

Exhibit 1

July 14, 2005

Via Certified Mail

HHS Freedom of Information Officer
Room 645-F, Hubert H. Humphrey Building
Independence Avenue, S.W.
Washington, DC 20201

Freedom of Information Act Request

Dear Sir or Madam:

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Department of Health and Human Services ("HHS") regulations relating to requests for disclosure of records, 45 C.F.R. §§ 5 et seq.

We are seeking a copy of any and all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice ("OLC") to any representative of HHS prior to September 20, 2004, relating to the enforcement of 22 U.S.C. § 7631(f) and in 22 U.S.C. § 7110(g)(2), provisions which require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution. The provisions are contained, respectively, in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPPRA").

In a letter dated September 20, 2004, from Daniel Levin, Acting Assistant Attorney General, to the Honorable Alex M. Azar, II, General Counsel of HHS, the OLC explicitly referred to and withdrew earlier "tentative advice" that these so-called "organization restrictions" could only be applied to foreign organizations acting overseas. A comparison of requests for proposals and applications issued by HHS both prior and subsequent to this letter demonstrates that HHS incorporated OLC's guidance into the conditions it placed on prospective Global AIDS Act grantees.

For these and other reasons, it is evident that the conclusions reached by the OLC regarding this matter have been incorporated into government policy for implementing the Global AIDS Act. Because the advice of the OLC has been incorporated into government policy, the requested prior guidance issued by the OLC is not protected from disclosure by any of the privileges that might typically attach to inter- or intra- agency guidance issued by the

HHS FOIA
July 14, 2005
Page 2

OLC, and must therefore be made available pursuant to a request under FOIA. *See Nat'l Council of La Raza v. Dept. of Justice*, --- F.3d ----, 2005 WL 1274270 (2d Cir. 2005); *see also* 5 U.S.C. § 552(a)(2)(B).

We agree to pay any fees for work done in responding to this request, as prescribed by 48 C.F.R. §§ 5.41-5.43, pursuant to the fee schedule for "Other requesters." *Id.* § 5.41(c).

Your attention to this request is appreciated, and I look forward to hearing from you within twenty (20) days. 5 U.S.C. § 552(a)(6)(A). Should you have any questions regarding this request, please contact me at your earliest convenience at the address below or by telephone at (212) 992-8635.

Sincerely,



Rebekah Diller
Associate Counsel

Exhibit 2



Case No. 2005-0988mb

March 7, 2007

Ms. Rebekah Diller
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas
12th Floor
New York, New York 10013

Dear Ms. Diller:

This is in response to your July 14, 2005, Freedom of Information Act (FOIA) request for a copy of all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice to any representative of DHHS prior to September 20, 2004, relating to enforcement of 22 U.S.C. § 7631(f) and in 22 U.S.C. §7110(g)(2). These provisions require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution.

Upon receiving your request, we forwarded a copy to the Office of the General Counsel to conduct a search of their files for the documents you are seeking. Since that time, they have informed this office that they located 231 pages of documents in their files responsive to your request. However, I have determined to withhold 46 pages of these documents, in their entirety, under exemption (b)(5) of the FOIA. Exemption (b)(5) permits the withholding of intra- and inter-agency records that contain deliberative process privilege and attorney-client privilege information.

Included in the documents located in the search of our files were 177 pages of documents that originated within the U.S. Department of Justice (DOJ) and 8 pages within the U.S. Agency for International Development (USAID). Therefore, in accordance with our regulation, 45 C.F.R. § 5.23, we are referring your request and those records to the appropriate agency for review and determination of release to you. Upon completion of their review, they will respond directly to you with the results of their findings. If you wish to contact them, you may do so at the following addresses:

Page 2 - Ms. Rebekah Diller

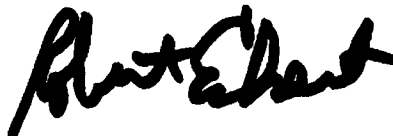
FOIA/PA Mail Referral Unit
United States Department of Justice
Room 115, LOC
Washington, D.C. 20530-0001

S. Lankford
FOIA Team Leader
Information & Records Division
Office of Administrative Services
United States Agency for International Development
Room 2.07C, RRB
Washington, D.C. 20523-2701

There is no fee in this instance because charges do not exceed our billing threshold of \$25.00.

If you have reason to believe that the denied documents should not be exempt from disclosure, you may appeal. If so, your appeal must be mailed within thirty (30) days of the receipt of this letter to the Deputy Assistant Secretary for Public Affairs (Media), Office of Public Affairs, Office of the Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services, 330 "C" Street, S.W., Room 5416 - Mary E. Switzer Building, Washington, D.C. 20201. Clearly mark both the envelope and your letter "Freedom of Information Act Appeal."

Sincerely yours,



Robert Eckert
Director
FOI/Privacy Acts Division
Office of Public Affairs



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Case No. 2005-0988mb

Washington, D C 20201

March 7, 2007

MEMORANDUM

TO: FOIA/PA Mail Referral Unit
Room 115, LOC
United States Department of Justice

FROM: Robert Eckert
Director
FOI/Privacy Acts Division
Office of Public Affairs

SUBJECT: Referral of Freedom of Information Act (FOIA) Request and
Responsive Documents

Attached is a copy of a July 14, 2005, Freedom of Information Act (FOIA) request from Ms. Rebekah Diller, Brennan Center for Justice at NYU School of Law, along with 177 pages of documents located in the search of our files, responsive to her request, which were generated in your Department. Also attached is a copy of our February 28, 2007, letter of response to Ms. Diller. We are referring the documents to you for your review and determination of release directly to the requester. Ms. Diller has been notified of this referral. Please note that two of the DOJ documents list exemption (b)(5) on them. The redacted information contained HHS attorneys' handwritten comments. Upon completion of your review and determination of release, please return a copy of your response letter and the information as released to the requester to this office.

If you have any questions, please call Maggie Blackwell, FOIA Specialist, at (202) 690-7453.

Attachments



Case No. 2005-0988mb

Washington, D.C. 20201

March 7, 2007

MEMORANDUM

**TO: S. Lankford, FOIA Team Leader
Information & Records Division
Office of Administrative Services
United States Agency for International Development**

**FROM: Robert Eckert
Director
FOI/Privacy Acts Division
Office of Public Affairs**

**SUBJECT: Referral of Freedom of Information Act (FOIA) Request and
Responsive Documents**

Attached is a copy of a July 14, 2005, Freedom of Information Act (FOIA) request from Ms. Rebekah Diller, Brennan Center for Justice at NYU School of Law, along with eight (8) pages of documents located in the search of our files, responsive to her request, which were generated in your Department. Also attached is a copy of our February 28, 2007, letter of response to Ms. Diller. We are referring the documents to you for your review and determination of release directly to the requester. Ms. Diller has been notified of this referral.

If you have any questions, please call Maggie Blackwell, FOIA Specialist, at (202) 690-7453.

Attachments

Exhibit 3

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

April 3, 2007

Via certified mail, return receipt requested

Deputy Assistant Secretary for Public Affairs (Media)
Office of Public Affairs
Office of the Assistant Secretary for Public Affairs
U.S. Department of Health and Human Services
330 C Street, S.W.
Room 5416 – Mary E. Switzer Building
Washington, DC 20201

Freedom of Information Act Appeal Case No. 2005-0988mb

Dear Director:

This is an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., concerning the refusal by the U.S. Department of Health and Human Services ("HHS") to disclose documents within its control.

