



September 30, 2013

M/OAA/P  
USAID/Washington  
1300 Pennsylvania Avenue, NW  
Washington, DC 20523  
M.OAA.RuleMaking@usaid.gov

RE: RIN 0412-AA71—Partner Vetting in USAID Assistance

To whom it may concern:

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The ACLU is a non-profit, non-partisan organization committed to protecting the civil liberties guaranteed by the United States Constitution. We are writing to respond to the United States Agency for International Development's (USAID) request for comments on proposed amendments to the regulations governing the administration of USAID assistance awards to implement a Partner Vetting System (PVS) pilot program.

The ACLU has submitted public comments to USAID and the Department of State six times since 2007, raising concerns with the PVS and the Risk Analysis and Management (RAM) program (see copies attached). While some of our comments have been addressed, the ACLU continues to have fundamental concerns with aspects of these programs.

The proposed PVS rule raises significant privacy and due process issues, with serious consequences for the associational rights of applicants and the individuals and organizations with whom they work. The standards employed by the program are wholly undefined. Moreover, whether the program is necessary in the first place remains an unanswered question, especially given that we are aware of no public reports of USAID resources being diverted to terrorist organizations or individuals.

### **PVS Puts Individuals' Privacy at Risk**

The information USAID is seeking under PVS is highly personal and confidential—including individuals' social security and government-issued identification numbers, mailing and email addresses, and information concerning national origin and citizenship. The Background on the proposed rule notes that the process will "protect sensitive information from disclosure,"<sup>1</sup> but the proposed rule does not specify what those measures may be and how they will protect against disclosure or misuse.

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<sup>1</sup> Partner Vetting in USAID Assistance, 78 Fed. Reg. 53375, 53376 (Aug. 29, 2013) (to be codified in 22 CFR Part 226).

This is a very real concern. PVS has been designed to enable USAID to use the Terrorist Screening Center (TSC) to determine whether “key individuals”<sup>2</sup> associated with an award applicant are “terrorists, supporters of terrorists or affiliated with terrorists.”<sup>3</sup> The Background on the proposed rule also states that the program is concerned with identifying those “linked to terrorist activities.”<sup>4</sup> The TSC, administered by the FBI, houses the Terrorist Screening Database (TSDB, known as the Watchlist), the U.S. government’s consolidated terrorist list. The names on the list are secret and are not limited to individuals and entities designated as terrorists by the U.S. government, which are already identified on lists that are made public by the Departments of Treasury and State. It also includes unpublished, secret intelligence databases that are centralized at the TSC.

The TSC shares information in the TSDB with thousands of law enforcement officers at every level of government and with 22 foreign governments. In some cases the information is shared with private-sector individuals.

Congress has expressed that USAID must disclose what will happen to the information it collects. The Senate Committee on Appropriations report accompanying the Fiscal Year 2014 State and Foreign Operations Appropriations Bill from July 2013 states: “All individuals and organizations being vetted should be provided with full disclosure of how information will be stored and used by the U.S. Government, including how information regarding a ‘positive match’ will be handled and how to appeal such a match.”<sup>5</sup>

This month the ACLU released a report, *Unleashed and Unaccountable: The FBI’s Unchecked Abuse of Authority*,<sup>6</sup> that documents abuse of surveillance powers. This includes the collection of vast amounts of personal information in various databases, including the TSDB, for data-mining programs. And in light of the ongoing revelations about the abuse of power of the National Security Agency and its sweeping collection of data, these concerns are more acute.

Yet, despite concerns expressed by Congress and evidence of data-mining misuse, the rulemaking is not clear about how the privacy of the highly personal and confidential data submitted to USAID during the vetting process will be treated and protected. There is no information on how long USAID will store the information, whether the data will be scrubbed, and under what criteria and timeline.

