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Via mail and fax

January 26, 2012

Re: Clarified appeal from letter dated Jan. 25, 2012 pertaining to FOIA Request # F-00185-11,¹ including a request for reconsideration in the context of Executive Order 13595 of December 19, 2011, the State Department's "Views on conclusions and/or recommendations" to the UN Human Rights Council for the Universal Periodic Review of March 8, 2011 and UN Security Council Resolutions 1325, 1820, 1888, and 1960

Dear Dr. Shah, Ms. Gomer, Mr. Peevey, and all relevant FOIA Appeals Officers for USAID,

This letter raises issues of utmost gravity which extend far beyond the illegalities specific USAID's partial response received by the Global Justice Center (GJC), a legal non-profit organization, on December 15, 2011. We take the occasion of this appeal to set forth the

¹ USAID's partial response was dated December 12, 2011 and postmarked December 13, 2011 and received on December 15, 2011, the day which commences the thirty day appeal time under USAID FOIA regulations. 22 C.F.R. 212.36(c).

context in which USAID's actions must be reviewed, including U.S. foreign policy imperatives and *jus cogens* precepts of international law.

USAID has failed to turn over USAID documents, contracts, e-mail and memoranda requested by the GJC on May 5, 2011 with regard to US humanitarian aid for medical care and other services for girls and women subjected to rape as a weapon of war. Many of the documents requested involve USAID's policies and disbursements under U.S. appropriations for victims of torture. USAID's stonewalling on providing documents critical of the rights of women raped in armed conflicts, undermines the integrity of US foreign policy, encourages US non-compliance with Security Council resolutions, and covers up violations of the rights of women under the laws of war.

The May 5, 2011 FOIA request by GJC, is to inform its "August 12th Campaign," named after the anniversary of the Geneva Conventions. The "August 12th Campaign" comprises of a growing coalition of over 3,000 global organizations and the country of Norway, seeking an executive order from President Obama lifting the imposition of a "no abortion" clause on all humanitarian aid contracts which cover services for girls and women raped in armed conflict.

Accordingly, GJC's FOIA request, and this immediate appeal to a lesser extent, must be reviewed in the context of enforcing the rights of women raped in war, who are also classified as torture victims, to non-discriminatory medical care, including access to safe abortions. President Obama has made ensuring rights of women raped in armed conflict a central priority of US foreign policy, most recently underscoring this Administration's commitment by enacting Executive Order 13595 on Women, Peace and Security on December 19, 2011, which "represents a fundamental change in how the United States will approach its diplomatic, military and development-based support to women in areas of conflict;"² the related action plan includes proposed reforms in how humanitarian aid is provided.³

The need for transparency around US abortion restrictions on humanitarian aid is demonstrated in the media's attention to this matter. In a September 8, 2011 editorial, the New York Times urged President Obama to sign an executive order lifting the US abortion restrictions on humanitarian aid for victims, noting that girls and women impregnated by war rape in places like the Democratic Republic of Congo, Sudan, and Burma have absolute rights to non-discriminatory medical care are governed by common Article 3 of the Geneva Conventions.

²"FACT SHEET: The United States National Action Plan on Women, Peace, and Security," The White House, Office of the Press Secretary, December 19, 2011 at <http://www.whitehouse.gov/the-press-office/2011/12/19/fact-sheet-united-states-national-action-plan-women-peace-and-security>.

³United States National Action Plan on Women, Peace and Security, Dec. 2011, available at: http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf,

The continued delay by USAID undermines US compliance with its international obligations, including Security Council resolutions which mandate that states ensure that international humanitarian law is enforced for female survivors of rape in conflict situations, who Secretary of State Clinton describes as “war’s most vulnerable and violated victims.”⁴ Further, USAID flouts President Obama’s directives on open government and shields its own contracts and policies from view by unlawfully allowing “submitters,” i.e. organizations funded to provide care to torture victims, including the International Rescue Committee and the International Medical Corps, effectively “veto” GJC’s FOIA request. Additionally, all USAID policies and information on submitter delay times omitted from USAID’s FOIA compliance reports.⁵

Accordingly, the GJC requests that this appeal to the “partial response” received by GJC should also serve to trigger a broader review of USAID’s FOIA related pattern and practice, which reflect system-wide non-compliance with the its own FOIA guidelines as well as those issued by Attorney General Holder.