By letter dated July 14, 2005, I requested a copy of "any and all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice ("OLC") to any representative of USAID prior to September 20, 2004, relating to the enforcement of 22 U.S.C. § 7631(f) and 22 U.S.C. § 7110(g)(2), provisions which require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution." The provisions are contained, respectively, in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA").

By letter dated March 7, 2007, Robert Eckert, Director of HHS's FOI/Privacy Act Division stated that he had "determined to withhold 46 pages of the documents, in their entirety, under exemption (b)(5) of the FOIA." The letter failed to identify the responsive documents. A copy of my FOIA request and HHS's subsequent denial is enclosed for your convenience.

HHS's refusal to disclose the requested items violates FOIA, 5 U.S.C. § 552 et seq. First, HHS has failed to release even a "reasonably segregable" portion of the withheld responsive documents, as required by 5 U.S.C. § 552(b).

Second, because the advice of the Department of Justice's Office of Legal Counsel ("OLC") has been incorporated into government policy, the requested prior guidance issued by the OLC is not protected from disclosure by any of the privileges that might typically attach to inter- or intra- agency guidance issued by the OLC, and must therefore be made available pursuant to a request under FOIA. *See Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350 (2d Cir. 2005); *see also* 5 U.S.C. § 552(a)(2)(B).


It is evident that the conclusions reached by the OLC regarding this matter have been incorporated into government policy for implementing the Global AIDS Act. For example, HHS incorporated OLC's guidance into the conditions it placed on prospective Global AIDS Act grantees. Similarly, the United States Agency for International Development ("USAID") incorporated OLC's guidance into its policies, including Acquisition and Assistance Policy Directive ("AAPD") 04-04 (Revision 2), Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 -- Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking, issued July 16, 2004. Moreover USAID explicitly referred to a draft opinion from the OLC in official guidance, stating:

The Office of Legal Counsel, U.S. Department of Justice in a draft opinion determined that [the Global AIDS Act's anti-prostitution provision] only may be applied to foreign non-governmental organizations and public international organizations because of the constitutional implications of applying it to U.S. organizations.

USAID, Guidance on the Definition and Use of the Child Survival and Health Programs Fund and the Global HIV/AIDS Initiative Account: FY2004 Update (July 22, 2004), at 35 n.10.

Because we do not agree that the requested materials are exempt from disclosure, we ask that the denial of the FOIA request be reversed. In the event this appeal is denied, the please provide a written response describing the reasons for the denial, and names and titles of each person responsible for the denial. I await your prompt reply.

Sincerely,


Rebekah Diller
Counsel

Enclosures



Case No. 2005-0988mb

March 7, 2007

Ms. Rebekah Diller
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas
12th Floor
New York, New York 10013

Dear Ms. Diller:

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Page 2 - Ms. Rebekah Diller

FOIA/PA Mail Referral Unit
United States Department of Justice
Room 115, LOC
Washington, D.C. 20530-0001

S. Lankford
FOIA Team Leader
Information & Records Division
Office of Administrative Services
United States Agency for International Development
Room 2.07C, RRB
Washington, D.C. 20523-2701

There is no fee in this instance because charges do not exceed our billing threshold of \$25.00.

If you have reason to believe that the denied documents should not be exempt from disclosure, you may appeal. If so, your appeal must be mailed within thirty (30) days of the receipt of this letter to the Deputy Assistant Secretary for Public Affairs (Media), Office of Public Affairs, Office of the Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services, 330 "C" Street, S.W., Room 5416 - Mary E. Switzer Building, Washington, D.C. 20201. Clearly mark both the envelope and your letter "Freedom of Information Act Appeal."

Sincerely yours,



Robert Eckert
Director
FOI/Privacy Acts Division
Office of Public Affairs



March 7, 2007

MEMORANDUM

TO: FOIA/PA Mail Referral Unit
Room 115, LOC
United States Department of Justice

FROM: Robert Eckert
Director
FOI/Privacy Acts Division
Office of Public Affairs

SUBJECT: Referral of Freedom of Information Act (FOIA) Request and Responsive Documents

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If you have any questions, please call Maggie Blackwell, FOIA Specialist, at (202) 690-7453.

Attachments



Case No. 2005-0988mb

Washington, D.C. 20201

March 7, 2007

MEMORANDUM

**TO: S. Lankford, FOIA Team Leader
Information & Records Division
Office of Administrative Services
United States Agency for International Development**

**FROM: Robert Eckert
Director
FOI/Privacy Acts Division
Office of Public Affairs**

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Attachments

July 14, 2005

Via Certified Mail

HHS Freedom of Information Officer
Room 645-F, Hubert H. Humphrey Building
Independence Avenue, S.W.
Washington, DC 20201

Freedom of Information Act Request

Dear Sir or Madam:

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We are seeking a copy of any and all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice ("OLC") to any representative of HHS prior to September 20, 2004, relating to the enforcement of 22 U.S.C. § 7631(f) and in 22 U.S.C. § 7110(g)(2), provisions which require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution. The provisions are contained, respectively, in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA").

In a letter dated September 20, 2004, from Daniel Levin, Acting Assistant Attorney General, to the Honorable Alex M. Azar, II, General Counsel of HHS, the OLC explicitly referred to and withdrew earlier "tentative advice" that these so-called "organization restrictions" could only be applied to foreign organizations acting overseas. A comparison of requests for proposals and applications issued by HHS both prior and subsequent to this letter demonstrates that HHS incorporated OLC's guidance into the conditions it placed on prospective Global AIDS Act grantees.

For these and other reasons, it is evident that the conclusions reached by the OLC regarding this matter have been incorporated into government policy for implementing the Global AIDS Act. Because the advice of the OLC has been incorporated into government policy, the requested prior guidance issued by the OLC is not protected from disclosure by any of the privileges that might typically attach to inter- or intra- agency guidance issued by the

HHS FOIA
July 14, 2005
Page 2

OLC, and must therefore be made available pursuant to a request under FOIA. See *Nat'l Council of La Raza v. Dept. of Justice*, --- F.3d ----, 2005 WL 1274270 (2d Cir. 2005); see also 5 U.S.C. § 552(a)(2)(B).

We agree to pay any fees for work done in responding to this request, as prescribed by 48 C.F.R. §§ 5.41-5.43, pursuant to the fee schedule for "Other requesters." *Id.* § 5.41(c).

Your attention to this request is appreciated, and I look forward to hearing from you within twenty (20) days. 5 U.S.C. § 552(a)(6)(A). Should you have any questions regarding this request, please contact me at your earliest convenience at the address below or by telephone at (212) 992-8635.

Sincerely,



Rebekah Diller
Associate Counsel

Exhibit 4



Case No. 2007-A-0054mb

Washington, D.C. 20201

Ms. Rebekah Diller
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas
12th Floor
New York, New York 10013

MAY 21 2007

Dear Ms. Diller:

This is in response to your April 3, 2007, letter in which you appealed the decision of Robert Eckert, this Department's Freedom of Information Act (FOIA) Officer's denial of 46 pages of records in their entirety responsive to your request. The pages were withheld under exemption (b)(5) of the FOIA. You were seeking all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice to any representative of HHS prior to September 20, 2004, relating to enforcement of 22 U.S.C. §7631(f) and in 22 U.S.C. §7110(g)(2).

