

Exhibit 22

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August 30, 2019

Via FedEx Tracking No. 7761 2116 8151
and Email (FOIA.Public.Liaison@ssa.gov)

Executive Director,
Office of Privacy and Disclosure
Social Security Administration
G-401 WHR
6401 Security Boulevard,
Baltimore, MD 21235

Re: Freedom of Information Appeal
Ref. No. SSA-2019-002259

Dear Sir or Madam:

We write to appeal the Social Security Administration's (SSA) August 19, 2019 determination that the above-captioned FOIA appeal is for "non-program related purposes," and to object to several factual errors in that determination letter.

Over the past three years, we have repeatedly told SSA that the requested materials are needed in order to pursue appeals before the Medicare Provider Reimbursement Review Board. Medicare is a program administered under the Social Security Act. The requested Supplemental Security Income Display records are required in order to verify the accuracy of information provided by Medicare to the hospitals on whose behalf we filed this request. Our FOIA request, and the currently pending appeal, therefore, meet the statutory and regulatory requirements and must be considered "program-related."

In addition, SSA's description of our request and appeal in its August 19th letter does not accurately reflect the underlying facts. In that letter, SSA alleges that on appeal we "clarified" our initial request as seeking "the full SSID with the *full* computation and payment history data/field for the dates specified," (emphasis in original) for the list of deceased beneficiaries that accompanied our original request. That statement is incorrect. As the record reflects, and as attached both here and to our May 2, 2019 appeal, the hospitals emphasized that they were requesting "the computation and payment history field," for each beneficiary, "for the periods referenced [in the patient lists]." *See* Exhibit 1 (March 2017 FOIA request). On multiple occasions, SSI asked us to clarify or further explain the scope of this request, and each time our response was the same. *See* Exhibits 14 and 19 (hospital clarification responses), 3, 16 and 17

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(FOIA appeals). SSA cannot credibly claim that the hospitals in any way altered the scope of their original request during the latest appeal proceedings.

Moreover, SSA's summary of the materials that it has provided thus far in this process is not accurate. SSA did not provide records for 316 deceased beneficiaries, as stated in its August 19th letter, but instead only provided records for 203 individuals. Exhibits 15 (FOIA response), 16-17 (May 2019 FOIA appeal). SSA produced no records at all for 113 of the deceased beneficiaries identified in our original request and with respect to whom there is no issue concerning proof of death. Exhibits 15, 17. In addition, SSA has not acted on our appeal of its determination to produce no records for another 116 individuals for whom the SSA FOIA staff initially requested additional proofs of death. *See, e.g.*, Exhibits 9 and 10 (SSA request for proofs of death and hospitals' response).

For the reasons explained below, we respectfully request that SSA reverse its August 19th determination and correct the record to reflect the true status of this long-pending FOIA matter.

BACKGROUND

1. By letter dated March 6, 2017, counsel acting on behalf of over 60 hospitals filed a FOIA request with the SSA Office of Privacy and Disclosure. The request sought Supplemental Security Income Display (SSID) records for deceased Medicare beneficiaries who had received treatment at the hospitals. The FOIA request included attached listings identifying 433 deceased individuals and the dates of each individual's hospital stay. The hospitals emphasized that they were requesting "the computation and payment history field," for each beneficiary, "for the periods referenced [in the patient lists]." Exhibit 1.

2. By letter dated July 14, 2017, SSA denied the hospitals' FOIA request, stating that the requested SSID records were exempted from disclosure. Exhibit 2.

3. The hospitals timely appealed that denial by letter dated August 18, 2017. Exhibit 3. In their appeal, the hospitals noted that their FOIA request is virtually identical to a 2003 request submitted through the same undersigned counsel on behalf of another hospital seeking the exact same SSID records with respect to other Medicare beneficiaries. The hospitals also explained that the 2003 request (*see* Attachment 1 to Exhibit 3), like the hospitals' request here, was made for the purpose of confirming the accuracy of the Medicare payment calculations by CMS that make use of SSI eligibility data for periods of hospitalization. Attached at Exhibit 4 is a redacted version of one of the SSIDs produced by SSA in response to that 2003 request.

