



SELECTIVE SERVICE SYSTEM

32 CFR Part 1660

RIN 3240-AA02

Release of Official Information in Litigation and Presentation of Witness Testimony by Selective Service System (SSS) Personnel (Touhy Regulation)

AGENCY: United States Selective Service System.

ACTION: Final rule.

SUMMARY: The Selective Service System (SSS) is finalizing regulations to ensure consistent processing of *Touhy* requests; clarify the responsibilities of all parties in the *Touhy* process; and provide additional information about criteria that SSS and its Components should consider in the *Touhy* process.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Daniel A. Lauretano, Sr., General Counsel, 703-605-4012, dlauretano@sss.gov.

SUPPLEMENTARY INFORMATION: SSS published a proposed rule on June 23, 2023 (88 FR 41051). No public comments were received and SSS is finalizing this rule without change.

A. Summary of New Regulatory Provisions and Their Impact.

The final rule creates *Touhy* regulations for the SSS to: (1) Promote consistent processing of *Touhy* requests among the SSS and SSS Components; (2) clarify the responsibilities of all parties in the *Touhy* process; and (3) provide additional information about criteria that SSS should consider in the *Touhy* process. The final rule sets forth the procedures to be followed with respect to a demand seeking official information or employee testimony relating to official information for use in a legal proceeding. The final rule also sets forth certain definitions, it applies to all SSS personnel (see § 1660.3), in particular, members and personnel of the Office of

the Director, National Headquarters Directorates and Offices, Region Offices, the Data Management Center, the National Appeals Board, District Appeals Boards, Local Boards (including panels, multicounty, and intracounty boards), and all other organizational entities within the SSS (referred to collectively in this part as the “SSS Components”).

The final rule is intended to provide guidance for the internal operations of the SSS, without displacing the responsibility of the Department of Justice to represent the United States in litigation. The final rule does not apply to the release of official information or the presentation of witness testimony in connection with:

- (1) Administrative proceedings or investigations conducted by the SSS.
- (2) Security-clearance adjudicative proceedings.
- (3) Administrative proceedings conducted by or for the Equal Employment Opportunity Commission or the Merit Systems Protection Board.
- (4) Negotiated grievance proceedings conducted in accordance with a collective bargaining agreement.
- (5) Requests by Government counsel representing the United States or a Federal agency in litigation.
- (6) Disclosures to Federal, State, local, or foreign authorities related to investigations or other law-enforcement activities conducted by a Federal law-enforcement officer, agent, or organization.

The final rule does not affect in any way existing laws or SSS programs governing:

- (1) The release of official information or the presentation of witness testimony in grand jury proceedings.
- (2) Freedom of Information Act requests submitted pursuant in accordance with 32 CFR part 1662, even if the records sought are related to litigation.
- (3) Privacy Act requests submitted pursuant in accordance with 32 CFR part 1665, even if the records sought are related to litigation.

(4) The release of official information outside of litigation.

The final rule does not create any right or benefit (substantive or procedural) enforceable by law against the SSS or the United States.

The final rule defines: *Court, Demand, Disclosure, Legal advisor, Litigation, Litigation request, Official information, Personnel, and SSS Components.*

The final rule outline the SSS policy to make official factual information, both testimonial and documentary, reasonably available for use in Federal courts, State courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure. It makes clear that SSS personnel shall not provide such official information, testimony, or documents, submit to interview, or permit a view or visit, without the authorization required by this part. It stresses that SSS personnel shall not provide, with or without compensation, opinion or expert testimony concerning official SSS information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written special authorization required by this part. Finally, it provides that upon a showing by a requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the SSS or the United States, the SSS GC may, in their sole discretion, and pursuant to the guidance contained in part 1660, grant such written special authorization for SSS personnel to appear and testify as expert or opinion witnesses at no expense to the United States.

Parties who submit a litigation request or demand to the SSS must describe, in writing and with specificity:

- (1) The nature of the official information or witness testimony sought, its relevance to the litigation, and other pertinent details addressing the factors in § 1660.8.
- (2) The litigation request or demand must show whether the request is consistent with the policy and rules of part 1660.