FOIA Appeal – FOIA Request #F-00185-11

1. FOIA #F-00185-11 was submitted by the Global Justice Center (GJC) to USAID on May 5, 2011, 180 days ago (as of January 26, 2012). (Exhibit 1)
2. The complete chronology that summarizes all communications that GJC has had with the USAID with regards to FOIA #F-00185-11 from May 5, 2011 to date. (Exhibit 3).
3. USAID has failed to turn over to the GJC any USAID humanitarian aid contract for medical care for war victims or any USAID internal documents on the matter. Nor has GJC received from USAID an index of documents to expect, a timeline of when documents can be expected, or any request from USAID FOIA to narrow the scope of the FOIA.
4. Due to this failure, the GJC does not have the vital and necessary information needed to fully analyze and disseminate information about the US abortion restrictions on foreign assistance, including with regard to possible breaches of the rights of war victims under the Geneva Conventions and customary international law.
5. Although USAID FOIA granted GJC’s request for expedited processing on May 19, 2011, USAID never intended to proceed expeditiously, warning GJC “...please be

⁴“Remarks on the Adoption of a United Nations Security Council Resolution to Combat Sexual Violence in Armed Conflict,” Remarks Hillary Rodham Clinton, United Nations Headquarters, New York City, September 30, 2009 at <http://www.state.gov/secretary/rm/2009a/09/130041.htm>.

⁵ See USAID, Chief FOIA Officer’s Report: Sean Carroll, Chief Freedom of Information Act Officer, March 8, 2011, available at: <http://www.usaid.gov/about/foia/reports/10officersreport.pdf> and USAID, Fiscal Year 2010 Annual FOIA report, available at: <http://www.usaid.gov/about/foia/reports/10report.pdf>.

aware there are other expedited requests ahead of yours. We will give priority as we can to your request as we do with the others.” USAID’s “as we can” condition to regulations governing FOIA is not legal. (Exhibit 4).

6. As of January 26, 2012, 170 days after USAID granted expedited processing, the GJC has only received only a “partial” response that consists of a heavily redacted and deficient version of one of the requested documents. (Exhibit 2).
7. The following four parts set forth the arguments for this appeal:
 - I. USAID’s failure to provide the requested documents within specified federal statutory and regulatory limits;
 - II. USAID’s failure to respond to the GJC’s requests for fee waiver request while stating it is charging fees to GJC in its partial response of December 12, 2011 and failure to honor the determination of expedited processing;
 - III. The deficiency of USAID’s partial response, dated December 12, 2011, including the failure to comply with FOIA guidelines on the submitter notification process and the deficient nature of the partial response; and
 - IV. USAID’s application of FOIA exemptions 5 U.S.C. § 552 (b)(4) to the Johns Hopkins 2002-2007 cooperative agreement (GPH-A-00-02-0003-00) violates US Law.
- I. USAID has failed to produce responsive documents or provide legally valid explanations for this failure, in violation of statutory and regulatory time limits.**
8. 5 U.S.C. § 522(a)(6)(A)(i), requires that an agency (here USAID) must “determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination.” Once a determination has been made, USAID FOIA regulations provide that “copies of the releasable documents will be made available promptly thereafter” 22 C.F.R. 212.34(a).
9. GJC submitted its FOIA request on May 5, 2011, USAID FOIA requested a clarification of this request and granted expedited processing on May 19, 2011, (Exhibit 4), and GJC replied to the request for clarification on May 23, 2011 (2 days after) (Exhibit 5).
10. USAID FOIA never responded to GJC’s FOIA request nor contacted GJC between its clarification request on May 19, 2011 and August 12, 2011 (57 days after the clarification was submitted). The August 12th communication from USAID was only made in response to GJC’s August 10, 2011 inquiry regarding the status of our