Even more worrisome, there is no assurance that the TSDB (or other government entities) will not store information about individuals whom USAID vets. Since TSC shares information with

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<sup>2</sup> “Key individuals” is a *very* broad category: “principal officers of the organization’s governing body,” “the principal officer and deputy principal officer of the organization,” “the program manager or chief of party,” and “any other person with significant responsibilities for administration of the USG-financed activities or resources.” *Id.* Based on USAID estimates of 44,000 applications for awards during the pilot program alone, a massive number of people will be subject to this screening. *See id.* at 53378.

<sup>3</sup> *Id.* at 53376. The ACLU objects to this practice just as it objects to any requirement that non-governmental organizations that are USAID applicants must screen their own employees against such lists.

<sup>4</sup> *Id.*

<sup>5</sup> S. Rep. No. 113-81, at 56 (2013).

<sup>6</sup> American Civil Liberties Union, *Unleashed and Unaccountable: The FBI’s Unchecked Abuse of Authority* (Sept. 2013), <https://www.aclu.org/sites/default/files/assets/unleashed-and-unaccountable-fbi-report.pdf>.

other agencies and foreign governments, individuals who submit their personal data have reason to be concerned about the privacy of their information. If the PVS pilot program is to go forward, USAID must spell out how the personal data will be secured and the very real possibility of abuse will be prevented.

Finally, by requiring all *applicants* to submit data for vetting, USAID will be collecting much more information than it needs to meet the program's purpose. By collecting what amounts to bulk data on the designated applicant pool, USAID will create concern about the actual purpose of the information collection and could create the appearance of intelligence gathering in communities USAID serves.

### **PVS Fails to Meet Due Process Requirements**

If an applicant does not pass vetting, it will be ineligible for a USAID award. Yet at a fundamental level, the PVS process lacks transparency and fails to provide notice—required by due process—of what association or activity may result in denial of a USAID award. For example, there is no definition for what is considered an “affiliation” or “linkage” to terrorism or who is considered a “supporter” that would trigger negative vetting result and result in serious harms to the applicant and key individuals.

The Fifth Amendment's due process protections also require notice of the basis for an adverse determination and an opportunity to contest that determination in a meaningful way. The proposed rule's broad discretion to restrict information released on why an applicant does not pass vetting and the very limited appeals process it provides violate this basic standard.

The proposed rule does not provide adequate notice of the basis for an adverse finding. Instead, an applicant will only be notified that it has failed vetting and the vetting official will only inform the applicant of information that USAID decides is “releasable,” “consistent with applicable law and Executive Orders, and with the concurrence of relevant agencies.”<sup>7</sup> This is no assurance that an applicant will receive any explanation stating the reason it has not passed vetting. In fact, the applicant may not even be informed about which key individual caused it to fail vetting, which would make it impossible to effectively seek reconsideration,<sup>8</sup> because the applicant would have to guess what error or misconstruction of evidence may be the basis for an adverse determination, and thus what evidence it should submit in its defense. Without meaningful notice and an explanation, an applicant cannot clear up misunderstandings or rebut erroneous inferences. Giving applicants the specific reasons for a decision increases the likelihood of error correction.

The proposed regulations allow for an appeals process of sorts, in which a denied applicant can ask for the decision to be reconsidered and provide more information.<sup>9</sup> This very limited process

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<sup>7</sup> 78 Fed. Reg. at 53379.

<sup>8</sup> This would be similar to the government's policy to refuse to confirm or deny information about a person's status on the No Fly List. We have argued that the policy is not constitutional in the context of the No Fly List, and similar concerns apply to USAID vetting. See Press Release, *American Civil Liberties Union, Federal Court Sides with ACLU in No Fly List Lawsuit* (Aug. 29, 2013), <https://www.aclu.org/national-security/federal-court-sides-aclu-no-fly-list-lawsuit>.

<sup>9</sup> 78 Fed. Reg. at 53379.

is unlikely to provide for a meaningful opportunity to challenge the vetting results and in fact, does not even comport with the more robust, but still insufficient, notice and procedures required in the national security context for organizations the government designates as terrorists.