- (3) The litigation request or demand must include copies of the complaint and relevant proceedings and be submitted at least 30 days before the desired date to the Selective Service System, General Counsel, 1501 Wilson Blvd., Suite 800, Arlington, Virginia 22209.
- (4) If the litigation request or demand seeks testimony, the identity of the SSS employee whose testimony is sought and a detailed summary about the relevance of the employee's testimony to the underlying legal proceeding.
- (5) If the litigation request or demand seeks documents or other materials, a description of the requested official information sought and a detailed summary about its relevance to the underlying legal proceeding.
- (6) An explanation of the unavailability of the requested official information or employee testimony through other sources.
- (7) An explanation of how each of the factors set forth in 32 CFR 1660.8 applies to their demand.

The final rule requires that this information must be submitted at least 30 calendar days before the official information or employee testimony is needed and further require the submission of the above information even if parties serve a subpoena on the SSS or a SSS employee. A litigation request or demand will not be granted if a party fails to follow the instructions set forth in the regulations.

SSS personnel who receive a litigation request or demand are to:

- (1) Inform their supervisors about the litigation request or demand so the supervisors may inform the SSS GC or other SSS legal advisor; and
- (2) Refrain from providing official information and/or testimony in response to the litigation request or demand.

B. Background & Legal Basis for This Rule.

The Housekeeping Statute, 5 U.S.C. 301, authorizes agency heads to promulgate regulations governing “the custody, use, and preservation of its records, papers, and property.”

The Supreme Court held in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), that under such authority, agency heads may establish procedures for determining whether to release official information and allow personnel testimony sought through a subpoena or other litigation request. This final rule sets forth SSS's procedures, which as the Supreme Court explained, are useful and necessary as a matter of internal administration to prevent possible harm from unrestricted disclosures in court. Currently, the SSS does not have *Touhy* regulations. This final rule creates new regulations spanning §§ 1660.1 through 1660.11.

C. Expected Impact of the Final Rule.

This final rule action will not impose any new costs. These SSS *Touhy* regulations will clarify and streamline requests and will produce efficiency and uniformity to the public's benefit. Less attorney time will be spent searching for SSS request procedures and complying with its requirements. After reviewing other agency regulations, the SSS concluded that attorneys for third-party litigants will save considerable time in performing research, review, and compliance time per subpoena or litigation request when referring to the Code of Federal Regulations for guidance.

For purposes of estimating the cost savings, the SSS's subject matter experts deemed it reasonable to use the mean hourly wage for lawyers as informed by the Bureau of Labor and Statistics, \$78.74.¹ In addition to these cost savings, there will be an unquantified benefit of transparency through access to official information, while safeguarding classified, privileged, and personally identifiable information.

¹ This information can be found in the website of the Bureau of Labor Statistics under National Wage Data for Lawyers, Occupation Code 23-1011 (available at <https://www.bls.gov/oes/current/oes231011.htm>), last updated in May 2019.

D. Executive Order (E.O.) 12866, “Regulatory Planning and Review,” E.O. 13563, “Improving Regulation and Regulatory Review,” and Congressional Review Act (5 U.S.C. 801-08).

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Following the requirements of these E.O.s, the Office of Management and Budget has determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866 nor a “major rule” as defined by 5 U.S.C. 804(2).

E. Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601).

SSS certifies that this final rule is not subject to the Regulatory Flexibility Act, 5 U.S.C. 601, because it would not have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require SSS to prepare a regulatory flexibility analysis.

F. Section 202 of Public Law 104-4, “Unfunded Mandates Reform Act” (2 U.S.C. 1532).

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require the expenditure of \$100 million or more (in 1995 dollars, adjusted annually for inflation) in any one year. This final rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

G. Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35).

It has been determined that 32 CFR part 1660 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act.

H. E.O. 13132, “Federalism”.

E.O. 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This final rule will not have a substantial effect on State and local governments.

