March 26, 2014

Via Electronic Transmission

Mr. Douglas J. Kramer
General Counsel
USAID

Dear Mr. Kramer:

I write in response to your letter of March 5, 2014, in which you rejected our request for consultation on two Freedom of Information Act requests received by SIGAR. I must say I am disappointed with your decision, but it is certainly USAID’s prerogative not to consult with us. We will therefore act on both FOIA requests without USAID’s advice on our proposed redactions.

However, I think it would be appropriate to discuss the issues referred to in your letter and which we discussed by telephone on February 26, so that there can be no misunderstanding as to the basis for SIGAR’s position.

Background

SIGAR has received two separate FOIA requests for copies of 15 Afghan ministry capability assessments performed by Ernst & Young and KPMG under contract to USAID, and 14 risk assessments performed by USAID based on those ministry capability assessments. These 29 specific documents were the subject of a recently published SIGAR audit report, Direct Assistance: USAID Has Taken Positive Action to Assess Afghan Ministries’ Ability to Manage Donor Funds, but Concerns Remain.¹

In preparation for responding to these FOIA requests, SIGAR reviewed the 29 documents and determined that certain privacy-related information should be redacted prior to providing copies of the documents to the requesters. Following review, SIGAR sent letters to USAID on January 30, 2014, and February 5, 2014, requesting USAID’s advice on SIGAR’s proposed redactions and any other information USAID believed should be redacted. Our letters were accompanied by the relevant documents, indicating SIGAR’s proposed redactions.

On February 6, USAID requested a one week extension of the consultation period, which SIGAR granted. On February 12, one day prior to the extended deadline, USAID asked that the FOIA requests be referred to USAID for disposition. On February 14, you sent a letter citing an outdated version of the nonbinding Department of Justice FOIA Guide as a basis for

asserting that SIGAR is “not authorized” to comply with these FOIA requests. Over the course of the next few weeks, SIGAR participated in two conference calls with your office, culminating in your most recent letter.

None of USAID’s communications provided a legal justification for USAID’s opinion that SIGAR must forward FOIA requests to USAID for disposition when the requests are for unclassified documents in SIGAR’s possession that were the basis for a SIGAR audit report. SIGAR believes that it has a legal obligation, supported by executive branch policy, to respond directly to FOIA requests for records in its possession.

The Presumption of Disclosure

SIGAR has fully embraced the presumption that government records should be made public, based on law and policy. This presumption was first adopted by Congress with enactment of FOIA in 1966.\(^2\) Congress enacted FOIA “to open agency action to the light of public scrutiny.”\(^3\) Federal agencies were required to adhere to “a general philosophy of full agency disclosure.”\(^4\)

Congress reaffirmed these principles with enactment of the Electronic FOIA Amendments of 1996, stating that “FOIA establishes a presumptive right for the public to obtain identifiable, existing records of Federal departments and agencies.”\(^5\) Observing that “FOIA access to unpublished agency records resulted in many disclosures of waste and fraud in the Federal Government,” Congress declared that “FOIA disclosures, and the reactions they produce, are critical to maintaining an open and free society.”\(^6\)

On his first full day in office, President Obama directed all Federal agencies to “adopt a presumption in favor of disclosure.”\(^7\) The President stated that “[t]he Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”\(^8\) The President also made it clear that “[t]he presumption of disclosure should be applied to all decisions involving FOIA.”\(^9\)

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\(^2\) 5 U.S.C. § 552.

\(^3\) United States Dept. of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989) (citations and quotations omitted). “Congress believed that this philosophy, put into practice, would help ensure an informed citizenry, vital to the functioning of a democratic society.” Id.

\(^4\) Id.


\(^6\) Id. at 7.


\(^8\) Id.

\(^9\) Id.
SIGAR’s Authority to Respond to FOIA Requests

In your letters of February 14 and March 5, you assert that SIGAR is “not authorized” to release information obtained from USAID without USAID’s permission. In effect, you are arguing that USAID should have the power to determine what information on Afghanistan reconstruction is disclosed to Congress and the public in a SIGAR audit report. Not only is there no basis for that proposition, but it is directly contrary to law and Congressional intent.