In your letter, you assert that: (1) the denial of your FOIA request fails to identify the responsive documents; (2) the Department fails to release a "reasonably segregable" portion of the withheld documents; (3) the Department of Justice's ("DOJ") Office of Legal Counsel's ("OLC") advice has been incorporated into government policy and "must therefore be made available pursuant to a request under FOIA;" and (4) "the conclusions reached by the OLC regarding this matter have been incorporated into government Policy implementing the Global Aids Act." I have completed my review of your appeal and the records at issue.

Upon receipt of your appeal letter, a second review of the previously withheld 46 pages was performed. Based on the second review of the withheld records, we have decided to continue to withhold the 46 pages in their entirety under exemption (b)(5), including the deliberative process privilege and the attorney-client privilege. The withheld material consists primarily of inter-agency e-mail exchanges between HHS attorneys and HHS employees, which contain predecisional comments, opinions, advice, and recommendations, as well as confidential attorney-client communications, regarding the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Act of 2003 ("TVPRA"). Some of the material is marked "protected AND/OR privileged." The withheld material also includes interagency e-mail communications between HHS attorneys and Department of Justice attorneys concerning a draft opinion on Sex Trafficking, AIDS Act grant restrictions.

Page 2 – Ms. Rebekah Diller

Further other withheld material contains confidential attorney-client communications for the purpose of seeking legal advice from DOJ regarding proposed HHS trafficking grant announcements. Finally, the remaining withheld material consists of a draft letter from the General Counsel of HHS to DOJ concerning implementation of the Global AIDS Act and the TVPRA.

In addition, all reasonably segregable, non-exempt information has been released. My office reviewed each page of every document withheld for segregability, and determined that no documents contained releasable information, which could be reasonably segregated from the nonreleasable portions. Non-exempt information amounts to essentially meaningless words and phrases.

Also, please be reminded that all documents originating from the DOJ, including any OLC guidance, have been referred to the DOJ for determination of release and direct reply to you. And, lastly, the majority of the withheld material predates the OLC guidance concerning the Global Aids Act.

This letter constitutes the final decision of the Department in this matter. If you wish, you may seek judicial review in the district court of the United States in the district in which you reside, at your principal place of business, or in which the agency records are located, or in the District of Columbia.

Sincerely yours,

A handwritten signature in black ink that reads "CH Pearson". The initials "CH" are written in a large, stylized cursive font, and "Pearson" is written in a smaller, more standard cursive font.

Christina H. Pearson
Deputy Assistant Secretary
for Public Affairs (Media)

Exhibit 5



U.S. Department of Justice
Office of Legal Counsel

Washington, D.C. 20530

June 21, 2007

Rebekah Diller
Brennan Center for Justice
New York University School of Law
161 Avenue of the Americas
12th Floor
New York, NY 10013

Dear Ms. Diller:

The Department of Health and Human Services referred to this Office 17 documents that are responsive to your July 14, 2005 Freedom of Information Act request. Enclosed is one of the documents. We are withholding the remaining documents pursuant to Exemption Five of the Act, 5 U.S.C. § 552(b)(5). The withheld documents are protected by the deliberative process and attorney-client privileges and are not appropriate for discretionary release.

If you are not satisfied with my action on this request, you may administratively appeal this denial by writing to the Director, Office of Information and Privacy, United States Department of Justice, Washington, D.C. 20530-0001, within 60 days of your receipt of this letter. Both the envelope and the letter should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Paul P. Colborn
Special Counsel

Enclosure



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 24, 2003

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2620, the "Trafficking Victims Protection Reauthorization Act of 2003." We support reauthorization of this important program, which is aimed at strengthening our efforts to combat trafficking in persons. However, we have several concerns about the bill, particularly the way it would alter the current statutory standard for certifying trafficking victims as eligible to receive benefits and services, the need for confidentiality provisions in T visa applications, and a new private right of action provision. In addition, we recommend adding the new trafficking crimes as RICO predicates and providing for the death penalty in human trafficking cases where the death of a victim results.

Subsection 3(a): Border Interdiction

Subsection 3(a) would amend section 106 of the Trafficking Victims Protection Act of 2000 ("TVPA"), Pub. L. 106-386, Div. A, to require the President to make grants to non-governmental organizations ("NGOs") to fund training for trafficking survivors who, in turn, would "educate and train border guards and officials, and other local law enforcement officials. . . ." Specifically, this subsection would establish grants to monitor "the implementation of border interdiction programs, including helping in the identification of such victims"

While we support training border and local officials in the identification of trafficking victims, we believe that subsection 3(a) is unnecessary and would potentially undermine the ability of Federal law enforcement to conduct border interdiction. We would therefore urge striking this subsection from the bill. Border security and intelligence gathering are Federal law enforcement functions. The TVPA mandated training for border officials and other Federal law enforcement officers on the identification of and assistance to trafficking victims, and the U.S.

Post-It® Fax Note	7671	Date	2/11	# of pages	9
To	Paula Stannard	From	Laura Ashfield		
Co./Dept.		Co.			
Phone #		Phone #			
Fax #	690-7998	Fax #			

Government carries it out.¹ While NGOs have an important role to play in helping trafficking victims, it remains nonetheless the purview of Federal law enforcement, while carrying out their law enforcement duties, to identify victims at the border.

In addition, we do not believe that monitoring border interdiction programs is the most effective use of Federal funding. Because it is not always clear who at the border is a "trafficking victim," as a victim must be destined for an exploitative labor or commercial sexual situation in order to have been "trafficked," the money appropriated for interdiction programs would be better spent enhancing our official border control efforts and increasing our ability to investigate and prosecute human trafficking.

The provision does not clarify to what extent NGOs would monitor these programs or what authority NGOs would have to attempt to influence these programs. The lack of specificity makes it unclear as to how these functions would implicate the exercise of Federal law enforcement authority by civilians and/or local law enforcement officials. Additionally, it is not clear whether training will be provided to such organizations, and whether principles such as agency law and vicarious liability will apply to any functions performed by such organizations or local law enforcement.

We note that use of the term "transit shelter" implies that the victims are passing through the United States temporarily and will be returning to their countries of origin. This has not been the U.S. Government's experience with the majority of trafficking victims who have been identified. Most of them choose to access immigration relief available under the TVPA, rather than self-repatriation.

If Congress chooses to proceed with this provision despite our opposition, we suggest amending the section on border interdiction by inserting (in the bill, following the first occurrence of the word "interdiction" in the first sentence) ", including", thereby authorizing support to NGO programs, while not strictly limiting such programs solely to NGOs.

Subsection 3(a) also would "ensure that any program established under this subsection provides the opportunity for any trafficking victim who is freed to return to his or her previous residence if the victim so chooses." Guaranteeing immediate return could undermine law enforcement needs, which often will require the presence of the victim in the country as a material witness or for other purposes. In the event the Committee retains this subsection, we urge that it contain a mechanism to ensure that the interests of law enforcement be protected in any provision for the return of trafficking victims to their own or third countries.

¹The Departments of State and Justice articulated their plans for U.S. Government anti-trafficking training responsibilities in the Federal Register. See 66 Fed.Reg. 38514 (July 24, 2001).

Subsection 3(b): Termination of Certain Grants, Contracts and Cooperative Agreements

The State Department will be submitting a separate views letter on H.R. 2620, in which it will address concerns regarding subsection 3(b). We simply note that we defer to, and concur in, the State Department's position.

Subsections 4(a)(3) and 4(b)(1)(a): State and Local Law Enforcement

Subsection 4(a)(3) would broaden the availability of certification of trafficking victims (as would section 4(b)(1)(a) in similar ways) by permitting individuals to obtain certification as trafficking victims based on endorsements made by State and local law enforcement agencies (in addition to Federal law enforcement). We have reservations about altering the current statutory standard for the certification of victims to receive benefits and services.

