



September 18, 2007

US Agency for International Development
1300 Pennsylvania Avenue, NW
Room 2.12-003
Washington, DC 20523-2120
Attention: Philip M. Heneghan, Chief Privacy Officer

RE: Response to Federal Register /Vol. 72, No.139/Friday, July 20, 2007
Agency: U.S. Agency for International Development
Title of Action: Proposed Rule; Privacy Act of 1974, Implementation of Exemptions
RIN: 0412-AA61

Sir:

This letter is in response to the above-referenced Federal Register Notice published by the United States Agency for International Development ("USAID"), whereby USAID is announcing a proposed rule to exempt portions of the "Partner Vetting System" ("PVS") from the Privacy Act of 1974, 5 USC § 552a ("Privacy Act") (the "Proposed Rule"). This letter incorporates by reference the August 22, 2007 comments of Catholic Relief Services ("CRS"), in which CRS maintained that USAID does not have legal authority to adopt the PVS.¹ CRS hereby reiterates that position and also submits the following comments to the Proposed Rule in the event that USAID is able to proffer proper legal authority to adopt the PVS.

Catholic Relief Services. CRS was founded in 1943 by the Catholic Bishops of the United States. Our mission is to assist the poor and disadvantaged, leveraging the teachings of the Gospel of Jesus Christ to alleviate human suffering, promote development of all people, and to foster charity and justice throughout the world. CRS programs achieve this without regard to creed, race, or nationality, and touch the lives of more than 80 million people per year, on five continents, in 99 countries around the world.

CRS assists with emergency disaster relief efforts, health care, agricultural needs, education, HIV/AIDS, small enterprise development, and the needs of the most vulnerable peoples (orphans, displaced persons, the disabled and terminally ill). We aid the poor by first providing direct assistance where needed, then encouraging people to help with their own development. Together, these approaches foster secure, productive, just communities that enable people to realize their potential. We have approximately 400 employees at headquarters in the U.S., and 4,800 worldwide. Approximately 63% of our programs are funded through U.S. government funds.

¹ The comments were submitted in response to Federal Register, Vol. 72, No. 136, July 17, 2007, pages 39041-39044.

USAID Is Undermining the Purpose of the Privacy Act by Claiming Wholesale Exemptions from the Privacy Act

In the Proposed Rule, USAID is exempting the PVS from key provisions of the Privacy Act, effectively nullifying the purpose of the Privacy Act. The U.S. Department of Justice's Overview of the Privacy Act of 1974 outlines the purpose and objectives of the Privacy Act as follows:

"[T]he purpose of the Privacy Act is to balance the government's need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies' collection, maintenance, use, and disclosure of personal information about them. The historical context of the Act is important to an understanding of its remedial purposes: In 1974, Congress was concerned with curbing the illegal surveillance and investigation of individuals by federal agencies that had been exposed during the Watergate scandal; it was also concerned with potential abuses presented by the government's increasing use of computers to store and retrieve personal data by means of a universal identifier -- such as an individual's social security number. The Act focuses on four basic policy objectives:

- (1) To restrict disclosure of personally identifiable records maintained by agencies [including restricting disclosure by one agency to another].
- (2) To grant individuals increased rights of access to agency records maintained on themselves.
- (3) To grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely, or complete.
- (4) To establish a code of "fair information practices" which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records."²

The Privacy Act exemptions sought by USAID in the Proposed Rule would nullify all of the above objectives. It would permit USAID to disclose records about individuals to other agencies or persons unbeknownst to those individuals; it would deny individuals the right to access such records; it would deny individuals the right to amend such records; and as such it certainly would not provide a code of "fair information practices." In fact, USAID seeks to exempt the PVS from key provisions of the Privacy Act, with the effect of significantly 'watering down' the Privacy Act protections established by Congress. USAID is seeking to claim itself exempt from at least 16 requirements of the Privacy Act as follows:

² U.S. Department of Justice, "Overview of the Privacy Act of 1974, 2004 Edition," <http://www.usdoj.gov/oip/1974polobj.htm>, accessed 18 September 2007.

