deal with the subjective nature of exemption 6, SSA created a freedom of information committee to consider all information requests that would not fit one of the categories already identified as either being or not being a "clearly unwarranted invasion of personal privacy."

Through this committee and other experience with the interim regulation, SSA identified a number of troublesome areas in balancing freedom of information with privacy rights: requests for law enforcement purposes, direct computer matching of taped lists, sharing of information with programs similar to those SSA administers, litigation involving neither SSA nor HHS, and research activities that are of importance to the general public or to a segment of the population served by SSA's programs. In each of these areas, SSA had confronted situations in which a request for disclosure seemed compelling in and of itself but which, in the broader context of personal privacy, was a step toward further erosion of privacy rights.

The interim regulation was to serve SSA's disclosure policy for the next 3 and one-half years. When, on

<sup>6</sup> 42 FR 14704, March 16, 1977.

<sup>7</sup> 45 CFR Part 5, Subpart F.

November 13, 1980, SSA published its new comprehensive Regulation No. 1, the document was the result of consideration of information and opinions from sources such as the: Privacy Protection Study Commission (established by the Privacy Act), individuals specializing in privacy concerns and computerization (Arthur R. Miller, Alan F. Weston, and James B. Rule, among the authors of books and articles), and members of the public (in addition to the usual request for comments when a proposed rule is published, SSA scheduled meetings throughout the country so the public had the greatest opportunity to comment), as well as the experience of working under the interim regulation.

The result of this process was the crystallization of the elements that make up the balancing judgment needed to determine the existence of "a clearly unwarranted invasion of privacy." SSA developed four basic criteria by which to weigh a specific disclosure situation: sensitivity of the information to individuals; public interest in disclosure; individual rights and expectations to have personal information kept confidential; and public interest in maintaining general standards of confidentiality of personal information.

Regulation No. 1, like the interim regulation, had a simple policy base. Unlike the interim regulation, Regulation No. 1 also addressed SSA's stance on the disclosures allowed by the PA. The rules for disclosure that SSA adopted with the publication of the regulation are:

- (1) SSA would disclose information in its records if the disclosure is required by Federal law;
- (2) SSA would not disclose information in its records if disclosure is barred by Federal law; and
- (3) If law neither bars nor requires disclosure, SSA would apply the FOIA principles to determine if disclosure is appropriate. Disclosure would be made according to FOIA principles even if the intended recipient (such as another Federal agency) is not able to make an FOIA request.

The regulation illustrates the application of the third criterion by stating the conclusions reached by its application to a select number of permissive disclosures allowed by the PA. The PA disclosures singled out for amplification by SSA were those that paralleled the areas of concern identified while operating under the interim regulation. These are:

- (1) Disclosure for a routine use—that is, use of a record for a purpose compatible with the purpose for which it was collected (Exception (b)(3));
- (2) Disclosure to another agency or to an instrumentality of any government jurisdiction within or under control of the United States for a civil or criminal law enforcement activity . . . (Exception (b)(7)); and
- (3) Disclosure pursuant to the order of a court of competent jurisdiction (Exception (b)(11)).

In each of these disclosure categories, SSA chose a

policy more restrictive than that allowed by statute. The agency's rationale was that to adopt the less restrictive policy would constitute a clearly unwarranted invasion of privacy for the subject individual.

Disclosures without consent under section (B)(3) of the PA are allowed:

- (1) where necessary to carry out SSA's programs;
- (2) to other programs with the same purposes as SSA programs; and
- (3) where Congress, by law, has directed disclosure for a particular use or purpose.

Even though disclosure is allowed to other programs, there is a limitation on what information is to be released. Not all information is made available by SSA; only information about eligibility, benefit amounts, or other matters of benefit status relevant to determining the same matters in the other program is released.

Disclosures for law enforcement purposes under section (b)(7) of the PA are restricted because of the sensitive nature of the information SSA has and the general inability of individuals to limit what information is given. Therefore, SSA may disclose information for criminal law enforcement if the crime committed is a violent one and the subject individual of the inquiry has been indicted or convicted of that crime. The agency will also disclose information for investigation or prosecution of criminal activity in non-SSA income or health-maintenance programs. Here again, the information disclosed is limited to that concerning eligibility, benefit amounts, or other matters of benefit status in the SSA program that are relevant to determining the same matters in the other program.

The policy for responding to court orders, for which disclosure is permitted by section (b)(11) of the PA, is based in part on the fact that most court orders and subpoenas are the result of court actions between two parties, neither of whom can demonstrate an overwhelming advantage of interest over the other, and the knowledge that information introduced in court becomes a matter of public record. Therefore, SSA honors a court order if: the disclosure would be permitted by any other part of the regulation, the Secretary of HHS is a party to the proceeding, or information is necessary for assuring due process in a criminal proceeding. In all other situations, SSA will negotiate with the court to attempt to find a solution short of complete disclosure that will satisfy the court's needs and still protect the individual's privacy.

In keeping with the PA provisions, the regulation addresses not only disclosures of personal information to parties other than the subject individual, it also addresses the individual's right to access one's own information. Since the PA allows Federal agencies some discretion in releasing medical information, and medi-

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cal information is often the most sensitive material in SSA's possession, SSA chose to impose conditions on an individual's access to medical information. When requesting release of medical information, the subject individual is to designate a representative to whom the information may be released if SSA decides that direct release could be harmful to the requestor. Although the individual designates a representative, that does not mean that the information must go to the representative in every case. In the majority of cases, the information is released directly to the subject individual. However, the safeguard provided by the regulation is available if needed.

Since the publication of Regulation No. 1, other laws have affected SSA disclosures—the Right to Financial Privacy Act and the Omnibus Budget Reconciliation Act of 1982 are two examples. The additional requirements brought about by these laws were easily assimilated under the rules in place and have required no change in policy.

SSA believes that the regulation has been successful. Admittedly, this is a somewhat parochial view and we are aware that not all requestors of SSA data are enthusiastic about the rules now in effect. The primary

source of discontent is SSA's rules on disclosure for law enforcement. In response to criticism from several sources, the Acting Commissioner of Social Security has directed a review of the policies on disclosures for law enforcement purposes and also disclosures to the courts. This review is currently underway, and it is expected that some modification of the current regulatory provisions will result.

By its very nature, confidentiality is subject to conflicting pressures. Therefore, SSA confidentiality policy will not remain static but will continue to evolve. Pressures that effect change are both external and internal to SSA. Externally, Congress is considering legislation to amend the FOIA; Federal deficit reduction considerations argue for greater efforts to combat waste and abuse in benefit programs; and the courts continue to define the subtleties of the FOIA exemptions as well as the PA provisions. Internally, the Systems Modernization Plan promises technological changes that will influence how SSA does business and that may raise a new generation of confidentiality issues. Nevertheless, in the absence of radical legislative direction, SSA will continue to insist on an as-strict-as-possible emphasis on confidentiality in its disclosure policy.