In our experience, accurate certification requires some investigation to determine whether the victim actually has suffered as the result of conduct that satisfies the elements of the TVPA. This investigation is best performed by trained investigators who are familiar with the TVPA. Currently, the Attorney General is consulted on whether a trafficking victim is assisting in an investigation or prosecution of human trafficking and a Federal law enforcement agency is in charge of the investigation and prosecution. We are concerned that State and local agencies may lack the resources or expertise to conduct the necessary inquiry. Only two States (Washington and Texas) have passed anti-trafficking laws. Hence, the vast majority of State and local law enforcement officials do not have the jurisdiction to investigate human trafficking. It is unclear whether State and local officials could determine that victims were cooperating with the investigation or prosecution of human trafficking, because the investigation would most likely be Federal. Further confusion may arise due to overlapping jurisdiction in cases in which State and local officials could be investigating activity that might constitute human trafficking under the Federal definition but that under State law would violate only non-trafficking laws, such as kidnaping.

We do not believe that these changes would result in substantial benefits in enforcing the anti-trafficking laws. Moreover, we are concerned about forcing the Department of Health and Human Services, when certifying trafficking victims, to reconcile possibly conflicting factual conclusions made by various Federal, State and local law enforcement authorities. For example, an individual might be cooperating with local law enforcement in a human trafficking investigation, but the Federal prosecutors, who are investigating the underlying activities, might have information that the victim does not meet the definition of a victim of a "severe form of trafficking in persons," the statutory standard for receipt of benefits. We note that the bill would continue to require the Secretary of Health and Human Services to consult with the Attorney General in making trafficking victim certifications, which we strongly support. Continuing to limit the endorsements to Federal law enforcement is more efficient and ensures uniformity in determining whether victims are cooperating with (the likely) Federal investigation or

prosecution.

Congress may be looking to the Battered Immigrant Women Protection Act of 2000, §1512 (regarding the U visa), Pub. L. 106-386, Div. B., Tit. V, as a model for allowing Federal, State or local officials to determine victimization and cooperation. Unlike that Act, where crimes related to battery are also crimes at the State level, enforcement against human trafficking remains predominantly a Federal sphere of activity. In many cases, it may be easier for State and local law enforcement to identify a crime that also violates State law than it would be to identify human trafficking. Therefore, we do not believe the U visa to be an analogous situation or a valid model to follow in trafficking cases.

We also are wary that this subsection would create the potential for forum shopping. We already are aware of persons who claim to be victims contacting multiple Federal agencies in the hope that one of them will support that person's request for certification from the Department of Health and Human Services. Extending the authority to determine that an individual meets one of the key criteria for certification to the 17,000 State and local law enforcement agencies in the country will exacerbate this situation. Under current law, Federal law enforcement analyzes claims of victimization and cooperation with law enforcement and ensures that certification is requested for legitimate, cooperating victims, so that such victims can receive the benefits mandated by the TVPA.

We believe this provision would cause confusion and potentially place Federal law enforcement against State and local law enforcement in determinations regarding cooperation in what is likely to be a Federal preserve.

Subsection 4(a)(4): Private Right of Action

The Department of Justice opposes the private right of action that would be established by subsection 4(a)(4), because it is unnecessary and could be accomplished by amending the Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. §§ 1589 - 1594).

Creation of a private right of action is a complex undertaking that should be approached only after careful consideration of collateral consequences and the appropriate standard for establishing a civil violation. It is common for civil rights violations to give rise to both civil and criminal sanctions. While these arrangements have produced some complexity in criminal prosecutions, Congress has concluded that the additional enforcement activity resulting from private civil actions is worthwhile. However, many such statutory schemes establish different elements for civil and criminal violations. If Congress believes that a civil action for human trafficking might be appropriate, it should consider in depth the conduct that should trigger a civil violation and the processes that would be helpful in protecting criminal enforcement.

We note that the amendment to the RICO Act included in H.R. 2620 would allow civil RICO claims for human trafficking, which may cover the universe of civil proceedings Congress

is intending to extend to trafficking victims.

The creation of a federal civil remedy, one that would include treble damages, is best accomplished through the amendment to RICO. If the purpose is to establish a new Federal tort, we question the need for it. The entire range of trafficking behaviors is already captured under State tort law, under which a victim may already recover. We do not see a need to recreate such a scheme at the Federal level.

If Congress concludes that a private right of action beyond RICO is warranted in these circumstances, we suggest several improvements to this subsection. The subsection does not indicate who can be sued. For example, the class of defendants needs to be defined. Foreign governments with lax border enforcement policies could be called into court under the provision, as could anyone linked to the trafficking. Even prosecutors could face a civil suit if a trafficking victim believed that the prosecutor did not pursue the trafficking prosecution with sufficient diligence. Presumably the traffickers who knew (or ought to have known) about the victim's plight would be the intended class of defendants.

The subsection should stay all pending civil actions in the wake of a criminal prosecution. Notably, in the context of 18 USC § 2255 ("civil remedy for personal injuries"), all civil actions are stayed pending the completion of a criminal action. See also 18 USC § 3509(k) ("child victims' and child witnesses' rights") ("If, at any time that a cause of action for recovery of compensation for damage or injury to . . . a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action. . .").

Without delineating who can be sued and whether the suit would be stayed until a prosecution was complete, this provision would provide unbridled discretion to trafficking victims to sue whomever they feel has victimized them and could hinder prosecutors' abilities to try a case unfettered by the complications of civil discovery. While perhaps unlikely, this provision could become an incentive for victims to skip criminal prosecution and go directly to Federal court to sue their traffickers for damages. We believe that prosecutions should take priority over civil redress and that prosecutions should be complete prior to going forward with civil suits.

Subsection 4(c): Waiver of Public Charge Ground for Inadmissibility

It is not clear what benefits would accrue from the amendments subsection 4(c) would make to § 214(n) of the Immigration and Nationality Act (INA) to disallow consideration of the "public charge" grounds for inadmissibility to the United States based on an approved T visa. The TVPA allows the Attorney General (now the Secretary of Homeland Security) to grant waivers generously for the public charge grounds of inadmissibility under § 212(d) of the INA and does not require that the public charge activity be linked to the trafficking victimization (as it did with regard to the criminal grounds, see § 212(d)(13)(B)(ii)). That having been said, we

believe the drafters probably intended to amend § 212(d)(13)(B)(i) to require DHS to waive the public charge ground in determining whether to grant the T visa application, rather than subsection 214(n).

Subsection 4(c): Penalties for Unlawful Disclosure of Information

We strongly oppose the new provisions governing confidentiality of T visa applications, and consequent penalties for unlawful disclosure of information, as unnecessary and inappropriate. Section 222(f) of the Immigration and Nationality Act already deems as confidential (with certain exceptions) information related to the issuance or denial of visas.

We are unaware of any inappropriate disclosures of information during the T visa process. That said, this provision does appear to preclude Federal law enforcement officials from reviewing T visa applications for the purpose of investigating or prosecuting human trafficking crimes. Proposed INA subsection 214(n)(5) states that "in no case" may DHS or Department of State officials "permit use by, or disclosure to, anyone, other than a sworn officer or employee of one of such Departments for legitimate Department purposes, of any information that relates to an alien" who has filed a T visa application.