4. By letter dated December 4, 2017, SSA reversed its decision and determined that the agency "can release portions of the requested SSIDs under the FOIA subject to proper proof of death and receipt of payment." Exhibit 5. At the same time, the agency asked for clarification that the information requested now is the same as the information that SSA had previously provided in response to the 2003 FOIA request. *Id.*

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5. Counsel for the hospitals promptly confirmed in a letter dated December 7, 2017 that they are seeking the same information in response to this FOIA request. *See* Exhibit 6 (response confirming that the hospitals are “requesting SSIDs in the same format” that SSA previously produced).
6. In early 2018, SSA again asked the hospitals to confirm their interest in the long-pending FOIA request by providing payment information to the agency and electronic copies of the patient listings that accompanied the March 6, 2017 FOIA request, which the hospitals promptly did. Exhibits 7 and 8 (SSA request and hospital response).
7. By letter dated April 11, 2018, SSA asked the hospitals to provide proof of death for 117 of the 433 deceased Medicare beneficiaries listed in the March 2017 FOIA request. Exhibit 9. The agency claimed that, under federal law, it cannot disclose information concerning the date of death of an individual for whom a state-provided record was the sole source of death in the agency’s records. SSA indicated that it would accept as proof of death “a copy of an official report of death or finding of death made by an agency or department of the U.S. which is authorized or required to make such a report of finding in the administration of any law of the U.S.” *See* 20 C.F.R. 404.720(b)(3) (SSA regulation stating that an “extract from an official report or finding of death made by an agency or department of the United States” is “preferred evidence of death.”).
8. By email dated May 4, 2018, hospital counsel sent the agency proof of death for 116 of the 117 requested individuals. Exhibit 10. This proof was in the form of screen prints extracted from the Medicare Common Working File reporting the date of death for each of the 116 beneficiaries. *Id.*
9. The Medicare Common Working File is derived from the Medicare Beneficiary Database, which the Department of Health and Human Services shares with SSA. *See, e.g.*, 69 Fed. Reg. 18,664 (Apr. 8, 2004) (establishing data exchange between SSA and CMS); *see also, e.g.*, CMS Program Transmittal No. 1375 (May 1, 2014) (clarifying connection between Medicare Beneficiary Database and Medicare Common Working File).
10. By email dated July 12, 2018, SSA FOIA staff asserted that the Common Working File screens “are foreign to SSA in that we are not familiar with them,” and asked the hospitals to provide a further “certification from HHS” to validate the Common Working File screens. Exhibit 11. Such further certification is not required by SSA regulations, 20 C.F.R. 404.720(b)(3).
11. The parties held a conference call on August 14, 2018 which SSA summarized by email dated September 10, 2018. Exhibit 12. SSA stated that it “understand[s] that the [Common Working File] is accessed by certain SSA and CMS staff in the administration of the Medicare program (under an agreement between both agencies).” The SSA FOIA staff reiterated its purported need for proofs of death for the 116 individuals because the FOIA staff themselves

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allegedly do not have access to the Common Working File. SSA FOIA staff agreed at that time to provide SSID records for those individuals for which it did not require further proof of death.

12. By email dated February 20, 2019, SSA staff again requested clarification of the scope of the hospitals' FOIA request. Exhibit 13. The agency also asked whether the hospitals "require the full SSID or just the most recent SSID for each number holder[.]" *Id.*

13. On February 22, 2019 hospital counsel replied to that additional request for clarification, reiterating again that the hospitals requested "hard copies of the Supplemental Security Income Displays (SSIDs), current and stale (active or inactive) including the computation history field and payment history field **for the periods noted in the patient listings that accompanied our request.**" Exhibit 14 (emphasis added). The hospitals also advised that they were prepared to file suit on April 1, 2019 if the agency did not produce the requested documents.

14. By letter dated April 3, 2019, which was delivered to undersigned counsel on April 8, 2019, SSA produced incomplete SSID information for 203 of the 433 requested deceased beneficiaries. Exhibit 15. The agency claimed that it was providing records for 316 individuals, but in fact did not provide records for 113 individuals. The agency also indicated that it made redactions pursuant for FOIA Exemption 6 to protect individual privacy rights, and refused to provide any records for the 117 of deceased beneficiaries for which the agency allegedly needed certification of the proofs of death that the hospitals provided.

15. The records that SSA provided are not responsive to the hospitals' long-pending and often repeated request and are of no use to them. Rather than produce the full computation and payment histories for the periods specified in the listings attached to the FOIA request, as requested and repeatedly reiterated in response to repeated requests for clarification, the agency produced only the latest entry in each of these fields, generally the data for the month (after the periods of hospitalization that were expressly requested) when benefits were terminated. The SSID information produced by SSA does not include the eligibility and payment data in the computational and payment histories for the hospitalization periods that were specified in the FOIA request and reiterated repeatedly in response to the agency's repeated clarification requests. *See, e.g.*, Exhibits 1, 14, 19.