These problems are exacerbated by the fact that there are significant concerns about the accuracy and management of the TSDB. A May 2009 audit by the Department of Justice's Office of Inspector General (OIG) documented the high error rate and dysfunction of the TSDB.<sup>10</sup> The audit revealed a process so disorganized that "the actual number of individuals the FBI nominated to the terrorist watchlist since its inception is unknown."<sup>11</sup> Many entries contained information "unrelated to terrorism."<sup>12</sup> The audit also found that the FBI:

- Failed to timely remove closed cases from the records in 72 percent of cases;<sup>13</sup>
- Failed to appropriately modify outdated records in 67 percent of cases;<sup>14</sup> and
- Failed to remove terrorism classification in 35 percent of cases, even though many of these should be removed from the Watchlist entirely.<sup>15</sup>

The known high error rate for listings in the TSDB (with no effective means for challenging the fact that one is on the list) means that USAID vetting has a high risk of erroneous outcomes, and therefore erroneous deprivation of rights.

The fact that classified or sensitive national security information may be involved is not enough to deny applicants notice of the reasons for a negative vetting finding, or an adequate opportunity to respond, given the enormity of the issues at stake for applicants and the humanitarian goals they seek to fulfill.

### **Inadequate Due Process Harms Applicants' and Individuals' Associational Rights**

Not only does PVS threaten privacy rights, but it may harm applicants' and individuals' interest in freedom from false government stigmatization. Being denied a USAID award on the basis of alleged association with terrorism (no matter how attenuated or unsupported) can seriously damage applicants' standing with the public and associations in their community and the communities they seek to serve. This can have a secondary effect of discouraging private donors, depriving the organization of the resources it needs to carry out non-USAID activities. These problems are in addition to the fact that the organization cannot legally partner with USAID. The key individual whose name matches the TSDB (if that information is released by USAID) may lose his or her job or contract and face an inability to conduct similar work in the future, all without a meaningful opportunity to clear his or her name.

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<sup>10</sup> U.S. Dep't of Justice, Office of Inspector Gen. Audit Div., Audit Report 09-25, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices* (May 2009).

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Id.* at vi.

<sup>13</sup> *Id.* at 36.

<sup>14</sup> *Id.* at 23.

<sup>15</sup> *Id.* at 54.

**PVS Lacks Demonstrated Need**

Finally, the ACLU continues to believe that USAID and the Department of State have failed to demonstrate that implementing PVS or RAM is necessary and that the government’s goals of assuring that grantee organizations will abide by the law cannot be achieved through much less burdensome means, such as by requiring recipients to abide by anti-terrorism financing and asset-control laws, statutes, and executive orders, in their use of grant funds

\* \* \*

We hope these comments are useful in your continued review of the proposed rule and we strongly urge you not to go forward with the PVS pilot program. Please contact Legislative Counsel Dena Sher at 202-715-0829 or dsher@dcaclu.org if you have questions or comments about our concerns.

Sincerely,



Laura W. Murphy  
Director, Washington Legislative Office



Dena Sher  
Legislative Counsel



Hina Shamsi  
Director, National Security Project



February 17, 2012

VIA Email to: OIRA\_Submission@omb.eop.gov

Department of State Desk Officer  
Office of Information and Regulatory Affairs  
Office of Management and Budget

Re: Department of State 30-Day Notice of Proposed Information Collection:  
DS-4164, Control #1405-XXXX (Public Notice 7753, Vol. 77 Fed. Reg.  
No. 11, page 2601)

To Whom It May Concern,

The ACLU is an organization committed to protecting the civil liberties guaranteed by the United States Constitution. I am writing in response to the Department of State (DOS) Notice requesting public comments concerning the Risk Analysis and Management program (RAM) being implemented by DOS in order to "to conduct screening to ensure that State funded activities are not purposefully or inadvertently uses (*sic*) to provide support to entities or individuals deemed to be a risk to national security."