552a(c)(3)	Eliminating requirement that individual be provided an accounting of disclosures of his/her records to other persons or agencies
(c)(4)	Eliminating requirement to inform others about correction or notation of dispute involving individual record
(d)	Eliminating individual access to records, right to amend records, and right to appeal determinations not to amend records
(e)(1)	Eliminating requirement that agency maintain only information as "is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by Executive order...."
(e)(2)	Eliminating agency requirement to collect information directly from subject individual when information may result in adverse determination about an individual's rights, benefits and privileges under federal programs
(e)(3)	Eliminating agency requirement to inform individual on the collecting form about the authority authorizing the solicitation; whether it is mandatory or voluntary; the principal purpose for which the information will be used; the routine uses of the information; and the effect on him of not providing the information ³
(e)(4)(G), (H), and (I)	Eliminating requirement to publish in Federal Register agency procedures whereby an individual can be notified at his request if agency system of records has a record on him , how he can gain access to such record and contest its contents , and the categories of sources of records in the system
(e)(5)	Eliminating requirement that agency " maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination."
(e)(8)	Eliminating requirement that agency make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record
552a(f)	Eliminating requirement that agency promulgate rules establishing procedures to notify individual of records, define requirements before agency will disclose records to individual, to amend records pertaining to the individual with appeal rights, and fees for record copies
552a(g)	Eliminating right to civil remedies and right to judicial review where agency fails to amend records or abide by Privacy Act; monetary penalties for certain intentional or willful agency actions
552a(h)	Eliminating rights of legal guardians
(k)(1)	Specific Exemption – discussed below
(k)(2)	Specific Exemption – discussed below

USAID has exempted the PVS from many key provisions of the Privacy Act -- namely, the right of an individual to know if USAID has information on them, the right to view the records, the right to amend the records, and the right to judicial review of the

³ In addition, USAID is exempting the PVS from section (e)(8), which requires an agency to advise individuals as to whether providing information under the PVS is mandatory or voluntary, and the authority for the agency's request. Because one of the categories of information in the PVS is social security numbers, this contradicts Section 7 of 552a(b), which requires government agencies requesting disclosures of social security numbers to inform individuals about whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

agency's practices. USAID has not demonstrated, however, that these exemptions are required to accomplish its objectives to "ensure that USAID funds and USAID-funded activities are not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security." For example, USAID has not demonstrated why it must apparently maintain information above and beyond what "is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by Executive order."⁴ It also has not demonstrated why it cannot give individuals access to records and the right to amend incorrect records, or why it must eliminate an individual's right to judicial review of the agency's practices. By eliminating the ability for an individual to access and review information about himself, how can USAID ensure the accuracy and reliability of the data collected?

This is particularly important given the high incidence of inaccurate USG watch list records. A September 2007 Department of Justice Office of Inspector General "Follow-Up Audit of the Terrorist Screening Center" (TSC) (Audit Report 07-41) noted concerns over the accuracy of watch list records, the same records that presumably would be checked as part of the PVS. The DOJ OIG report concluded that the "TSC needs to further improve its efforts for ensuring the accuracy of the watchlist records." (pg. iii) The report noted that a testing of specific watchlist records revealed that records "contained significant errors – 38 percent of the records tested contained data that was inaccurate, incomplete, inconsistent, or not current" (pg xxii). It further noted that TSC "continues to lack important safeguards for ensuring data integrity, including a comprehensive protocol outlining the agency's quality assurance procedures...." (pg. iii). The report opined that "inaccurate, incomplete, and obsolete watchlist information increases the chances of innocent persons being stopped or detained during an encounter because of being misidentified as a watchlist identity" (pg. iii). By eliminating access and amendment rights, USAID cannot ensure that the PVS would be a reliable mechanism for screening individuals, such that it can use those vetting results to deny PVOs' funding with any degree of certainty.

Moreover, USAID has not substantiated why it has eliminated individuals' redress rights to correct misinformation held by the agency. According to the DOJ OIG report, in 2005, TSC created a dedicated unit for redress matters and it helped spearhead the creation of a multi-agency Memorandum of Understanding focusing on watch list redress and developing standard operating procedures (pg. xviii). The DOJ OIG report highlights the usefulness of a redress procedure, noting that the redress activities "identified a high rate of error in watchlist records" (pg xix). The report noted that "[t]hrough its comprehensive redress review process, the TSC concluded that 45 percent of the watchlist records related to redress complaints required modification or deletion from the watchlist" (pg. xix). USAID has not indicated how this inter-agency redress procedure would mesh with USAID's elimination of those rights under the Privacy Act. In addition, USAID has not provided any rationale as to why TSC and other agencies can provide a right of redress, but USAID cannot.