I. EO 11623, Delegation of Authority & Coordination Requirements.

In E.O. 11623, the President delegated to the Director of Selective Service the authority to prescribe the necessary rules and regulations to carry out the provisions of the Military Selective Service Act. In carrying out the provisions of E.O. 11623, as amended by E.O. 13286, the Director shall request the views of the Secretary of Defense, the Attorney General, the Secretary of Labor, the Secretary of Health, Education, and Welfare, the Secretary of Homeland Security (when the Coast Guard is serving under the Department of Homeland Security), the Director of the Office of Emergency Preparedness, and the Chairman of the National Selective Service Appeal Board with regard to such proposed rule or regulation, and shall allow not less than 10 days for the submission of such views before publication of the proposed rule or regulation. On June 13, 2023, the SSS completed its coordination requirements, and the Director certifies that he has requested the views of the officials required to be consulted pursuant to subsection (a) of E.O. 11623, considered those views and as appropriate incorporated those views in these regulations, and that none of them has timely requested that the matter be referred to the President for decision.

List of Subjects in 32 CFR Part 1660

Government employees, Organization and functions (Government agencies).

For the reasons discussed in the preamble, the Selective Service System amends 32 CFR chapter XVI by adding part 1660 to read as follows:

PART 1660 - RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND PRESENTATION OF WITNESS TESTIMONY BY SSS PERSONNEL (*TOUHY* REGULATION)

Sec.

1660.1 Purpose.

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1660.11 Procedures - expert or opinion testimony.

Authority: 5 U.S.C. 301; 50 U.S.C. 3809; and E.O. 11623, 36 FR 19963, 3 CFR, 1971-1975 Comp., p. 614, as amended by E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

§ 1660.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for the release of official information in litigation and the presentation of witness testimony by Selective Service System (SSS) personnel pursuant to 5 U.S.C. 301 and the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 1660.2 Applicability.

This part:

(a) Applies to all SSS personnel (see § 1660.3), in particular, members and personnel of the Office of the Director, National Headquarters Directorates and Offices, Region Offices, Data Management Center, the National Appeals Board, District Appeals Boards, Local Boards (including panels, multicounty, and intercounty boards), and all other organizational entities within the SSS (referred to collectively in this part as the “SSS Components”).

(b) Is intended only to provide guidance for the internal operations of the SSS, without displacing the responsibility of the Department of Justice to represent the United States in litigation.

(c) Does not preclude official comments on matters in litigation.

(d) Does not apply to the release of official information or the presentation of witness testimony in connection with:

(1) Administrative proceedings or investigations conducted by or for a SSS Component.

(2) Security-clearance adjudicative proceedings.

(3) Administrative proceedings conducted by or for the Equal Employment Opportunity Commission or the Merit Systems Protection Board.

(4) Negotiated grievance proceedings conducted in accordance with a collective bargaining agreement.

(5) Requests by Government counsel representing the United States or a Federal agency in litigation.

(6) Disclosures to Federal, State, local, or foreign authorities related to investigations or other law-enforcement activities.

(e) Does not affect in any way existing laws or SSS programs governing:

(1) The release of official information or the presentation of witness testimony in grand jury proceedings.

(2) Freedom of Information Act requests submitted pursuant to 32 CFR part 1662, even if the records sought are related to litigation.

(3) Privacy Act requests submitted pursuant to 32 CFR part 1665, even if the records sought are related to litigation.

(4) The release of official information outside of litigation.

(f) Does not create any right or benefit (substantive or procedural) enforceable at law against the SSS or the United States.

§ 1660.3 Definitions.

These terms and their definitions are for the purpose of this part.

Court. A Federal, State, or local court, tribunal, commission, board, or other adjudicative body of competent jurisdiction.

Demand. An order or subpoena by a court of competent jurisdiction for the production or release of official information or for the presentation of witness testimony by SSS personnel at deposition or trial.

Disclosure. The release of official information in litigation or the presentation of witness testimony by SSS personnel.

Legal advisor. (1) The General Counsel of the SSS (SSS GC).

(2) Any legal advisor designated by the SSS GC.

Litigation. All pretrial (e.g., discovery), trial, and post-trial stages of existing judicial or administrative actions, hearings, investigations, or similar proceedings before a court, whether foreign or domestic.

Litigation request. Any written request by a party in litigation or the party's attorney for the production or release of official information or for the presentation of witness testimony by SSS personnel at deposition, trial, or similar proceeding.

Official information. All information of any kind and however stored that is in the custody and control of the SSS, relates to information in the custody and control of the SSS, or was acquired by SSS personnel due to their official duties or status.

Personnel. (1) Employees of the SSS.

(2) Present and former (e.g., retired, separated) Service members assigned to, detailed to, or otherwise affiliated with the SSS.

