



March 4, 2009

Rhonda Turnbow, Chief Privacy Officer
United States Agency for International Development
1300 Pennsylvania Ave. NW, Office 2.12-003
Washington, D.C. 20523-2120

**Re: Partner Vetting System
Privacy Act of 1974: Implementation of Exemptions, RIN 0412-AA61**

Dear Ms. Turnbow,

I am writing you on behalf of OMB Watch, a national nonprofit that promotes government accountability, transparency and citizen participation in public issues and decision-making. We appreciate USAID's action in re-opening the comment period for the proposed Partner Vetting System (PVS). This provides the new administration, USAID's grantee community and the nonprofit sector at large with an opportunity to consider alternative vetting approaches that are more effective and less counterproductive.

All parties desire the same outcome: to prevent resources from going to support violence. The challenge is finding the best strategy to reach that goal. Such a strategy must take the safety of aid workers into account, ensure funds are used for their intended purposes and respect the independence of the non-governmental sector. We believe it is possible for USAID to develop such a system. However, PVS does not achieve any of these goals.

Our concerns about PVS, as proposed, were summarized in our Aug. 2007 comments (online at <http://www.ombwatch.org/files/npa/OMBWPVSCComments.pdf>). After reviewing the final rule as published in the Federal Register on January 2 we are very concerned with the lack of responsiveness to public concerns.

Insufficient Details

The final rule lacks essential details necessary to inform the public about what is required and how the program will work. The assurances listed in the response to comments and background information are not binding, offering no real legal protection to grantees or individuals whose personal information may be submitted. And the final rule leaves many central details to be determined later.

USAID says PVS would not rely solely on a computer match with a government watch list in making determinations about grants. Instead, it will conduct its own follow up investigation. However, the scope and procedures for such investigations are not described, leaving open too

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much flexibility, seemingly subjective to those in charge of "looking behind" the match. This also allows for the possibility that determinations could be made on the basis of incomplete sources. We are also concerned that this review will not include any clarifying or explanatory information provided by the applicant, because the applicant seemingly will not be told until after a determination is made. This could result in unfair denials and/or delays in program implementation. It may prove helpful if this practice is detailed with more specifics, for example, will more than one person be going through this process?

Critical terms are left undefined. For example, USAID does not explain what a "risk to national security" is or what criteria are used to deem an individual or group to be such a risk. It also does not define what constitutes indirect association that would trigger a denial for a grant.

USAID says PVS screening results will not be utilized to create lists of organizations which would then be used for subsequent screening. However, it does not describe any procedures to ensure that information on individuals is not inadvertently retained in intelligence databases. This is a logical concern for people required to submit information, since errors in federal databases have been documented. Most recently, the *Washington Post* revealed that the names of peaceful protesters and advocates were tracked by the Department of Homeland Security and transferred to Maryland State Police databases.¹

A Solution In Search of a Problem

USAID notes allegations in the media and by the government that its funds may have gone to organizations controlled by Hamas, and in Pakistan and Bosnia "about whom derogatory information was reported." [p. 10] On December 10, 2007, the Office of Inspector General (IG) issued a report in response to these concerns and showed that although procedural violations occurred, none of these grants assisted a designated terrorist organization. The audit found that "[s]ince 2002, USAID/West Bank and Gaza has provided funding for 16 subawards (from 8 different USAID prime recipients) for approximately \$900,000 to the Islamic University in Gaza, 14 of which were awarded prior to 2006. Also since 2002, USAID/West Bank and Gaza arranged to have the Islamic University in Gaza vetted eight times—most recently in February 2006. None of these vetting requests resulted in derogatory information. Of these 16 subawards, 2 subawards totaling approximately \$87,000 were awarded after Hamas claimed a parliamentary majority in the election of January 2006. In each of these cases, vetting was conducted."² The IG also examined scholarships provided to students at the Islamic University in Gaza and found that vetting was in fact conducted. USAID failed to follow its own vetting procedures in two of twenty-six cases, which does not prove that USAID funded terrorists, but made bureaucratic errors. Expanding the USAID/West Bank and Gaza program will inevitably cause more mistakes and lapse in procedure.