⁴ U.S. Department of Justice, "Overview of the Privacy Act of 1974, 2004 Edition," <http://www.usdoj.gov/oip/1974agenreq.htm#e1>, accessed 18 September 2007

USAID Has No Authority to Claim the Exemptions from The Privacy Act

Congress did permit certain agencies to exempt their systems of records from certain Privacy Act provisions. The plain language of the Privacy Act, however, suggests that USAID would not qualify as one of those agencies. Congress provided in Section 552a(j) of the Act that the head of any agency may promulgate rules to exempt itself from any part of the Privacy Act (except for certain specific subsections) if the system of records is--(1) maintained by the Central Intelligence Agency; or (2) **"maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws...."** (emphasis added). USAID by its own admission in the Federal Register states that "the primary functions of USAID are not of a law enforcement nature." (See Federal Register Notice at 39769.) The US DOJ Guide on the Privacy Act states that subsection (j)(2)'s threshold requirement is that the system of records must be maintained by an agency which performs as its principal function any activity pertaining to the enforcement of criminal laws, and that "[t]his requirement is usually met by such obvious law enforcement components as FBI, DEA and ATF."⁵ Therefore, USAID has not cited any authority in the Privacy Act or elsewhere to claim the general exemptions from the Privacy Act as provided in the Proposed Rule.

Specific Exemptions. USAID also is misplaced in relying on the specific exemptions under 5 USC § 552a(k)(1) and (k)(2) as a basis for its claimed Privacy Act exemptions.

5 USC § 552a(k)(1). Section 552a(k)(1) provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order" (*emphasis added*). Executive Order 12958 provides that when properly classified, national security information is exempt from mandatory disclosure under the Privacy Act exemptions. However the information to be collected and maintained in the PVS would not be properly classified under EO 12958, as it does not fall under any of the categories listed in the Executive Order, and USAID's reliance on this exemption is misplaced.⁶

5 USC §552a(k)(2). This section provides specific exemption for "investigatory material compiled for law enforcement purposes," except that if a person is denied a right, privilege or benefit under federal law, only confidential source information may be withheld by the agency. Under this exemption, materials must be compiled for an investigative "law enforcement" purpose, such as a civil or criminal investigation by a non-principal function

⁵U.S. Department of Justice, "Overview of the Privacy Act of 1974, 2004 Edition," <http://www.usdoj.gov/oip/1974tenexemp.htm>, accessed 18 September 2007.

⁶ The information to be collected and maintained in the PVS would not be properly classified under EO 12958 as it does not concern: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or (h) weapons of mass destruction.

criminal law enforcement agency.⁷ The collection of information under the PVS is not for a civil or criminal investigation. USAID is not investigating individuals for law enforcement purposes under the PVS; rather it is proposing the screening of individuals to determine if the organizations they work for are eligible for funding. USAID's reliance on 5 USC §552a(k)(2) is misplaced.

The PVS and Privacy Act Exemptions Represent a Significant Regulatory Action Requiring OIRA Review

USAID claims that the Proposed Rule is not a 'significant regulatory action' that would require review by the Administrator of OMB's Office of Information and Regulatory Action (OIRA) under Executive Order 12866 and the Congressional Review Act. Not only is it OIRA's responsibility, and not USAID's, to determine if a proposed rule is subject to review under Section 6 of the Executive Order, but also USAID erroneously determined that the Proposed Rule is not a 'significant regulatory action' requiring OIRA review. Under Executive Order 12866, a 'significant regulation action' is defined as any regulatory action that is likely to result in a rule that may: ... materially alter *the rights and obligations of the recipients [of grants]*" (*emphasis added*). (See EO 12866, Section 3(f)(3).) The PVS and the proposed exemptions from the Privacy Act clearly would materially alter the rights and obligations of funding recipients. If PVOs are required to submit vetting data to apply for funding, then PVO rights and obligations would be 'materially altered' by virtue of this new requirement, especially due to the type of information requested, the volume of data required, as well as the sensitivity surrounding the disclosure of employee and board member personal data. Additionally, rights would be altered by a grant proposal evaluation process which is not transparent nor fairly based on merit alone, as well as by the security risk and mistrust created for recipients who would be perceived as extensions of USG intelligence and law enforcement services. Moreover, if employees or board members decide NOT to allow the disclosure of their personal information for vetting purposes, then PVOs are placed in the precarious position of not being able to meet the vetting requirement. In addition, the 'rights' of recipients would also be materially affected as USAID apparently will not "confirm or deny" the results of the vetting, leaving neither PVOs nor their employees with access or redress rights to correct any errors in the system that may have caused a denial of funding. If PVOs are obligated to provide vetting data, then clearly their obligations and rights are materially altered such that the PVS and the Proposed Rule exempting Privacy Act provisions are "significant regulatory actions" requiring OIRA review as a matter of law.⁸ The Inventory of Review Requests on OIRA's website