This provision has the potential to derail our prosecutions when T visa applicants are prosecution witnesses, given prosecutors' discovery responsibilities. There is language in subparagraph (n)(5)(D) that may cover prosecutors' discovery obligations ("may each provide, in each Secretary's discretion, for the disclosure of information described in subparagraph (A) to law enforcement officials to be used solely for a legitimate law enforcement purpose" [followed by a series of examples unrelated to prosecutors' discovery obligations]). However, it is not clear that this would allow for disclosure to defense counsel. And if it does not, then it might result in dismissal of the indictment because prosecutors could not comply with disclosure obligations. Moreover, it is unclear whether such a provision would require regulations to be issued by DHS or the State Department, that could potentially affect prosecutors' abilities to meet discovery obligations.

This provision does not appear to permit compliance with a judge's order to produce certain "confidential" information. Subparagraph (B) states "Subparagraph (A) shall not be construed as preventing disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information." This language appears to provide for review of records in the case of judicial review of the applications, but not with regard to other forms of judicial requests.

Finally, these confidentiality provisions allow a penalty of \$5,000 for each disclosure. We believe it unwise to subject prosecutors (or DHS or State Department personnel who allow them access) to these sanctions if they legitimately disclose information in the course of a prosecution that is not deemed to be a "law enforcement purpose."

If this provision is to remain, in carrying out the certification responsibilities in section 107(b)(1)(E) of the TVPA, the Department of Health and Human Services must be able to receive information from DHS regarding a person's bona fide application for a T visa. We recommend that a new subparagraph (I) be added to section 214(n)(5) of the Immigration and Nationality Act, as added by the bill. The new subparagraph would read as follows:

"(I) The Secretary of Homeland Security may disclose information described in subparagraph (A) to the Department of Health and Human Services for the purposes of implementing section 107(b)(1)(E) of the Trafficking Victims Protection Act of 2000."

In summary, provisions and safeguards exist for sharing visa information for routine law enforcement activity. The provisions of this subsection would impede domestic and international criminal investigations to identify and gather evidence against traffickers.

Section 5: Enhancing Prosecutions of Traffickers (18 USC Amendments)

Subsection 5(a) would extend the jurisdictional nexus of 18 U.S.C. § 1591 to include foreign commerce and the special maritime jurisdiction of the United States; these changes are technical fixes to the original TVPA. We welcome these jurisdictional changes that will enhance prosecutors' ability to bring human trafficking cases.

Trafficking Crimes as RICO Predicates

We support the inclusion of human trafficking crimes as RICO predicates. These crimes occasionally are perpetrated by organized groups that RICO was intended to target. Indeed, the RICO predicate list in 18 U.S.C. § 1961(1) includes various offenses that overlap with human trafficking offenses, including the substantive offenses in the peonage and slavery chapter of the criminal code (18 U.S.C. §§ 1581-88) and the main prostitution offenses (18 U.S.C. §§ 2421-24). This existing offense coverage under RICO is useful. Furthermore, we believe adding human trafficking offenses to RICO's coverage would prove to be beneficial.

We would suggest two changes to the RICO section as currently drafted. In section 5(b), which amends 18 U.S.C. § 1961(1) (definition of "racketeering activity") by adding the three criminal offenses related to trafficking in persons, we suggest that the amendatory language be inserted in section 1961(1) after "sections 1581-1588 (relating to peonage and slavery)," instead of after "murder-for-hire)," as proposed. The offenses that define "racketeering activity" should be placed in numerical order and with offenses in the same chapter of title 18 for easy reference. As proposed, the three offenses found in Chapter 77 (peonage and slavery) of title 18 have been inexplicably inserted in the list of statutes without consideration of their subject matter. Instead of being inserted to follow other offenses in Chapter 77, they have been inserted after "section 18 U.S.C. 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire)," an offense in Chapter 95 of title 18. We would also suggest that the Chapter 77 offenses be listed together. Therefore section 5(b) would now read:

"(b) **DEFINITION OF RACKETEERING ACTIVITY.**—Section 1961(1) of title 18, United States Code, is amended by striking 'sections 1581-1588 (relating to peonage and slavery)' and by inserting after 'section 1546 (relating to fraud and misuse of visas, permits, and other documents)' the following: "section 1581-1591 (relating to peonage, slavery, and trafficking in persons.".

Title of Chapter 77

As a final edit to Chapter 77, we would suggest adding "trafficking in persons" to its title, which would now read "CHAPTER 77—PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS". Parallel edits would also have to be made to the "Title 18 CRIMES AND CRIMINAL PROCEDURES" list of "PART 1—CRIMES".

Death Penalty for Trafficking Crimes

Questions also have arisen regarding the justification for the discrepancy between alien smuggling crimes and human trafficking crimes with regard to death penalty eligibility. Because we do not see a logical justification for the discrepancy, we support equalizing the penalties between the two. Therefore, we would suggest that this bill include amended criminal provisions extending death penalty eligibility to the relevant human trafficking crimes that result in the deaths of trafficking victims, namely 18 U.S.C. §§ 1581, 1583, 1584, 1587, 1589, 1590, and 1591. We recognize that these provisions would have to interact with 18 U.S.C. § 3591 ("sentence of death").

Subsection 7(7): Restriction on Organizations

While we are not prepared to take the position that subsection 7(7) (proposed section 113(g)(2) of the TVPA) is unconstitutional, we do think that it raises serious First Amendment concerns and may not withstand judicial scrutiny. We therefore recommend that this provision be struck from the bill.

The Federal Government may, consistent with the First Amendment, prohibit private organizations from using Federal funds to promote, support, or advocate the legalization or practice of prostitution. *See Rust v. Sullivan*, 500 U.S. 173, 196-198 (1991). There is substantial doubt, however, as to whether the Federal Government may restrict a domestic grant recipient participating in a Federal anti-trafficking program from using its own private, segregated funds to promote, support, or advocate the legalization or practice of prostitution, even if such a restriction applies only to those grant recipients providing assistance to victims of severe forms of trafficking. *See Rust*, 500 U.S. at 197; *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984). As a result, because this provision of H.R. 2620 would, in effect, prevent any organization receiving Federal funds to implement a program targeting victims of severe forms of trafficking from using its own private funds to promote, support, or advocate the legalization or practice of prostitution, we believe that there is serious doubt as to whether that provision

would survive judicial scrutiny if challenged in court. In particular, we note that the prohibition on grant recipients using their own private, segregated funds to promote the legalization of prostitution, as opposed to the practice of prostitution, would be particularly vulnerable to legal challenge.

* * * * *

Thank you for the opportunity to comment on this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Exhibit 6

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

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New York, New York 10013
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www.brennancenter.org

August 7, 2007

Via Certified Mail, Return Receipt Requested

Director, Office of Information and Privacy
United States Department of Justice
Washington, D.C. 20530-0001

Freedom of Information Act Appeal (HHS Case No. 2005-0988mb)

Dear Director:

This is an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, concerning the refusal by the United States Department of Justice ("DOJ") to disclose documents within its control.

By letter dated July 14, 2005, I requested a copy of "any and all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice ("OLC") to any representative of [the Department of Health and Human Services ("HHS")] prior to September 20, 2004, relating to the enforcement of 22 U.S.C. § 7631(f) and 22 U.S.C. § 7110(g)(2), provisions which require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution." The provisions are contained, respectively, in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA").

