

The Social Security Administration (SSA) places a high priority on preserving the confidentiality of personal information. Much of the information SSA collects and maintains on individuals is especially sensitive. Therefore, before SSA may disclose any information, SSA must look to the Privacy Act of 1974 (PA), 5 U.S.C. § 552a, the Freedom of Information Act of 1967 (FOIA), 5 U.S.C. § 552, section 1106 of the Social Security Act, 42 U.S.C. § 1306, and its own regulations. SSA employees are prohibited from disclosing any information contained in SSA records unless the disclosure is authorized by regulation or otherwise required by Federal law. See § 1106(a) of the Social Security Act. An employee who inappropriately releases personal information is subject to criminal sanctions. Id. SSA's disclosure regulations, found at 20 C.F.R. Part 401, permit SSA to disclose personal records when the individual to whom the records pertain provides written consent or when the disclosure falls into one of several narrowly-drawn exceptions. One such exception applies in limited circumstances where SSA is ordered to disclose the information by a court of competent jurisdiction. A recent change in SSA's regulations found at 20 C.F.R. § 401.180 (2007), which became effective May 29, 2007, clarifies the process of disclosure under court order or other legal process. See also Privacy and Disclosure of Official Records and Information, 72 Fed. Reg. 20,935, 20,941 (Apr. 27, 2007) (to be codified at 20 C.F.R. pt. 401).

SSA may release records in response to a written consent. SSA provides a consent form that can be downloaded from its website at <http://ssa.gov/online/ssa-3288.pdf>. This form is also available at local SSA offices. However, SSA will accept any consent as long as it is written, identifies SSA as the party authorized to release the records, specifies to whom the information may be disclosed, identifies the information SSA may disclose (a general "all records" request will not be sufficient, because SSA must be confident the individual knowingly consents to each type of record released), and notes any timeframe for disclosure. See 20 C.F.R. § 401.100(b). Once signed and dated, the consent form should be submitted to a local SSA office. If the records may ultimately be submitted to a court, the consent should be accompanied by a request for certification of the records. See 20 C.F.R. § 403.155; see also section 704(d) of the Social Security Act, 42 U.S.C. § 904(d) (authorizing the Commissioner to make a seal of office and stating that judicial notice shall be taken of such seal). SSA cannot certify records once they have left the possession of SSA, and a fee may be charged for copying and certification. See 20 C.F.R. §§ 401.95, 402.155-.165, 403.155. If the individual refuses to consent to the release of his or her records, but is a party in litigation, a court can compel the individual to consent to SSA's release of the records or draw a negative inference from refusing to consent to the release of records.

The Privacy Act permits but does not require a federal agency to disclose information without consent pursuant to an order of a court of competent jurisdiction. See 5 U.S.C. § 552a (b)(11). SSA's regulations clarify how this provision, in conjunction with § 1106 of the Social Security Act, applies to SSA records. A court order is defined as any legal process issued by a federal court of competent jurisdiction, signed by a judge or magistrate judge, that commands SSA to disclose information. See Privacy and Disclosure of Official Records and Information, 72 Fed. Reg. at 20,941. Only a federal court of the United States can be considered a court of competent jurisdiction. Id. SSA will disclose information in response to an order from a federal court if: (1) another section of the regulations would specifically allow disclosure; or (2) the

Commissioner is a party to the proceeding; or (3) the information is necessary to ensure that an individual who is accused of a crime receives due process in a criminal proceeding in federal court. In other circumstances, SSA will balance the needs of the court while preserving the confidentiality of information. See id. at 20,941-42.

The regulations implementing section 1106 of the Social Security Act explain that, "under the Privacy Act the Federal Government has not waived sovereign immunity, which precludes state court jurisdiction over a Federal agency or official." Id. at 20,941. Sovereign immunity protects the United States from a state court order that seeks to compel it to produce documents in violation of valid agency regulations. In United States ex rel. Touhy v. Ragen, 340 U.S. 462, 468 (1951), the Supreme Court held that a federal officer cannot be held in contempt for refusing to produce information in response to a court order, when such production would violate specific instructions from the department head, who was acting pursuant to valid regulations. Under the doctrine of sovereign immunity, the United States and its branches are immune from suit, except when there has been an express waiver of sovereign immunity. Block v. North Dakota, 461 U.S. 273, 287 (1983); Army & Air Force Exchange Service v. Sheeha, 456 U.S. 728, 734 (1983); United States v. Sherwood, 312 U.S. 584, 586 (1941). Consequently, "SSA will not honor state court orders as a basis for disclosure." Privacy and Disclosure of Official Records and Information, 72 Fed. Reg. at 20,941.

SSA employees cannot honor state court subpoenas or state court orders to compel the production of records. To do so would require SSA to violate the Social Security Act and its implementing regulations and subject the employee making the disclosure to federal felony sanctions. The Social Security Act imposes additional safeguards against disclosure of Social Security records because much of the information SSA collects and maintains on individuals is especially sensitive. Therefore, in most cases involving litigation in which SSA is not a party, SSA may only disclose records pursuant to a valid consent or in response to an order from a court of competent jurisdiction as defined in its regulations.