More disturbingly, USAID is not concerned with proof, and even though "none of these grant activities resulted in assistance being furnished directly to a designated individual or entity,"

¹ Washington Post, *Federal Agency Aided Md. Spying*, Feb. 17, 2009
<http://www.washingtonpost.com/wp-dyn/content/article/2009/02/16/AR2009021601131.html>

² http://nefafoundation.org/miscellaneous/FeaturedDocs/USAIDOIG_IUGAudit.pdf

USAID does not feel it should wait to implement a vetting system, "even the suggestion that our funds or resources are benefiting terrorists is harmful to U.S. foreign policy and U.S. national interests." Regulating based on hearsay may be liable to misjudgments, and discredit the most valuable form of vetting, the expertise of the NGO sector and already developed standards to protect the integrity of their operations. While preventative action makes sense, PVS does not. It ignores the benefits of person-to-person due diligence that focuses on how resources are used and what results are achieved.

Problems with Due Process

The final rule provides limited information regarding an appeal process. It states that any denial of funding will be accompanied with reasoning and an opportunity for the organization to appeal administratively, however this appeal process is not described in any way. In fact, the appeal process appears to be undetermined. Immediately following the mention of an appeal, the rule references areas that are not developed; "procedures remain to be developed as part of the Agency's guidance and protocol development process." USAID thereby avoids hearing/receiving and acting upon public comment and input on critical aspects of the program. By the time such guidance is in place, the rule will be final, without public comment on important specifics of PVS. More information should be made available for comment regarding this appeal process before implementing PVS.

Safety of Aid Workers

Many comments to the proposed PVS rule in 2007 explained that collecting highly personal information from program partners in foreign countries to be turned over to the U.S. government compromises the independence of the organization in the eyes of local populations, creating the perception that USAID grantees are instruments of the U.S. government. In response, the Jan. 2 final rule remains unchanged and simply states that a purpose of PVS is to enhance the safety of USAID personnel. This ignores commenter's concerns that lie in the perception upon collecting personal information, which is that grantees are acting as agents of the U.S. government. Rather than alleviating risk this could create new dangers for aid workers, who already work in very difficult areas. USAID must realize how significant it is that NGOs are seen as neutral and independent, especially in conflict zones. Recently, there has been a significant increase in the number of attacks against aid workers. Patronus Analytical, a group measuring the security risks in places receiving humanitarian aid, finds that 90 percent of relief worker deaths are non-accidental. According to their findings, the second leading cause of aid worker deaths is "political/conflict" with deaths occurring in politically turbulent areas.

Listchecking Is Not an Effective Strategy

PVS fails to appreciate the due diligence already conducted by civil service organizations. The most effective way to prevent the diversion of funds is the fundamental due diligence of organizations knowing their grantees and establishing relationships that encourage trust and transparency. The final rule issued on Jan. 2 references the U.S. Department of Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities, which relies heavily on list checking. NGOs have repeatedly called for the removal of these guidelines and

list checking ignores the problems in government terrorist watch databases. The problem is so widespread that Congress is considering H.R. 559, the Fair, Accurate, Secure, and Timely Redress Act. It would create a process for individuals placed on government watch lists to challenge their classification. It has already passed in the House of Representatives by a wide margin.