By letter dated March 7, 2007, HHS stated that it had located in its search 177 pages of documents that originated within DOJ and that HHS was therefore referring my request for those records to DOJ. By letter dated June 21, 2007, DOJ stated that HHS had referred to DOJ 17 documents responsive to my July 14, 2005 FOIA request and that it was withholding all but one of those documents pursuant to Exemption Five of FOIA, 5 U.S.C. § 552(b)(5). The letter failed to identify the responsive documents that DOJ withheld. Copies of my July 14, 2005 FOIA request to HHS, HHS's March 7, 2007 letter and DOJ's June 21, 2007 letter are enclosed for your convenience.

DOJ's refusal to disclose the requested items violates FOIA, 5 U.S.C. § 552 *et seq.* First, DOJ has failed to release even a "reasonably segregable" portion of the responsive documents, as required by 5 U.S.C. § 552(b).

Director, Office of Information and Privacy, DOJ

August 7, 2007

Page 2

Second, because the advice of the OLC was incorporated into government policy, the requested prior guidance issued by the OLC is not protected from disclosure by any of the privileges that might typically attach to inter- or intra- agency guidance issued by the OLC, and must therefore be made available pursuant to a request under FOIA. See *Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350 (2d Cir. 2005); see also 5 U.S.C. § 552(a)(2)(B).

It is evident that the conclusions reached by the OLC regarding this matter were incorporated into government policy for implementing the Global AIDS Act. For example, HHS incorporated OLC's guidance into the conditions it placed on prospective Global AIDS Act grantees. Similarly, USAID incorporated OLC's guidance into its policies, including Acquisition and Assistance Policy Directive ("AAPD") 04-04 (Revision 2), Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 -- Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking, issued July 16, 2004. Moreover USAID explicitly referred to a draft opinion from the OLC in official guidance, stating:

The Office of Legal Counsel, U.S. Department of Justice in a draft opinion determined that [the Global AIDS Act's anti-prostitution provision] only may be applied to foreign non-governmental organizations and public international organizations because of the constitutional implications of applying it to U.S. organizations.

USAID, Guidance on the Definition and Use of the Child Survival and Health Programs Fund and the Global HIV/AIDS Initiative Account: FY2004 Update (July 22, 2004), at 35 n.10.

Because we do not agree that the requested materials are exempt from disclosure, we ask that the denial of the FOIA request be reversed. In the event this appeal is denied, then please provide a written response describing the reasons for the denial, and names and titles of each person responsible for the denial. I await your prompt reply.

Sincerely,



Rebekah Diller
Counsel

Enclosures

Exhibit 7



U.S. Department of Justice
Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

SEP 25 2007

Ms. Rebekah Diller
Brennan Center for Justice
12th Floor
161 Avenue of the Americas
New York, NY 10013

Re: Appeal No. 07-2177
KAH:CG

Dear Ms. Diller:

You appealed from the action of the Office of Legal Counsel (OLC) on your request for access to records pertaining to OLC's guidance to the United States Department of Health and Human Services prior to September 20, 2004, regarding 22 U.S.C. § 7631(f) and 22 U.S.C. § 7110(g)(2).

After carefully considering your appeal, I am affirming OLC's action on your request. OLC properly withheld certain information that is protected from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the attorney work-product privilege.

If you are dissatisfied with my action on your appeal, you may seek judicial review in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Janice Galli McLeod
Associate Director

Exhibit 8

July 14, 2005

Via Certified Mail

Elizabeth Farris
Supervisory Paralegal
Office of Legal Counsel
Room 5515, 950 Pennsylvania Ave., NW
Department of Justice
Washington, DC 20530-0001

Freedom of Information Act Request

Dear Ms. Farris:

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Department of Justice regulations relating to requests for disclosure of records, 28 C.F.R. §§ 16.1 to 16.11.

We are seeking a copy of any and all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice ("OLC") to any representative of either the U.S. Agency for International Development ("USAID") or the Department of Health and Human Services ("HHS") prior to September 20, 2004, relating to the enforcement of 22 U.S.C. § 7631(f) and 22 U.S.C. § 7110(g)(2), provisions which require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution. The provisions are contained, respectively, in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA").

In a letter dated September 20, 2004, from Daniel Levin, Acting Assistant Attorney General, to the Honorable Alex M. Azar, II, General Counsel of HHS, the OLC explicitly referred to and withdrew earlier "tentative advice" that these so-called "organization restrictions" could only be applied to foreign organizations acting overseas. A comparison of requests for proposals and applications issued by HHS both prior and subsequent to this letter demonstrate that HHS incorporated OLC's guidance into the conditions it placed on prospective Global AIDS Act grantees. Similarly, USAID incorporated OLC's guidance into its policies, including Acquisition and Assistance Policy Directive ("AAPD") 04-04 (Revision 2), Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 -- Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking, issued July 16, 2004.

For these and other reasons, it is evident that the conclusions reached by the OLC regarding this matter have been incorporated into government policy for implementing the

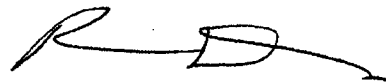
Elizabeth Farris
July 14, 2005
Page 2

Global AIDS Act. Because the advice of the OLC has been incorporated into government policy, the requested prior guidance issued by the OLC is not protected from disclosure by any of the privileges that might typically attach to inter- or intra- agency guidance issued by the OLC, and must therefore be made available pursuant to a request under FOIA. *See Nat'l Council of La Raza v. Dept. of Justice*, --- F.3d ----, 2005 WL 1274270 (2d Cir. 2005); *see also* 5 U.S.C. § 552(a)(2)(B).

We agree to pay any fees for work done in responding to this request, as prescribed by 28 C.F.R. §§ 16.3(c), 16.11(e), so long as the fees do not exceed \$25.00. If you estimate that the fees will exceed \$25.00, please notify us, and we will decide at that time whether we will request the additional work.

Your attention to this request is appreciated, and I look forward to hearing from you within twenty (20) days. 5 U.S.C. § 552(a)(6)(A). Should you have any questions regarding this request, please contact me at your earliest convenience at the address below or by telephone at (212) 992-8635.

Sincerely,



Rebekah Diller
Associate Counsel

Exhibit 9



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

September 9, 2005

Rebekah Diller
Brennan Center for Justice
161 Avenue of the Americas
12th Floor
New York, New York 10013

Dear Ms. Diller:

This responds to your Freedom of Information Act request dated July 14, 2005. We have searched the files of the Office of Legal Counsel and have found one document that is responsive to your request. We are withholding the document pursuant to Exemption Five of the Act, 5 U.S.C. § 552(b)(5). It is protected by the deliberative process and attorney client privileges and not appropriate for discretionary release.

If you are not satisfied with my action on this request, you may appeal by writing to the Co-Director, Office of Information and Privacy, United States Department of Justice, Washington, D.C. 20530, within 60 days from the date of this letter. Both the envelope and letter should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Paul P. Colborn
Special Counsel
Office of Legal Counsel

Exhibit 10

November 3, 2005

Via Overnight Mail

Co-Director
Office of Information and Privacy
United States Department of Justice
Flag Building, Suite 570
Washington, DC 20530-0001

Freedom of Information Act Appeal

Dear Co-Director:

This is an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., concerning the refusal by the Department of Justice ("DOJ" or "the Department") to disclose documents within its control.

By letter dated July 14, 2005, I requested a copy of "any and all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice ("OLC") to any representative of either the U.S. Agency for International Development ("USAID") or the Department of Health and Human Services ("HHS") prior to September 20, 2004, relating to the enforcement of 22 U.S.C. § 7631(f) and 22 U.S.C. § 7110(g)(2), provisions which require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution." The provisions are contained, respectively, in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA").