- request and merely stated that “this note acknowledges receipt of your inquiry...I will get back to you with details soon.” (Exhibit 6).
11. On August 15, 2011, GJC once again asked USAID for a timeline for obtaining responsive documents, and USAID FOIA replied on August 23, 2011 that USAID was “gathering information for the timeline you requested” and would provide it to GJC by August 29, 2011 (Exhibit 7).
 12. After USAID failed to respond to its own August 29, 2011 deadline, GJC contacted USAID FOIA on August 30, 2011.
 13. USAID FOIA responded to GJC’s August 30, 2011 inquiry on September 2, 2011 stating that they had “located” responsive documents (84 days after our original request) which they expected to receive within the next week and review them for release. However, no list of the responsive documents identified was provided. (Exhibit 8).
 14. USAID once again did not respond and after three weeks of waiting GJC again e-mailed USAID FOIA on September 23, 2011 regarding the status of the requested documents and for a projected timeline.
 15. USAID FOIA notified on September 29, 2011 that “the documents” had been sent out for “submitter notification” and that they were awaiting comments citing to FOIA regulations including that,

Section 1 of Executive Order 12600 requires that submitters of confidential commercial information have an opportunity to comment on the release of their documents. The comments will address how the disclosure of the information could cause substantial competitive harm. The submitters will have up to 10 days to review the documents and submit comments to us. The FOIA office will review the comments and redact the documents using the appropriate FOIA exemptions as needed. Then we will get back to you with all available documents/information (emphasis added). (Exhibit 9).

16. On December 12, 2011, 151 days after GJC’s FOIA request was submitted and 49 days after documents were sent to submitters, USAID FOIA sent the partial response which is the subject of this appeal. This delay (which continues) violates USAID’s obligation to be “prompt” under USAID guidelines. 22 C.F.R. 212.34(a). (Exhibit 2).

17. The FOIA statute requires USAID to provide GJC with written notices with regards to all delays, “setting forth the unusual circumstances for such extension and the date on which the determination is expected to be dispatched...no such notice shall specify a date that would result in an extension for more than ten working days” (emphasis added). 5 U.S.C. § 522(a)(6)(B)(i). Such notices have not been provided.
18. Even if the 4 day period, from May 19, 2011 to May 23, 2011, is considered tolled by USAID’s request for clarification, the GJC still did not receive a determination on if USAID FOIA would in fact comply with the GJC’s request until 84 days after the submission of our initial FOIA request, which is well outside the 30 day maximum time limit specified by the FOIA statute. USAID FOIA gave no indication that it in fact intended not to comply with the GJC’s request until September 2, 2011. (Exhibit 8).

II. USAID has not complied with the statutory limit for expedited processing nor responded to GJC’s May 5, 2011 request for a fee waiver (although it is being assessed fees).

Expedited Processing

19. GJC’s May 5, 2011 FOIA request included a request for expedited processing, as permitted under 5 U.S.C. § 522(a)(6)(E), including a demonstration of “compelling need,” as required. (Exhibit 1).
20. USAID FOIA responded on May 19, 2011 stating that “the FOIA office can honor expedited processing,” although then conditioned the grant by saying “if” it can given USAID’s work load. (Exhibit 4).
21. Once expedited processing is granted, the FOIA statute requires USAID to “process as soon as practicable any request for records to which the agency has granted expedited processing.” 5 U.S.C. § 522(a)(6)(E)(iii). To date, 180 days after the original FOIA request, GJC has only received a partial response, consisting of a deficient version of one of the requested documents and no timeline of when other responsive documents can be expected. This violates (and continues to violate) the statutory requirements governing expedited processing.