16. By letter dated May 2, 2019 and a follow-up letter dated May 8, 2019, the hospitals appealed SSA's disclosure determinations, noting that SSA did not provide any of the computation and payment history information that they requested. Exhibits 16 and 17.

17. After the 20-day period for processing their appeal had passed, requestors' counsel contacted SSA FOIA about the status of the appeal. On June 12, 2019, FOIA staff again asked for clarification of the scope of the FOIA request. Exhibit 18. On June 26, 2019, requestors' counsel reiterated again the plain language of the original 2017 FOIA request. Exhibit 19.

18. On July 9, 2019, SSA FOIA staff acknowledged that "there was a misunderstanding in what was requested," and stated that the agency was in the process of retrieving the appropriate

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responsive records. SSA refused to provide a date by which the appeal would be processed but demanded “an additional fee involved with this additional search for records,” the amount to be determined later. Exhibit 20.

19. In a response letter dated August 19, 2019, SSA claimed that it “determined that [the hospitals’] request is for non-program related purposes” and would therefore charge the requesters more than \$5,000 to process their already-three-year-old FOIA request. Exhibit 21. This letter did not mention the fees that SSA had previously charged the hospital in 2018. Exhibit 7.

20. In this same letter, SSA alleged that the hospitals only recently clarified scope of their request in their May 2, 2019 appeal. *See* Exhibit 21 (“In your appeal, you clarified that you would like the full SSID with the *full* computation and payment history data/field for the dates specified.”). SSA also reiterated the false claim that it had provided responsive records for 316 deceased beneficiaries, and did not address the hospitals’ appeal as to the 116 beneficiaries for whom the hospitals had provided the requested proofs of death. *Id.*, *see also* Exhibits 15 (FOIA response) and 18 (second appeal letter).

ARGUMENT

I. The Hospitals’ Request Is Program-Related

In its August 19th letter SSA claims that, in accordance with section 1106 of the Social Security Act and regulations at 20 C.F.R. § 402.175, it determined that the hospitals’ request was not “program-related,” and therefore the hospitals should be charged the full cost of processing the request. In making this determination, SSA misapplied the law.

Section 1106 allows the “Commissioner or Secretary” to charge a requester for the full cost of producing records when the request “is made for any other purpose not directly related to the administration of the program or programs *under this chapter* to which such information relates.” 42 U.S.C. § 1306(c) (emphasis added). This provision is part of a larger statutory section, section 1306, whose title is “Disclosure of information in possession of Social Security Administration or Department of Health and Human Services.” *Id.* § 1306. The reference to the “Secretary” in Section 1106 therefore clearly refers to the Secretary of Health and Human Services, and, accordingly, the reference to “programs under this chapter,” is not limited to programs administered by the SSA, but includes programs under the Act that are administered by the Secretary. Medicare is one such program, as the Medicare Act is a part, Title XVIII, of the Social Security Act. *See* 42 U.S.C. § 1395 et seq.

The clear intent of the statute is also reflected in SSA’s own regulations, which the FOIA office cited in its August 19th letter. 20 C.F.R. § 402.175 authorizes the Commissioner to charge full processing costs when the request was filed “* * * for any other purpose not directly related to the administration of the program or programs under * * * the Social Security Act.” Like the statute, the regulation does not limit its scope to programs administered by SSA, but instead

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focuses on programs “under . . . the Social Security Act.” As explained above, the hospitals’ request concerns Medicare which is a “program under . . . the Social Security Act.”

In addition, the regulation at 20 C.F.R. § 402.175 cross references 20 C.F.R. § 402.170, which says that in determining whether a request is program-related SSA will ask “Is the information needed solely to verify the accuracy of information obtained in connection with a program administered under the Act?” (*id.* § 402.170(a)(2)(i)(B)) or “Is the information needed in connection with an activity that has been authorized under the Act?” (*id.* § 402.170(a)(2)(i)(C)). The answer to both questions is yes. First, as explained in the hospitals’ March 2017 FOIA request, the requested records are needed solely to verify the accuracy of information obtained in connection with Medicare and “are the only potential source of data reflecting the federal SSI eligibility of the Medicare beneficiaries who were treated by the Providers during the periods at issue.” Exhibit 1 at 4. The records are also needed in connection with Medicare reimbursement appeals, which are an activity authorized under Title XVIII of the Act. *See id.* at 3 (“The SSIDs requested . . . are relevant and material to administrative proceedings . . . before the Department of Health and Human Services, Provider Reimbursement Review Board.”), *see also* 42 U.S.C. § 1395oo (authorizing appeals before the Board).