On five occasions, the ACLU has submitted public comments to DOS and the United States Agency for International Development (USAID) raising concerns with RAM and the Partner Vetting System (PVS) (see August 27, 2007 and December 3, 2007 letters to Mr. Philip Heneghan, Chief Privacy Officer, USAID, March 4, 2009 letter to Ms. Rhonda Turnbow, Chief Privacy Officer, USAID, December 19, 2012 letter to Edward Vazquez, DOS, and January 5, 2011 letter to the Office of Information and Regulatory Affairs attached hereto).

While some of our comments have been addressed, the ACLU continues to have fundamental concerns with aspects of the proposed RAM and PVS programs. These concerns regard the lack of due process and transparency in the proposed screening, the overbroad scope of the individuals whose information is to be collected, and the privacy implications of collecting such highly personal, confidential information and sharing it across agencies. The ACLU also continues to believe that DOS and USAID have failed to demonstrate that implementing RAM or PVS is necessary.

To our knowledge DOS has not published any details regarding RAM. DOS explicitly recognizes the lack of public information about the RAM program in its Supporting Statement for the Paperwork Reduction Act Submission.<sup>1</sup> Without knowing such details, the ACLU has little basis on which to comment on the program and whether its implementation will heighten or diminish our concerns, or raise new concerns.

We continue to recommend that DOS and USAID publish details regarding the RAM and PVS programs and permit the public to provide full and meaningful comments.

Sincerely,

Devon Chaffée  
Legislative Counsel

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<sup>1</sup> Supporting Statement for Paperwork Reduction Act Submission, Risk Analysis and Management: OMB Number 1405-XXXX.

DOROTHY M. EHRLICH  
DEPUTY EXECUTIVE DIRECTOR



August 27, 2007

Mr. Philip M. Heneghan  
Chief Privacy Officer  
United States Agency for International Development  
1300 Pennsylvania Avenue NW  
Office 2.12-003  
Washington, DC 20523-2120

BY ELECTRONIC MAIL TO: [privacy@usaid.gov](mailto:privacy@usaid.gov)

Dear Mr. Heneghan:

The ACLU is an organization committed to protecting the civil liberties guaranteed by the United States Constitution. We are submitting comments concerning Notices published in the Federal Register on July 17, 20 and 23 concerning the proposed Partner Vetting System (PVS).

First, the ACLU strongly urges USAID to postpone implementation of the PVS until the Agency has had time to receive and respond to comments from individuals and organizations that have an interest in the PVS, and particularly from those individuals and NGOs who receive USAID funds. We strongly oppose making the PVS effective Monday, August 27, the same day as the deadline for receiving comments. We understand that you are considering postponing the effective date until you've had the opportunity to thoroughly and meaningfully review the comments you've received, and we think that would be the correct decision.

Additionally, it is not clear to us what USAID's basis is for concluding that it is necessary to implement the PVS, as USAID has not conclusively demonstrated that its funds have been used for criminal activities associated with terrorism or wound up in the hands of individuals or organizations responsible for such criminal activities. Nor has USAID demonstrated that the PVS will be an effective means of ensuring its funds are not used for such purposes and do not wind up in such hands. This is particularly problematic given that the PVS is not a program that is required by statute; in fact, questions are raised about whether the PVS may actually exceed the authority granted to USAID by Congress.

Further, the opaqueness of the PVS raises serious concerns for the ACLU. It is not clear what USAID itself will do with the information it collects and to which other governmental agencies it will give the information. The fact that USAID will not confirm to individuals or entities that its denial of funds or

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August 27, 2007

Page 2

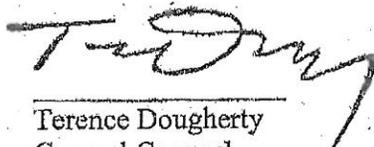
refusal to enter into a contract with those individuals or entities is a result of their having failed its undisclosed screening process, and the fact that there appears to be no effective means of challenging such denial or refusal, raises serious due process concerns. To the extent USAID or other governmental entities will check individual and entity names collected against the so-called terrorist watch lists, the ACLU objects to this practice (much as it objects to any requirement that NGOs that are USAID applicants must screen their own employees against such lists) 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. Again, this lack of due process raises significant concerns.