(3) Present and former (e.g., retired, separated) employees of another Federal agency assigned to, detailed to, or otherwise affiliated with the SSS.

- (4) Any individuals who are or were supervised by an SSS official and who perform or have performed services for the SSS through a contractual arrangement.
- (5) Any individuals who perform or have performed services for the SSS as a volunteer board member (local, panel, multicounty, intracounty, district appeals).
- (6) Members of the National Appeals Board.

SSS Components. The SSS Components consist of:

- (1) The Office of the Director.
- (2) National Headquarters Directorates and Offices.
- (3) Region Offices.
- (4) Data Management Center.
- (5) the National Appeals Board.
- (6) District Appeals Boards.
- (7) Local Boards (including panels, multicounty, and intercounty boards).
- (8) All other organizational entities within the SSS.

§ 1660.4 Policy.

- (a) It is the policy of the SSS to make official factual information, both testimonial and documentary, reasonably available for use in Federal courts, State courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure.
- (b) SSS personnel, as defined in § 1660.3, however, shall not provide such official information, testimony, or documents, submit to interview, or permit a view or visit, without the authorization required by this part.
- (c) SSS personnel shall not provide, with or without compensation, opinion or expert testimony concerning official SSS information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written special authorization required by this part.

(d) Paragraphs (b) and (c) of this section constitute a regulatory general order, applicable to all SSS personnel individually, and need no further implementation. A violation of the provisions in paragraphs (b) and (c) is the basis for appropriate administrative procedures with respect to civilian employees. Moreover, violations of this paragraph (d) by SSS personnel may, under certain circumstances, be actionable under 18 U.S.C. 207.

(e) Upon a showing by a requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the SSS or the United States, the SSS GC may, in their sole discretion, and pursuant to the guidance contained in this part, grant such written special authorization for SSS personnel to appear and testify as expert or opinion witnesses at no expense to the United States.

§ 1660.5 Responsibilities – the Selective Service System General Counsel.

The SSS GC has overall responsibility for the policy in this part, oversees the implementation of its procedures throughout the SSS, and provides supplemental guidance as appropriate.

§ 1660.6 Responsibilities – the SSS Component heads.

The SSS Component heads implement the policy and procedures in this part and, through the SSS GC or other SSS legal advisor, provide guidance for their respective components.

§ 1660.7 Procedures - authorities.

(a) In response to a litigation request or demand, and after any required coordination with the Department of Justice, the SSS GC and other SSS legal advisor (see § 1660.3) are authorized to:

- (1) Determine whether the respective SSS Components may release official information originated by or in the custody of such components.
- (2) Determine whether personnel assigned to, detailed to, or affiliated with the respective SSS Components may be contacted, interviewed, or used as witnesses concerning official information or, in exceptional circumstances, as expert witnesses.

(3) Impose conditions or limitations on disclosures approved pursuant to this paragraph

(a) (e.g., approve the release of official information only to a Federal judge for in-camera review).

(4) Assert claims of privilege or protection before any court.

(b) The SSS GC may assume primary responsibility for responding to any litigation request or demand.

§ 1660.8 Procedures - factors to consider.

In making a determination pursuant to §1660.7(a), the SSS GC and other SSS legal advisor will consider whether:

(a) The litigation request or demand is overbroad, unduly burdensome, or otherwise inappropriate under applicable law or court rules, or this part.

(b) The disclosure would be improper (e.g., the information is irrelevant, cumulative, or disproportional to the needs of the case) under the rules of procedure governing the litigation from which the request or demand arose.

(c) The official information or witness testimony is privileged or otherwise protected from disclosure under applicable law.

(d) The disclosure would violate a statute, Executive order, regulation, or policy.

(e) The disclosure would reveal:

(1) Information properly classified pursuant to 44 U.S.C. chapters 21, 22, 31, 33, and 35; 5 U.S.C. 102, 105, 552, and 552a; Executive Order 12968, “Access to Classified Information,” August 2, 1995, as amended; Intelligence Community Directive 703, “Protection of Classified National intelligence, Including Sensitive Compartmental Information (SCI),” June 21, 2013; Executive Order 12958, “Classified National Security Information,” April 17, 1995, as amended; and Presidential Memorandum, “Implementation of the Executive Order, ‘Classified National Security Information,’” December 29, 2009.