By letter dated September 9, 2005, DOJ stated that it had found one responsive document in the files of the Office of Legal Counsel but that it was withholding the document pursuant to Exemption Five of FOIA, 5 U.S.C. § 552(b)(5), for the stated reason that "[i]t is protected by the deliberative process and attorney client privileges and not appropriate for discretionary release." A copy of my FOIA request and DOJ's subsequent denial is enclosed for your convenience.

The Department's refusal to disclose the requested item violates FOIA, 5 U.S.C. § 552 et seq. Because the advice of the OLC has been incorporated into government policy, the requested prior guidance issued by the OLC is not protected from disclosure by any of the privileges that might typically attach to inter- or intra- agency guidance issued by the OLC, and must therefore

Co-Director, Office of Information and Privacy
November 3, 2005
Page 2

be made available pursuant to a request under FOIA. *See Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350 (2d Cir. 2005); *see also* 5 U.S.C. § 552(a)(2)(B).

It is evident that the conclusions reached by the OLC regarding this matter have been incorporated into government policy for implementing the Global AIDS Act. For example, HHS incorporated OLC's guidance into the conditions it placed on prospective Global AIDS Act grantees. Similarly, USAID incorporated OLC's guidance into its policies, including Acquisition and Assistance Policy Directive ("AAPD") 04-04 (Revision 2), Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking, issued July 16, 2004. Moreover USAID explicitly referred to a draft opinion from the OLC in official guidance, stating:

The Office of Legal Counsel, U.S. Department of Justice in a draft opinion determined that [the Global AIDS Act's anti-prostitution provision] only may be applied to foreign non-governmental organizations and public international organizations because of the constitutional implications of applying it to U.S. organizations.

USAID, Guidance on the Definition and Use of the Child Survival and Health Programs Fund and the Global HIV/AIDS Initiative Account: FY2004 Update (July 22, 2004), at 35 n.10

Because we do not agree that the requested materials are exempt from disclosure, we ask that the Office of Information and Privacy reverse the denial of the FOIA request. In the event this appeal is denied, the please provide a written response describing the reasons for the denial, and names and titles of each person responsible for the denial. I await your prompt reply.

Sincerely,



Rebekah Diller
Associate Counsel

Enclosures

Exhibit 11



U.S. Department of Justice
Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

SEP 18 2006

Ms. Rebekah Diller
Brennan Center for Justice
12th Floor
161 Avenue of the Americas
New York, NY 10013

Re: Appeal No. 06-0416
KDC:ALB:CL

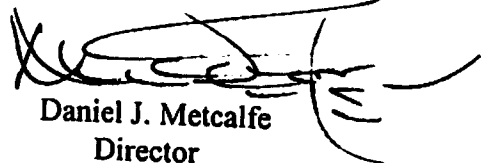
Dear Ms. Diller:

You appealed from the action of the Office of Legal Counsel (OLC) on your request for copies of any guidance provided by OLC prior to September 20, 2004 pertaining to the enforcement of 22 U.S.C. §§ 7110(g)(2) and 7631(f).

After carefully considering your appeal, I am affirming the action of OLC on your request. OLC properly withheld the information your requested because it is protected from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the attorney-client privilege.

If you are dissatisfied with my action on your appeal, you may seek judicial review in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Daniel J. Metcalfe
Director

Exhibit 12

BRENNAN
CENTER
FOR JUSTICE

March 12, 2009

Elizabeth Farris,
Supervisory Paralegal
Office of Legal Counsel
Room 5515, 950 Pennsylvania Avenue, NW
Department of Justice
Washington, DC 20530-0001

Brennan Center for Justice
at New York University School of Law

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New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

Freedom of Information Act Request

Dear Ms. Farris:

This is a renewed request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for documents from the Office of Legal Counsel for the Department of Justice ("OLC"). Our resubmission of this request is prompted by President Obama's injunction that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails." 74 Fed. Reg. 4683 (Jan. 26, 2009). It is our hope that, in accordance with the spirit of that injunction, your agency will reconsider its previous refusal to release the requested documents.

In particular, we are seeking a copy of any and all documents containing guidance from OLC to any representative of either the United States Agency for International Development ("USAID") or the Department of Health and Human Services ("HHS") prior to September 20, 2004, relating to the enforcement of 22 U.S.C. § 7631(f) and 22 U.S.C. § 7110(g)(2), provisions that require organizations receiving funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution. The provisions are contained, respectively, in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA").

We previously submitted this request to OLC, USAID and HHS. By letter dated September 9, 2005, OLC stated that it had found one document responsive to our request but withheld the document pursuant to Exemption Five of FOIA, 5 U.S.C. § 552(b)(5). The Brennan Center appealed that denial to the DOJ Office of Information and Privacy (Appeal No. 06-0416), which denied the appeal by letter dated September 18, 2006.

Separately, by letter dated March 7, 2007, HHS stated that it had located in its search 177 pages of documents that originated within DOJ and that HHS was therefore referring my request for those records to OLC. By letter dated June 21, 2007, OLC stated that HHS had referred to OLC 17 documents responsive to my request and that it was withholding all but one of those documents pursuant to Exemption Five of FOIA, 5 U.S.C. § 552(b)(5). The letter failed to identify the responsive documents that were withheld. The Brennan Center then appealed this denial to the DOJ Office of Information and Privacy (Appeal 07-2177), which rejected the appeal by letter dated September 25, 2007.

For your consideration, we maintain that DOJ's refusal to disclose the requested items violates FOIA, 5 U.S.C. § 552 *et seq.* First, DOJ has failed to release even a "reasonably segregable" portion of the responsive documents, as required by 5 U.S.C. § 552(b). Second, because the advice of the OLC was incorporated into government policy, the requested prior guidance issued by the OLC is not protected from disclosure by any of the privileges that might typically attach to inter- or intra- agency guidance issued by the OLC, therefore it must be made available pursuant to a request under FOIA. *See Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350 (2d Cir. 2005); *see also* 5 U.S.C. § 552(a)(2)(B).

It is evident that the conclusions reached by the OLC regarding this matter were incorporated into government policy for implementing the Global AIDS Act. HHS incorporated OLC's guidance into the conditions it placed on prospective Global AIDS Act grantees, for example, and USAID incorporated OLC's guidance into several of its policies. (Acquisition and Assistance Policy Directive ("AAPD") 04-04 (Revision 2), Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 -- Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking, issued July 16, 2004.¹) USAID also explicitly referred to a draft opinion from the OLC within its official guidance, stating:

The Office of Legal Counsel, U.S. Department of Justice in a draft opinion determined that [the Global AIDS Act's anti-prostitution provision] only may be applied to foreign non-governmental organizations and public international organizations because of the constitutional implications of applying it to U.S. organizations.

USAID, Guidance on the Definition and Use of the Child Survival and Health Programs Fund and the Global HIV/AIDS Initiative Account: FY2004 Update (July 22, 2004), at 35 n.10.²

Given the requirements of the FOIA statute, precedent on releasing documents with OLC advice incorporated into government policy, and the vital importance of an open, transparent federal government, we look forward to your prompt attention to this request. Should you have any questions regarding this request, please contact me at your earliest convenience at (212) 992-8635.

Sincerely,



Rebekah Diller
Deputy Director

¹ Available at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd04_04.pdf.

² Available at <http://www.usaid.gov/policy/ads/200/200mab.pdf>.