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Finally, the information USAID is seeking under the PVS is highly personal, confidential information concerning individuals--including social security and passport numbers, mailing and email addresses, telephone and fax numbers and information concerning national origin and citizenship. The creation of such a database by USAID and the fact that it, or portions of it, will be shared with other governmental entities raises privacy concerns that should be thought through more critically.

In light of the above reasons, we believe that the PVS proposal should be withdrawn or, at the very least, its effective date should be postponed until there has been a reasonable notice and comment period to ensure that USAID takes all interested parties' views into consideration.

Very truly yours,



Terence Dougherty  
General Counsel



Dorothy M. Ehrlich  
Deputy Executive Director





March 4, 2009

Ms. Rhonda Turnbow  
Chief Privacy Officer  
United States Agency for International Development  
1300 Pennsylvania Avenue NW  
Office 2.12-003  
Washington, DC 20523-2120

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BY ELECTRONIC MAIL TO: [privacy@usaid.gov](mailto:privacy@usaid.gov)

Dear Ms. Turnbow:

The ACLU is an organization committed to protecting the civil liberties guaranteed by the United States Constitution. On August 27th and December 3<sup>rd</sup> of 2007 we submitted comments concerning Notices about the proposed Partner Vetting System (PVS), which I am including here. Now that the new Administration has taken office, we would like to reiterate our previous points and give additional comments regarding our concerns with the implementation of the Partner Vetting System ("PVS").

We want to highlight one aspect of the new proposed rule, which is the exemption that will be granted the PVS under the Privacy Act. Apart from the procedural concerns that have been raised by other commenters about the exemption from the Privacy Act that the PVS will receive, we also have concerns regarding due process and transparency.

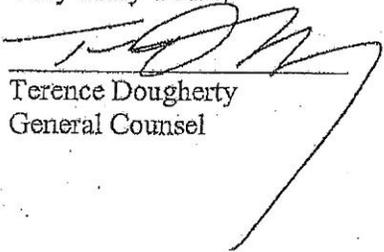
Under the new rule an applicant must wait until he or she is denied funding before being given the opportunity to provide clarifying information. Additionally, applicants may not even learn exactly why they were denied, since USAID may protect certain information due to "security concerns." While we do recognize that the final rule does take into consideration some of the due process complaints voiced in previous comments, we still think this leaves USAID with too much discretion about what information it will reveal. If an applicant is not given a meaningful opportunity to learn why he or she was denied funding, he or she may never know, for example, that his or her name is on a watch list, and as we've seen countless times these past 8 years, these security watch lists contain many errors and are subject to abuse.

Additionally, we have concerns about the vagueness of the language used in the vetting criteria under this rule. It is unclear what exactly qualifies as "supporting" or "being affiliated with" an organization or individual engaged in "terrorist activities." Is support limited solely to the organization's programming? How is "terrorist activities" defined? What relationships qualify as affiliation? We believe any policy governing who can receive USAID funds should only require recipients to abide by applicable anti-terrorism financing and asset control laws, statutes and executive orders. This allows for assurance that grantee organizations will abide by the law and refrains from imposing any additional burdens.

We ask you to please reconsider these important issues as you decide if and how to implement this new rule as it is currently formulated. We believe serious due process, vagueness, and transparency issues still remain in this final version of the PVS.