- (2) Controlled Unclassified Information pursuant to Executive Order 13556, "Controlled Unclassified Information," November 4, 2010, as amended; and 32 CFR part 2002.
- (3) Technical data withheld pursuant to 32 CFR part 250.
- (4) Information protected by the Privacy Act, which may not be disclosed in the absence of written consent, a routine use, or other authority listed in 5 U.S.C. 552a(b).
- (5) Information otherwise exempt from unrestricted disclosure.

(f) The disclosure would:

- (1) Interfere with an ongoing law enforcement proceeding.
- (2) Compromise a constitutional right of another.
- (3) Expose an intelligence source or confidential informant.
- (4) Divulge a trade secret or similar confidential information.
- (5) Be otherwise inappropriate.

§ 1660.9 Procedures - requirements and determinations.

- (a) A litigation request or demand must describe, in writing and with specificity, the nature of the official information or witness testimony sought, its relevance to the litigation, and other pertinent details addressing the factors in § 1660.8.
- (b) A litigation request or demand must be submitted at least 30 days before the desired date to the Selective Service System, General Counsel, 1501 Wilson Blvd., Suite 800, Arlington, Virginia 22209.
- (c) Personnel and former personnel (e.g., retired employees and Reserve Service Members, past volunteers) who receive a litigation request or demand must notify the SSS GC or their SSS legal advisor immediately.
- (d) If another Federal agency originated the responsive information or otherwise has the primary equity with respect to that information, the SSS GC will:
 - (1) Transfer the litigation request or demand (or the appropriate portions) to such other agency for action.

(2) Inform the requesting party or issuing court.

(e) If the litigation request or demand requires a response before a determination can be made, the SSS GC or other SSS legal advisor will inform the requesting party or the issuing court (through the Department of Justice) that the request or demand is still under consideration. The SSS GC or other SSS legal advisor also may seek a stay from the court in question until a final determination is made.

(f) Upon making a final determination pursuant to § 1660.7(a), the SSS GC or other SSS legal advisor will inform the requesting party or issuing court.

(g) If the SSS GC or other SSS legal advisor approves the release of official information or the presentation of witness testimony, personnel will limit the disclosure to those matters approved by the SSS GC or other SSS legal advisor. Personnel may not release, produce, comment on, or testify about any official information without the prior written approval of the SSS GC or other SSS legal advisor.

(h) If a court orders a disclosure that the SSS GC or other SSS legal advisor previously disapproved or has yet to approve, personnel must respectfully decline to comply with the court's order unless the SSS GC or other SSS legal advisor directs otherwise.

§ 1660.10 Procedures - fees.

Parties seeking official information by litigation request or demand may be charged reasonable fees to reimburse expenses associated with the Government's response. These reimbursable expenses may include the cost of:

- (a) Materials and equipment used to search for, copy, and produce responsive information.
- (b) Personnel time spent processing and responding to the request or demand.
- (c) Attorney time spent assisting with the Government's response, to include reviewing the request or demand and the potentially responsive information.

§ 1660.11 Procedures - expert or opinion testimony.

In any legal proceeding before the SSS or in which the United States (including any Federal agency or officer of the United States) is a party:

(a) The SSS GC shall arrange for an employee to testify as a witness for the United States whenever the attorney representing the United States requests it.

(b) SSS personnel may testify for the United States both as to facts within their personal knowledge and as an expert or opinion witness. Except as provided in paragraph (c) of this section, SSS personnel may not testify as an expert or opinion witness, with regard to any matter arising out of their official duties or the functions of the SSS, for any party other than the United States in any legal proceeding in which the United States is a party. SSS personnel who receive a demand to testify on behalf of a party other than the United States may testify as to facts within the employee's personal knowledge, provided that the testimony be subject to the prior written approval of the SSS GC or other SSS legal advisor and to the Federal Rules of Civil Procedure and any applicable claims of privilege, the anticipated testimony is not adverse to the interests of the SSS or the United States Government, and is presented at no cost to the Government.

(c) SSS personnel may testify as an expert or opinion witness on behalf of the SSS or in any legal proceeding conducted by the SSS or the United States.

Daniel A. Lauretano, Sr.,

General Counsel.

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