Exhibit 13

July 14, 2005

Via Certified Mail

JM Paskar, Chief
Information & Records Division
Office of Administrative Services
U.S. Agency for International Development
Room 2.07C, RRB
Washington, DC 20523-2701

Freedom of Information Act Request

Dear Ms. Paskar:

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the U.S. Agency for International Development ("USAID") regulations relating to requests for disclosure of records, 22 C.F.R. §§ 212 et seq.

We are seeking a copy of any and all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice ("OLC") to any representative of USAID prior to September 20, 2004, relating to the enforcement of 22 U.S.C. § 7631(f) and 22 U.S.C. § 7110(g)(2), provisions which require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution. The provisions are contained, respectively, in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA").

The conclusions reached by the OLC regarding this matter were incorporated into USAID policy for implementing the Global AIDS Act. This is demonstrated, for example, by USAID's Acquisition and Assistance Policy Directive ("AAPD") 04-04 (Revision 2), Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 -- Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking, issued July 16, 2004.

Because the advice of the OLC has been incorporated into government policy, the requested prior guidance issued by the OLC is not protected from disclosure by any of the privileges that might typically attach to inter- or intra- agency guidance issued by the OLC, and must therefore be made available pursuant to a request under FOIA. *See Nat'l Council of La Raza v. Dept. of Justice*, --- F.3d ----, 2005 WL 1274270 (2d Cir. 2005); *see also* 5 U.S.C. § 552(a)(2)(B).

JM Paskar
July 14, 2005
Page 2

We agree to pay any fees for work done in responding to this request, as prescribed by 22 C.F.R. §§ 212.35, pursuant to the fee schedule for "All other requesters." *Id.* § 212.35(b)(4).

Your attention to this request is appreciated, and I look forward to hearing from you within twenty (20) days. 5 U.S.C. § 552(a)(6)(A). Should you have any questions regarding this request, please contact me at your earliest convenience at the address below or by telephone at (212) 992-8635.

Sincerely,



Rebekah Diller
Associate Counsel

Exhibit 14



USAID

FROM THE AMERICAN PEOPLE

Ms. Rebekah Diller
Brennan Center for Justice
161 Avenue of the Americas
12th Floor
New York, NY 10013

FEB 28 2007

RE: FOI-245/05

Dear Ms. Diller:

This responds to your Freedom of Information Act (FOIA) request for "a copy of any and all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice to any representative of USAID prior to September 20, 2004, relating to the enforcement of 22 U.S.C. Section 7631(f) and 22 U.S.C. Section 7110(g)(2), provisions which require organizations that received funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution." We regret the delay in responding to your request.

The documents identified as responsive to your request are attorney-client privileged and cannot be released. The FOIA exempts from disclosure documents protected by the Attorney-Client Privilege (FOIA Exemption 5). The privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.

You have a right to appeal the above withholding. Your appeal must be received in writing within 30 days from the date of this letter. To be considered and official appeal, your letter must be addressed as follows:

Director, Office of Administrative Services
U.S. Agency for International Development
Room 4.6B, Ronald Reagan Building
Washington, DC 20523-4601.

Both the appeal and the envelope must be plainly marked "FOIA Appeal." Please include your FOIA tracking number, **FOI-245/05**, in your letter.

Sincerely,

J.M. Paskar, Chief
Information and Records Division
Office of Administrative Services

Exhibit 15

BRENNAN
CENTER
FOR JUSTICE

*Brennan Center for Justice
at New York University School of Law*

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

March 28, 2007

Via Overnight Mail

Director, Office of Administrative Services
U.S. Agency for International Development
Room 4.6B, Ronald Reagan Building
Washington, DC 20523-4601

Re: Freedom of Information Act Appeal (FOI-245/05)

Dear Director:

This is an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., concerning the refusal by the United States Agency for International Development ("USAID") to disclose documents within its control.

By letter dated July 14, 2005, I requested a copy of "any and all documents containing guidance provided by the Office of Legal Counsel of the Department of Justice ("OLC") to any representative of USAID prior to September 20, 2004, relating to the enforcement of 22 U.S.C. § 7631(f) and 22 U.S.C. § 7110(g)(2), provisions which require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution." The provisions are contained, respectively, in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act") and the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA").

By letter dated February 28, 2007, USAID stated that "the documents identified as responsive to your request are attorney-client privileged and cannot be released" and that it was withholding the documents pursuant to Exemption Five of FOIA, 5 U.S.C. § 552(b)(5). The letter failed to identify the responsive documents or state how many responsive documents had been located. A copy of my FOIA request and USAID's subsequent denial is enclosed for your convenience.

USAID's refusal to disclose the requested items violates FOIA, 5 U.S.C. § 552 et seq. First, USAID has failed to even estimate the volume of the responsive documents that it is withholding as required by 5 U.S.C. § 552(a)(6)(F). Second, USAID has failed to

BRENNAN CENTER FOR JUSTICE

Director, Office of Administrative Services, USAID

March 28, 2007

Page 2

release even a "reasonably segregable" portion of the responsive documents, as required by 5 U.S.C. § 552(b).

Third, because the advice of the OLC has been incorporated into government policy, the requested prior guidance issued by the OLC is not protected from disclosure by any of the privileges that might typically attach to inter- or intra- agency guidance issued by the OLC, and must therefore be made available pursuant to a request under FOIA. *See Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350 (2d Cir. 2005); *see also* 5 U.S.C. § 552(a)(2)(B).

It is evident that the conclusions reached by the OLC regarding this matter have been incorporated into government policy for implementing the Global AIDS Act. For example, HHS incorporated OLC's guidance into the conditions it placed on prospective Global AIDS Act grantees. Similarly, USAID incorporated OLC's guidance into its policies, including Acquisition and Assistance Policy Directive ("AAPD") 04-04 (Revision 2), Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 -- Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking, issued July 16, 2004. Moreover USAID explicitly referred to a draft opinion from the OLC in official guidance, stating:

The Office of Legal Counsel, U.S. Department of Justice in a draft opinion determined that [the Global AIDS Act's anti-prostitution provision] only may be applied to foreign non-governmental organizations and public international organizations because of the constitutional implications of applying it to U.S. organizations.

USAID, Guidance on the Definition and Use of the Child Survival and Health Programs Fund and the Global HIV/AIDS Initiative Account: FY2004 Update (July 22, 2004), at 35 n.10.

Because we do not agree that the requested materials are exempt from disclosure, we ask that the denial of the FOIA request be reversed. In the event this appeal is denied, the please provide a written response describing the reasons for the denial, and names and titles of each person responsible for the denial. I await your prompt reply.

Sincerely,



Rebekah Diller
Counsel

Enclosures

EXHIBIT 16



USAID
FROM THE AMERICAN PEOPLE

JUN 5 2007

Rebekah Diller, Esq.
Brennan Center for Justice
New York University School of Law
161 Avenue of the Americas
New York, NY 10013

FOI - 245/05 (APPEAL)

Dear Ms. Diller:

This is in response to your March 28 appeal from our February 28 withholding of three documents totaling 58 pages. These documents were withheld under the "attorney-client privilege" of FOIA Exemption 5, 5 U.S.C. §552(b)(5).

We have carefully reviewed the points raised in your letter and believe that our decision to withhold the documents in question was proper and consistent with applicable law. Accordingly, your appeal is denied. We will continue to withhold the documents based on FOIA Exemption 5's "attorney-client privilege" and additionally its "deliberative process" privilege.

This action constitutes USAID's final decision in this matter. You are entitled, under 5 U.S.C. §552(a)(4)(B), to seek judicial review of this decision in the appropriate United States District Court.

Sincerely,

Roberto J. Miranda
Director of Administrative
Services