Fee Waiver Request

22. The GJC’s May 5, 2011 FOIA request also included a request for a fee waiver pursuant to 5 U.S.C. § 522(a)(4)(A)(iii), which provides that “documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

23. GJC affirmed as a part of its fee waiver request that as a non-profit organization, the GJC has no commercial interest in documents requested and explained how the information contained in the requested contracts and communications are of significant public interest and will contribute significantly to public understanding of government operations and activities. (Exhibit 1).
24. Furthermore, for the purposes of a fee waiver determination, the GJC can be considered to be a representative of the new media because it is “an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes the work to an audience.”⁶ A key component of the GJC’s work is to gather, analyze and distribute information that is of interest to the public through legal and advocacy publications which are made available to the public through our website, blog, Twitter, and Facebook and that are distributed through electronic newsletters.
25. However, as of January 26, 2012, the GJC has received no response or determination on our request for a fee waiver. Instead, USAID FOIA in the December 12, 2011 partial response stated that “[w]e will aggregate the fees for this portion of your request in a future response.” (Exhibit 2). The GJC would hereby appeal this *de facto* fee waiver denial and asserts that FOIA statute, all fees associated with the present FOIA must be waived.
26. Further, USAID action in *de facto* assessing fees without any legal basis for doing so constitutes arbitrary and capricious agency behavior which flouts not only federal law but the FOIA mandates issued by Attorney General Holder to implement President Obama’s FOIA Memorandum of Jan. 21, 2009.⁷
27. USAID must now waive all fees associated with #F-00185-11 due to its failure to comply with any relevant statutory and regulatory time frames. 5 U.S.C. § 522(a)(4)(A)(viii) provides that “an agency shall not assess search fees (or in the case of a requested described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6).”

III. USAID’s partial response is deficient, incorrectly subjects the requested documents to the “submitter notification process.” and violates relevant statutory and regulatory guidelines

28. On December 15, 2011, GJC received a “partial response” letter from USAID. Attached was a redacted cooperative agreement between AID and Johns Hopkins

⁶ National Sec. Archive v. Department of Def., 880 F.2d 1381, 1387 (D.C. 1989).

⁷ Attorney General Eric Holder, Memorandum for Heads of Executive Departments and Agencies on the Freedom of Implementation Act (FOIA), Mar. 19, 2009, available at: <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

University for \$33,000,000 over 5 years (2002 – 2007) for the “Information and Knowledge for Optimal Health” project (INFO), GPH-A-00-02-0003-00. Furthermore, this partial response does not comply with US law as detailed in Part V, *infra*.

USAID’s partial response is deficient

29. USAID’s partial response is deficient in many ways, including by not providing, as requested, the “most recent predecessor” to the INFO contract.
30. Further, USAID FOIA also failed to include the directives or correspondence relating to US abortion restrictions which applied to the contract. US law and the public record⁸ make clear that since 1973, abortion restrictions have applied to USAID funds to JHU for projects relating to family planning, including INFO Team partner, the Alan Guttmacher Institute.⁹ Additionally, no information concerning the requirements of the “Global Gag Rule,” which while not directly applicable to JHU, would have been applicable to any non-US based sub-grantees to the contract as required by President Bush’s Executive Order of Jan. 21, 2001.
31. GJC requests that USAID immediately correct these deficiencies and provide the most recent version of this contract, as well as all applicable abortion related restrictions to the contract.

The contracts requested by the GJC should not be subject to the submitter notification process because they are USAID generated government documents

32. USAID FOIA informed GJC that because we were requesting contracts and grants, the documents would be subject to the submitter notification process. Specifically, USAID FOIA stated that “Section 1 of Executive Order 12600 requires that submitters of confidential commercial information have an opportunity to comment on the release of their documents. The comments will address how the disclosure of the information could cause substantial competitive harm” (emphasis added).
33. The submitter notification process in this case is improper given that the information requested by GJC originates from USAID. Therefore, GJC demands that all contracts and grants that have been located to date should immediately be released to the GJC and not be subject to the submitter notification process.