Congress created SIGAR “[t]o provide for the independent and objective conduct and supervision of audits and investigations relating to the programs and operations funded with amounts appropriated or otherwise made available for the reconstruction of Afghanistan” and to “provide for the independent and objective leadership and coordination of, and recommendations on, policies designed to . . . prevent and detect waste, fraud, and abuse in such programs and operations.” 10 As noted above, Congress has long recognized that FOIA has “resulted in many disclosures of waste and fraud in the Federal Government.” 11

SIGAR’s mission to provide independent oversight and to expose waste, fraud, and abuse in Afghanistan reconstruction programs would be substantially undermined if we allowed USAID to unilaterally prohibit us from responding to FOIA requests concerning our own audit reports. The argument that “the Executive Branch needs to speak with one voice” (asserted by a Justice Department participant in our February 26 conference call) represents a very basic misunderstanding of the role of an independent inspector general. Congress was very clear that it wanted SIGAR to be an independent voice, not an echo.

USAID’s Demand for Referral, Rather Than Consultation

In your letter of February 14 you demanded that both FOIA requests be referred to USAID for disposition. In your letter of March 5, you again demanded referral of these requests to USAID, citing “well-established Executive Branch practice, set forth in DOJ guidance.”

There is no law or regulation that requires SIGAR to refer these FOIA requests to USAID for disposition. The reference in your March 5 letter to “DOJ guidance” (without citation) for the proposition that SIGAR should forward these FOIA requests to USAID for disposition because the 29 documents originated at USAID, is unsupported.

In fact, the Justice Department’s own FOIA regulations, FOIA Guide, and FOIA guidance, do not require that the receiving agency forward a FOIA request to the agency in which the documents originated. The Justice Department’s FOIA regulations, which apply only to Justice but are cited by the Justice Department FOIA Guide as model regulations, state that the office that receives a FOIA request is responsible for determining who is best able to process that request:

“When a component receives a request for a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from disclosure under the FOIA . . . . If the receiving component determines that it is best able to process the record in response to the request, then it shall do so.”

Note that the Justice Department’s own regulations provide that it is up to the receiving component to determine whether it is best able to process a FOIA request for documents which originated in another agency.

The current edition of the Department of Justice FOIA Guide also shows that, while referral to another agency is normal procedure, it is not required in matters such as this:

“When an agency locates records that originated with another agency or component, as a matter of sound administrative practice it should ordinarily refer those records to their originator so that the agency can make a direct response to the requester on those records.”

Moreover, the Justice Department’s 2011 nonbinding guidance concerning consultations and referrals also contemplates consultation in situations like this:

“Ultimately, the agency in the best position to respond regarding the records should do so. Typically that is the originator of the records, but that is not necessarily always the case.”

SIGAR is in the best position to respond to these two FOIA requests. The scope of the requests is not in question, as I have repeatedly stated in our conference calls. Both requests are specifically for 29 ministry assessments and risk reviews identified by SIGAR’s audit. Frankly, USAID’s repeated assertion that it needs to review the requests itself to determine their scope seems disingenuous.

Similarly, your repeated requests for the identities of the requesters is also a concern. SIGAR believes that the identity of the requesters is irrelevant to disposition of their FOIA requests. The Supreme Court has stated clearly that a FOIA requester’s identity generally “has no bearing on the merits of his or her FOIA request.” Is it really USAID’s position that some FOIA requesters should be treated differently than others?

12 28 C.F.R. § 16.4(c) (emphasis added).
SIGAR is thoroughly knowledgeable about the contents of the 29 requested documents. All 29 documents were analyzed by SIGAR auditors and were the subject of an audit report published by SIGAR. As noted above, following receipt of the two FOIA requests, SIGAR reviewed the documents, proposed the redaction of certain privacy-related information, and consulted USAID for its views on the proposed redactions and any other redactions USAID believes might be necessary.