AMERICAN CIVIL  
LIBERTIES UNION

Very Truly Yours,



Terence Dougherty  
General Counsel



Julie Strom  
Associate Corporate Counsel



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December 19, 2011

**VIA Email**

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Edward Vazquez  
U.S. Department of State  
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Washington, DC 20520

**Re: Department of State, Public Notice 7662 (Oct. 14, 2011), "60-Day  
Notice of Proposed Information Collection: DS-4184, Risk  
Management and Analysis" (the "Notice")**

Dear Mr. Vazquez,

The ACLU is an organization committed to protecting the civil liberties guaranteed by the United States Constitution. We are writing in response to the Department of State Notice requesting public comments concerning the Risk Analysis and Management Program (the "Program") being implemented by the Department of State in order to "vet potential contractors and grantees seeking funding from the Department of State to mitigate the risk that such funds might benefit terrorists or their supporters."

On three occasions, the ACLU has submitted public comments to the United States Agency for International Development ("USAID") concerning the USAID Partner Vetting System (see August 27 and December 3, 2007 letters to Mr. Philip Heneghan, Chief Privacy Officer, USAID, and March 4, 2009 letter to Ms. Rhonda Turnbow, Chief Privacy Officer, USAID, attached hereto). While some of our comments have been addressed, the ACLU continues to have fundamental concerns with aspects of the Partner Vetting System.

While the Department of State's October 14 Notice seeks public comments regarding its Program, to our knowledge the Department of State has not published any details regarding the Program; the Notice itself merely announces it will begin collecting information from potential contractors and grantees using Department of State Form DS-4184. Without knowing these details, the ACLU has little basis on which to comment on the Program and

whether its implementation will heighten or mitigate our concerns, or raise new concerns.

We recommend that the Department of State publish details regarding the Program and permit the public to provide full and meaningful comments.

Sincerely,



Terence Dougherty, Esq.  
General Counsel

Attachments

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January 5, 2012

**VIA Email to: OIRA [Submission@omb.eop.gov](mailto:Submission@omb.eop.gov)**

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**Re: U.S. Agency for International Development (USAID) Nov. 30, 2011, "Notice of Public Information Collection Requirements Submitted to OMB for Review," Vol. 76, Fed. Reg. No. 235, p. 76539, OMB Number 0412-0577, Form No. AID 500-13, "Partner Information Form" (the "Notice")**

To Whom It May Concern,

The ACLU is an organization committed to protecting the civil liberties guaranteed by the United States Constitution. We are writing in response to USAID's Notice requesting public comments concerning USAID's use of a Partner Information Form to collect personally identifiable information in order "to conduct screening to ensure that neither USAID funds nor USAID-funded activities inadvertently provide support to entities or individuals associated with terrorism."

On three previous occasions, the ACLU has submitted public comments to USAID concerning the USAID Partner Vetting System (see August 27 and December 3, 2007 letters to Mr. Philip Heneghan, Chief Privacy Officer, USAID, and March 4, 2009 letter to Ms. Rhonda Turnbow, Chief Privacy Officer, USAID, attached hereto). While some of our comments have been addressed, the ACLU continues to have fundamental concerns with aspects of the Partner Vetting System. These concerns regard the lack of due process and transparency in the proposed screening, the overbroad scope of the individuals whose information is to be collected, and the privacy implications of collecting such highly personal, confidential information and sharing it across agencies. The ACLU also continues believe that USAID has failed to demonstrate that implementing the Partner Vetting System is necessary.

While USAID's November 30 Notice seeks public comments regarding its new information collection program, to our knowledge USAID

has published few details regarding the program. The Notice itself merely announces it will begin collecting information from individuals and/or officers of non-governmental organizations who apply for USAID funding or registration using USAID form AID 500-13. Without knowing these details, the ACLU has little basis on which to comment on the program and whether its implementation will heighten or mitigate our concerns, or raise new concerns.

We recommend that USAID publish details regarding the program and permit the public to provide full and meaningful comments.

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Sincerely,



Terence Dougherty, Esq.  
General Counsel

Attachments