⁷ U.S. Department of Justice, "Overview of the Privacy Act of 1974, 2004 Edition," <http://www.usdoj.gov/oip/1974tenexemp.htm>, accessed 18 September 2007.

⁸ Moreover, such a significant regulatory action involving the creation of a new database of personal information should not have been undertaken without the development of a "Privacy Impact Assessment," as mandated by OMB guidance M-03-22 (September 26, 2003) and as is commonly practiced across US government agencies and private-sector institutions as well. We are not aware that a PIA process has been undertaken by USAID or that a PIA has been published in concert with the proposed System of Records notice and notice of exemptions. This is potentially a serious oversight in USAID's rule-making process. A PIA is essential to the Agency's understanding of the impact on the institutions and persons affected by this data collection, would be helpful in framing the policy imperative, and would increase the likelihood of success in discovering terrorist financing, versus the burden on data subjects and institutions and the chilling effect on the work of the PVOs included. A PIA should have been completed before the proposal of a regulatory action of this significance.

(accessed 18 September 2007) does not reveal any request to review USAID partner vetting system information collection.

Moreover, OIRA is charged with reviewing whether a Proposed Rule is deemed a "major rule" under the Congressional Review Act, 5 USC §§ 801 *et seq.* (CRA), thereby subject to Congressional review. See, 5 USC §804(2). The Proposed Rule should have been submitted to OIRA for determination of whether or not it is subject to Congressional review as a "major rule" pursuant to 5 USC §§ 804(3). The Proposed Rule falls within the definition of "rule" at 5 USC § 804(3)(C) as it substantially affects the rights and obligations of non-USAID parties by proposing exemptions under the Privacy Act that result in the suspension of an individual's privacy protections and serious potential harm to the work of the PVOs.

USAID Should Withdraw the Notices and Consider all Consequences of the PVS and the Claimed Privacy Act Exemptions After Dialogue With the PVO Community and Others

Many of the details on the implementation of the PVS have not been communicated in the Federal Register notices⁹, and thus remain unclear, hindering full and accurate public comment on the Proposed Rule's impact on recipient rights and obligations. The authority of USAID to adopt the PVS and to claim such sweeping exemptions from the Privacy Act has not been established. USAID has effectively tried to 'legislate' itself out of the Privacy Act protections that Congress deemed important in protecting individuals against the harms that ensue when the government assembles vast amounts of information about individuals without ensuring that protections are in place. USAID's efforts and role in the fight against terrorism also are misplaced here. Congress has decided in the Privacy Act to exempt certain agencies from certain Privacy Act requirements for specific law enforcement purposes. USAID is not one of those agencies. Finally, USAID has not substantiated that by 'casting a wide net' with the proposed PVS, and by claiming wholesale exemptions from the Privacy Act, USAID has found the only reasonable way for it to accomplish its stated purpose.

⁹ Most specifically and importantly, the following have not been provided: the data collection form; identification of the exact watch lists to be consulted; specifics on which federal agencies will receive the data; and a description of how the data collected will be managed (e.g. record retention periods; data security measures)

Chief Privacy Officer
United States Agency for International Development
September 18, 2007
Page 8 of 8

In sum, USAID should withdraw the Federal Register Notices announcing the PVS and the Proposed Rule, and engage in a carefully-considered process that includes consultation with OIRA and the PVO community.

Sincerely,

CRS



Kenneth Hackett
President, CRS
228 W. Lexington Street
Baltimore, MD 21201
(410) 625-2220
khackett@crs.org

cc: Henrietta Fore, Acting Foreign Assistance Director
Susan Dudley, Administrator OIRA (by email: sdudleyomb.eop.gov)
Art Fraas, Branch Chief, OIRA (by email: afraas@omb.eop.gov)
David Rostker, Desk Officer for USAID, OIRA (by email: drostker@omb.gov)