The Social Security Act and SSA’s own regulations require that the hospitals’ FOIA request be appropriately considered as program-related.¹

II. SSA Must Correct The Factual Record

The August 19, 2019 letter contains several statements that do not accurately reflect the facts underlying this FOIA matter. First, in the first sentence of the August 19th letter, SSA categorizes the matter as a FOIA request. Exhibit 21. The matter is, instead, an appeal, and is the second such appeal that has been filed based on the original March 2017 request. Exhibits 1, 3, 16, 17.

Next, the letter incorrectly claims that, in their second appeal, the hospitals “clarified that [they] would like the full SSID with the *full* computational and payment history data/field for the dates specified.” Exhibit 21. As noted above, the hospitals have been consistent throughout this process in saying that they seek “the computation and payment history field” for each beneficiary listed, for the dates specified. Exhibit 1. This position has been communicated to SSA on several occasions, when the agency sought clarification of the scope of this request. *See* Exhibit 6 (December 2017 statement from hospitals that they are “requesting SSIDs in the same format” that SSA previously produced), Exhibit 14 (in response to request for clarification, hospitals

¹ By separate email, the hospitals have provided payment authorization for the full amount quoted in SSA’s August 19th letter. This payment authorization was made in an attempt to avoid further delay in what is already a years-overdue FOIA request and is not a waiver of the appeal rights raised herein. Further, if any fees are to be assessed for processing the hospitals’ FOIA appeal, we request that such fees be offset by amounts already paid for records that were not responsive to the request. *See* Exhibits 7 (February 2018 fee notice) and 8 (February 2018 payment authorization).

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reiterated they had requested “hard copies of the Supplemental Security Income Displays (SSIDs), current and stale (active or inactive) including the computation history field and payment history field for the periods noted in the patient listings that accompanied our request.”), *but see also* Exhibit 20 (communication from SSA stating that “there was a misunderstanding in what was requested.”). Throughout this multiyear process, the hospitals have been clear and unwavering as to the scope of their FOIA request, and the record does not support SSA’s statement to the contrary.

Finally, the agency’s August 19th letter also incorrectly states that the agency provided responsive records for 316 of the 433 deceased Medicare beneficiaries identified in our FOIA request. Exhibit 21, *see also* Exhibit 15 (FOIA response letter also misstating number of responsive records). As indicated in our latest FOIA appeal, upon review of the records that SSA provided, we found that the agency, in fact, only provided records for 203 individuals, despite claiming otherwise. Exhibits 17 and 18.

CONCLUSION

For the reasons noted above, we respectfully request that the agency reverse its determination that the hospitals’ FOIA request is not program-related, and correct the factual errors in its August 19th fee notice letter.

Sincerely,



Christopher L. Keough

EXHIBITS

- Exhibit 1 FOIA Request, March 6, 2017
(redacted and numbered sequentially)
- Exhibit 2 FOIA Request Denial, July 14, 2017
- Exhibit 3 FOIA Appeal, August 18, 2017
(including attached 2003 FOIA request, other attachments omitted)
- Exhibit 4 Excerpt from Response to 2003 FOIA Request (redacted)
- Exhibit 5 SSA FOIA Appeal Determination, December 4, 2017
- Exhibit 6 Hospital Response to SSA Appeal Determination, December 7, 2017
- Exhibit 7 SSA Fee Notice and Request for Electronic Patient Logs, February 8, 2018
(attachments omitted)
- Exhibit 8 Response to Fee Notice and Request for Electronic Patient Logs,
February 14, 2018 (attachments omitted)
- Exhibit 9 SSA Request for Proofs of Death, April 11, 2018
- Exhibit 10 Email Submitting Proofs of Death, May 4, 2018
(including a redacted copy of one of the 116 attached screen prints from
the Medicare Common Working File)
- Exhibit 11 SSA Request for Certification of Proofs of Death, July 12, 2018
- Exhibit 12 SSA Summary of Conference Call, September 10, 2018
- Exhibit 13 SSA Clarification Request, February 20, 2019
- Exhibit 14 Hospital Response to Clarification Request, February 22, 2019
- Exhibit 15 FOIA Response Letter, April 3, 2019
(including redacted version of one SSID record produced by SSA)
- Exhibit 16 FOIA Appeal (2), May 2, 2019
(exhibits omitted)
- Exhibit 17 FOIA Appeal Clarification Letter, May 8, 2019
- Exhibit 18 SSA Clarification Request, June 12, 2019

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Exhibit 19 Hospital Response to Clarification Request, June 26, 2019

Exhibit 20 SSA Processing Update, July 9, 2019

Exhibit 21 SSA Fee Notice, August 19, 2019