SIGAR is legally responsible for processing FOIA requests it receives for documents in its possession.16 “[W]hen an agency receives a FOIA request for ‘agency records’ in its possession, it must take responsibility for processing that request. It cannot simply refuse to act on the ground that the documents originated elsewhere.”17

To carry out this responsibility, SIGAR sought to consult with USAID on release of the documents. FOIA specifically recognizes that an agency which receives a FOIA request may consult with another agency prior to responding.18 The U.S. Court of Appeals for the D.C. Circuit has held that “consultation is per se acceptable” when a FOIA request to one agency involves records that originated with another agency.19

SIGAR is also best able to handle these FOIA requests expeditiously. Unlike USAID, SIGAR has no backlog of FOIA requests. Your letter of March 5 indicated that USAID is “prepared to respond to the requests directly and promptly, after they are referred to us.” However, at the end of fiscal year 2013, USAID had over 230 pending FOIA requests, with average wait times of 270 days. During fiscal year 2013 it took USAID an average of 288 days to process “expedited” requests. As recently as the end of fiscal year 2012, pending expedited requests made to USAID had average wait times of 358 days. As you know, expedited FOIA requests are granted when there is an “urgency to inform the public concerning actual or alleged Federal Government activity.”20 If it takes USAID nearly a full calendar year to process FOIA requests it acknowledges to be urgent, then its promise of promptness concerning the FOIA requests at issue here seems unreliable.

USAID’s Position on Public Disclosure of the Ministry Assessments

At virtually every turn USAID has sought to withhold from the public information concerning the direct assistance programs discussed in SIGAR’s audit report. When SIGAR first requested copies of the ministry assessments at issue here, USAID stamped them “Sensitive But Unclassified” (SBU), with a legend on the front covers stating that they should not be released “outside the Executive Branch”, i.e., should not be released to Congress or the public.


19 Sussman v. United States Marshals Serv., 494 F.3d 1106, 1118 (D.C. Cir. 2007) (emphasis added).

SIGAR agrees with USAID that privacy-related information about individuals, including names, should be redacted, as well as truly sensitive information, such as physical security vulnerabilities. However, when SIGAR compared the redacted versions of the ministry assessments that USAID provided to Congress with the original documents, we found that many of USAID’s redactions seemed to be without reasonable explanation or legal support. For example, USAID redacted information indicating the Afghan government’s apparent inability to prevent its ministries from contracting with individuals with ties to terrorism. Other USAID redactions covered up information indicating that certain Afghan ministries lacked controls on the management of cash, could not keep track of fixed assets, and were using pirated copies of Microsoft software. SIGAR is unaware of any legal basis for withholding information of that nature.

In January 2014, USAID sought to prevent public release of an unredacted version of SIGAR’s audit report on the ministry assessments, on the basis that it contained “sensitive” information derived from the unclassified assessments and risk reviews. USAID claimed that the assessments and risk reviews contained information that was originally obtained by USAID from Afghan government officials in exchange for “understandings that the results of the risk assessments would not be made public.”21 Despite this claim, USAID was unable to produce any evidence of these “understandings” and could not provide a specific legal justification for concealing this information from the public. In fact, the State Department’s own Foreign Affairs Manual (FAM) addresses this issue very clearly and directly:

“Information obtained from or exchanged with a foreign government or international organization as to which public release would violate conditions of confidentiality or otherwise harm foreign relations must be classified in order to be exempt from release under FOIA or other access laws. The [Sensitive But Unclassified] SBU label cannot be used instead of classification to protect such information.”22

Your March 5 letter now claims that the 29 documents “implicate concerns relating to sensitive financial information of assessed institutions, deliberative processes of USAID, and privacy.” However, we have repeatedly requested USAID to identify specific information it believes should be redacted, along with the legal basis for those redactions, to no avail. We are therefore forced to proceed.

In our view, USAID’s prior actions with respect to the release of this information indicate a predisposition toward non-disclosure, contrary to FOIA, Executive Branch policy, and the State Department’s own regulations.

21 Memorandum from Donald L. Sampler, Assistant to the Administrator for Afghanistan and Pakistan, to John F. Sopko, Special Inspector General for Afghanistan Reconstruction (January 23, 2014).
22 12 FAM 543(f) (emphasis added). This provision applies to both USAID and the State Department. See 12 FAM 511.1(a).
Conclusion

In cases where documents requested under FOIA are central to a SIGAR audit, are not classified, are otherwise unlikely to be disclosed expeditiously, and there is evidence leading SIGAR to believe that all or part of the documents may be improperly withheld, SIGAR will request consultation with the originating agency, rather than referral.

Should you have any further questions about this matter, please do not hesitate to contact me.

Sincerely,

John G. Arlington
General Counsel
Special Inspector General
for Afghanistan Reconstruction