Even assuming proper use of the submitter notification process, USAID violated applicable statutes and regulations

⁸ For example, in early 2008, a key component of the INFO project, the POPLINE Database was censored by USAID due to the application of US abortion restrictions, *see* Johns Hopkins Bloomberg School of Public Health, *Follow Up Statement Regarding POPLINE Database*, Apr. 8, 2008, available at: <http://www.jhsph.edu/publichealthnews/popline/poplinestatement.html>.

⁹ *Alan Guttmacher Inst. v. McPherson*, 597 F.Supp. 1530, 1536-37 (S.D.N.Y.1984).

34. Even if some of the documents requested by GJC are legitimately subject to the submitter notification process, USAID FOIA has failed to comply with relevant statutory and regulatory frameworks, including notification requirements and time limits. Furthermore, USAID FOIA did not request or suggest that GJC narrow the request so as to avoid the submitter notification process.
35. Section 9 of Executive Order 12600 requires that, “whenever an agency notifies a submitter that it may be required to disclose information pursuant to Section 1 of this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of decision pursuant to section 5 of this Order, the agency shall also notify the requester.” GJC has never been notified specifically when submitters have been contacted to comment on the release of documents, or on USAID’s determinations on the redactions, directly in violation of the notification requirement in Section 9 of EO 126000.
36. GJC further requests as a part of this appeal that USAID FOIA immediately provide GJC with the information as to which of the requested documents are presently undergoing the submitter notification process and the projected timeline for receipt of these documents.

IV. USAID’s application of FOIA exemption 5 U.S.C. § 552 (b)(4) to the Johns Hopkins 2002-2007 cooperative agreement (GPH-A-00-02-0003-00) violates US Law

37. As stated above, USAID’s “partial response” received December 12, 2011, consists of a single, heavily redacted and expired USAID cooperative agreement dated September 23, 2002, awarding Johns Hopkins University (JHU) a five-year, \$33,000,000 grant to support an “Information and Knowledge for Optimal Health” project (INFO). (Exhibit 2).
38. The USAID INFO contract was for JHU to build and support a “networks and knowledge community” and inform “decision-makers” globally about population and family planning issues including medical/legal information. However, USAID redacted from the contract provided to GJC information which we believe includes: (1) all discussions relating to the “conceptual framework” of the INFO proposal; (2) all information on the “Associates Award program,” deemed “integral” to INFO; and (3) all names of JHU funded Associates, sub-recipient organizations, and network members. (Exhibit 2).
39. The redactions are merely accompanied by small print citing exemption “(b)(4)

with no further details or explanation, in violations of FOIA regulations.¹⁰ USAID made no effort to explain how the redacted contract pages would: (1) to impair the Government's ability to obtain necessary information from JHU in the future;¹¹ or (2) cause "substantial harm" to the competitive position of JHU.¹² Accordingly, GJC demands that USAID FOIA disclose all communications with JHU regarding the redactions, or it can be assumed that USAID FOIA accepted all the proposed redactions and exclusions without independent review as required by law.

40. It is not possible – except in some extraterrestrial sense – for USAID, in December 2011, to have concluded that as required under 5 U.S.C. § 552 (b)(4), that JHU met the burden of proof needed for USAID to conclude that the redacted material would "foreseeable[y] lead to competitive harm," based on the fact that the contract expired in 2007, and USAID funding for JHU has been continues for some 34 years.¹³
41. Additionally, JHU associates' and sub-recipients names should not have been redacted since they are generally available in the public domain, including on JHU and USAID websites.¹⁴ One example of such a public naming of JHU associates is evidence by the reports on USAID Administrator Dr. Rajiv Shah's India visit to JHU-CCP-led Health Communication Partnership Associate Award for HIV/AIDS,¹⁵ where he met with associate JHU's Associate the National AIDS Control Organization's (Norco) "spokesbird," a parrot. This parrot delivers HIV messages and horoscopes as part of his USAID/JHU work (apparently in full compliance with US "no abortion speech" restrictions) and the information about the partners and associates on this grant are clearly identified on the website and in reports.