We are concerned that PVS will use terrorist databases, which are much broader and larger than those available to the public such as the Specially Designated Global Terrorist (SDGT) list compiled by the Department of Treasury. These public lists are available so that, in appropriate circumstances, nonprofits can consult them in the course of their due diligence activities. Associations with persons beyond the official lists are perfectly legal, and should not be used to deny a grant application. The American Civil Liberties Union (ACLU) comments on the 2007 proposed rule said these databases "raise serious due process concerns...in light of the fact that the lists are error-filled and unreliable, with many false positives, and there is no effective means for challenging the fact that one is on the list." ACLU research has uncovered numerous cases of names being entered into terrorism-related databases because of activities supporting human rights, the environment, and other causes. (See http://www.washingtonpost.com/wp-dyn/content/article/2009/01/03/AR2009010301993_4.html?sid=ST2009010302013&s_pos= and examples in *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, at http://www.ombwatch.org/files/npadv/PDF/collateraldamage_chapter8.pdf) A recent report from the International Committee of Jurists found that such lists are "often based on unsubstantiated secret information that cannot be contested" and the panel "received virtually uniform criticism of the listing process as it presently operates."³

USAID should look at the experience of the Combined Federal Campaign (CFC) for a more appropriate strategy for using government lists. In 2004, the CFC began to require participating charities and foundations to sign an agreement certifying that they did not "knowingly employ individuals or contribute funds to organizations" found on terrorist watch lists created by the U.S. government, United Nations, or European Union. If a matching name was found, the organization was required to notify the CFC within 15 days. In November 2007, the CFC shifted its position away from mandatory list checking and issued new certification language that permitted participating charities and foundations to determine internally how best to comply with counterterrorism measures.⁴ On Nov. 7, 2005, the Office of Personnel Management formally withdrew the list-checking requirement.

CFC allowed each organization to determine the most effective steps to ensure its funds are spent solely on charitable activities. This organization-specific focus on due diligence is consistent with the legal and regulatory environment in which charitable organizations operate.

³ The International Commission of Jurists (ICJ) report "Assessing Damage, Urging Action" available at <http://ejp.icj.org/IMG/EJP-Report.pdf>

⁴ *Federal Register*: March 29, 2005 (Volume 70, Number 59) Proposed Rules, pp. 15783-15784 at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-6023.htm>.

One of the many resources nonprofits can draw on in their due diligence activities is the *Principles of International Charity*, published in 2005 by a working group of charities, grantmakers and advocacy groups. The Principles include specific examples that reflect multiple approaches charities can take to prevent diversion of funds for terrorist purposes. The full text of the Principles is available online at http://www.cof.org/files/Documents/International_Programs/2005Publications/Principles_Final.pdf. The principles include;

- *Charitable organizations must comply with both U.S. laws applicable to charities and the relevant laws of the foreign jurisdictions in which they engage in charitable work. Charitable organizations, however, are non-governmental entities that are not agents for enforcement of U.S. or foreign laws or the policies reflected in them.*
- *Consistent with the privilege inherent in their tax-exempt status, charitable organizations must exclusively pursue the charitable purposes for which they were organized and chartered.*
- *Fiscal responsibility is fundamental to international charitable work.*
- *The responsibility for observance of relevant laws and adoption and implementation of practices consistent with the principles contained herein ultimately lies with the governing board of each individual charitable organization.*
- *Charitable organizations may choose to adopt practices in addition to those required by law that, in their judgment, provide additional confidence that all assets – whether resources or services – are used exclusively for charitable purposes.*
- *When supplying charitable services, fiscal responsibility on the part of a provider involves taking appropriate measures to reduce the risk that its assets would be used for non-charitable purposes.*
- *Each charitable organization must safeguard its relationship with the communities it serves in order to deliver effective programs. This relationship is founded on local understanding and acceptance of the independence of the charitable organization.*

Conclusion

For all the reasons cited, and to protect the integrity of USAID programs, we urge you to withdraw the Final Rule. We also encourage the adoption of a new strategy for vetting that favors standards that include due diligence investigations by NGOs that emphasize personal contact and oversight. Any new vetting process should be done in consultation with the nonprofit sector.

Yours truly,

A handwritten signature in black ink, appearing to read 'Lee Mason'. The signature is fluid and cursive, with a large loop at the end.

Lee Mason, Director
Nonprofit Speech Rights

A handwritten signature in black ink, appearing to read 'Amanda Adams'. The signature is cursive and somewhat stylized.

Amanda Adams
Nonprofit Speech Rights Policy Analyst