¹⁰See *Maydak v. DOJ*, 254 F. Supp. 2d 23, 48-49 (D.D.C. 2003) (denying Exemption 4 protection based upon the agency's failure to provide "any description of the report's content), 362 F. Supp. 2d 316 D.D.C. 2005). See also *Def. of Animals v. NIH*, 527 F. Supp. 2d 23, 32 (D.D.C. 2007) (rejecting agency's two-sentence Exemption 4 argument both on grounds it failed to identify information, "with any level of specificity," and because it failed to explain how information could be used by competitors), and *Oglesby v. U. S. Dep 't of Justice*, No. 02-603, 2007 U.S. Dist. LEXIS 13229, at 6 (D.D.C. Feb. 27, 2007) (stating that an agency must disclose sufficient information about records not disclosed).

¹¹See *Washington Post Co. v. HHS*, 690 F.2d 26 (agency must demonstrate that a threatened impairment is "significant" and that the degree of impairment "necessarily involves a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure).

¹²See *Def. of Animals v. NIH*, supra note 7.

¹³ See *Niagara Mohawk Power Corp. v. U.S. Dept. of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999), *Hercules, Inc. v. Marsh*, 659 F. Supp. 849, 854 (W.D. Va. 1987) aff'd, 839 F.2d 1027 (4th Cir. 1988) (competitive harm prong not available for submitter unless submitter meets "threshold requirement" of facing competition).

¹⁴See *Inner City Press/Cmty.on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006) (concluding that Exemption 4 does not apply "if identical information is otherwise in the public domain).

¹⁵See <http://www.jhuccp.org/news/jhu%E2%88%99ccp-project-showcased-usaid-administrator%E2%80%99s-visit-india>.

42. USAID's refusal to turn over internal contracts and documents puts the agency in the ironic position of censoring access to information regarding the application of US abortion censorship. A key goal of the INFO grant was to provide information to "decision makers;" presumably reached all if not most countries in armed conflict aimed at humanitarian providers and parties to situations of conflict who have the primary duty to ensure non-discriminatory medical care for war victims.¹⁶ Accordingly, the redacted information regarding networks and sub-recipients is key to examining what US-funded information about abortion, if any, was transmitted, directly or indirectly, to women raped in armed conflict ("the wounded and sick") whose rights to information and medical services are governed the Geneva Conventions.
43. GJC submits as part of this appeal that USAID reconsider whether the redactions to GPH-A-00-02-0003-00 are valid given that: (1) the information has been published or has been officially made available to the public; (2) as an already concluded contract that the redacted information could lead to continued substantial competitive harm; and (3) disclosure of the information in the contract may be required by law other than FOIA regulations; including the Geneva Conventions and the Executive Order 13595.

For the reasons stated above, we request: (1) a complete list of all "responsive documents" and a complete list of who was consulted with in the search for documents relating to the Universal Periodic Review process of the US at the UN Human Rights Council; (2) all communications to and from submitters on documents located to date; (3) a timeframe that details when GJC can expect receipt of all documents, including all agency and interagency communications and the most recent predecessor to the JHU contract provided in the December 12, 2011 partial response; (4) a determination on our request for a fee waiver; and (5) reconsideration of the application of exemptions under 5 U.S.C. § 552 (b)(4) to GPH-A-00-02-0003-00.

Please do not hesitate to contact me if you have any further questions. I can be reached by e-mail at jbenshoof@globaljusticecenter.net or by phone at 212.725.6530, ext. 206. We also request that you please cc aradhakrishnan@globaljusticecenter.net on all correspondence.

Regards,

¹⁶See "Statement produced by the Johns Hopkins University Bloomberg School of Public Health Center for Communication Programs, INFO project," available at: www.ghtechproject.com, which provides that "from 2006 to 2007 alone the INFO Web site (www.infoforhealth.org) was visited over 2.3 million times, up from about 330,000 visits in the first year, and INFO distributed over 3 million copies of *Population Reports*, *INFO Reports*, and *Global Health Technical Briefs*" and that "INFO logged 1.5 million visits to its publications online."

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CC:

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