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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
EDUCATION and UNITED STATES
DEPARTMENT OF JUSTICE,

Defendants.

No. 17 Civ. 6390 (LGS) (SN)

DEFENDANTS' ANSWER

Defendants the United States Department of Education (the "Education Department") and the United States Department of Justice, (the "DOJ" and, together with the Education Department, "defendants"), by their attorney, Joon H. Kim, Acting United States Attorney for the Southern District of New York, answers plaintiff's complaint (the "Complaint") as follows:

1. Paragraph 1 contains plaintiff's description of this action, to which no response is required.
2. Paragraph 2 contains plaintiff's description of its requests under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (the "FOIA"), to which the Court is respectfully referred for a true and accurate description of their contents.

3. Paragraph 3 contains plaintiff's description of a letter issued by the Education Department on or about January 7, 2015, to which the Court is respectfully referred for a true and accurate description of its contents.

4. Paragraph 4 contains plaintiff's description of a Dear Colleague Letter issued by defendants on or about May 13, 2016, to which the Court is respectfully referred for a true and accurate description of its contents.

5. Paragraph 5 contains plaintiff's description of a Dear Colleague Letter issued by defendants on or about February 22, 2017, to which the Court is respectfully referred for a true and accurate description of its contents.

6. Paragraph 6 contains plaintiff's descriptions of various documents, to which the Court is respectfully referred for a true and accurate description of their contents. Defendants neither confirm nor deny the remaining allegations in Paragraph 6, as they are immaterial to this FOIA action.

7. Paragraph 7 contains plaintiff's legal conclusions regarding the Dear Colleague Letter issued by defendants on or about February 22, 2017, to which no response is required. To the extent that Paragraph 7 contains argument, defendants neither confirm nor deny the allegations in Paragraph 7, as they are immaterial to this FOIA action.

8. To the extent that Paragraph 8 contains plaintiff's description of this action or plaintiff's legal conclusions regarding defendants' obligations under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (the "FOIA"), no response is required. To the extent a response is required, deny the allegations in Paragraph 8.

9. Admit the allegations in Paragraph 9.

10. The Education Department denies the allegations contained in Paragraph 10, except admits and avers that it has not released any records responsive to plaintiff's March 13, 2017, FOIA request.

11. DOJ denies the allegations contained in Paragraph 11, except admits and avers that, by letter dated March 15, 2017, DOJ informed plaintiff that it had referred its March 13, 2017 FOIA request to DOJ's Civil Rights Division (the "Civil Rights Division") and DOJ's Office of Information Policy ("OIP"), and that the Civil Rights Division notified plaintiff on June 19, 2017, that it had located responsive records at the Civil Rights Division and determined that such records were properly withheld pursuant to 5 U.S.C. § 552(b)(5).

12. Paragraph 12 contains plaintiff's legal conclusions regarding defendants' obligations under the FOIA, to which no response is required. To the extent a response is required, deny the allegations in Paragraph 12, except admit and aver that defendants have not released records responsive to plaintiff's requests.

13. Paragraph 13 contains plaintiff's description of this action, to which no response is required. To the extent a response is required, deny that plaintiff is entitled to the requested relief, or any relief whatsoever.

Jurisdiction and Venue

14. Paragraph 14 contains plaintiff's legal conclusions regarding the Court's jurisdiction over this dispute, to which no response is required.

15. Paragraph 15 contains plaintiff's legal conclusions regarding the proper venue for this dispute, to which no response is required. To the extent a response is required, deny knowledge or information sufficient to form a belief regarding Paragraph 15.

Parties

16. Deny knowledge or information sufficient to form a belief regarding Paragraph 16.

17. The Education Department admits that it falls under the authority of the Executive Branch of the United States Government, and that it enforces certain civil rights laws, including Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* The remaining allegations of this paragraph contain plaintiff's legal conclusions, to which no response is required. To the extent that a response is required, denies the remaining allegations in Paragraph 17.

18. DOJ admits that it falls under the authority of the Executive Branch of the United States Government. The remaining allegations of this paragraph consist of legal conclusions, to which no response is required. To the extent that a response is required, denies the allegations in Paragraph 18, except admits and avers that DOJ's Civil Rights Division has identified records responsive to plaintiff's March 13, 2017, FOIA request and is withholding such records pursuant to 5 U.S.C. § 552(b)(5).

Lambda Legal's FOIA Request to ED

19. Admits that plaintiff submitted a FOIA request to the Education Department on March 13, 2017. The Court is respectfully referred to that document for a true and accurate description of its contents.

20. Admits that Exhibit A to the Complaint is a true and correct copy of the March 13, 2017, FOIA request to the Education Department.

21. Paragraph 21 contains plaintiff's description of the Education Department's March 28, 2017, letter to plaintiff, to which the Court is respectfully referred for a true and accurate description of its contents.

22. The Education Department denies knowledge or information sufficient to form a belief regarding the allegations in Paragraph 22, except admits and avers that it received an e-mail from plaintiff on or about April 19, 2017.

23. Paragraph 23 contains plaintiff's description of the Education Department's April 25, 2017, letter to plaintiff, to which the Court is respectfully referred for a true and accurate description of its contents.

24. The first sentence of Paragraph 24 contains plaintiff's description of the Education Department's April 25, 2017, letter to plaintiff, to which the Court is respectfully referred for a true and accurate description of its contents. The Education Department denies knowledge or information sufficient to form a belief regarding the allegations in the second sentence of Paragraph 24.

25. The Education Department denies the allegations in Paragraph 25, except admits and avers that the Institute of Education Services, the Office of Elementary and Secondary Education, the Office of the Deputy Secretary, and the Office of the Under Secretary have completed their search and have not identified any responsive records; and that it is still searching for responsive records from four additional offices.

26. Paragraph 26 contains plaintiff's description of its June 30, 2017, letter to the Education Department and the Education Department's July 3, 2017, response to plaintiff, to which the Court is respectfully referred for a true and accurate description of their contents. The

Education Department admits that it has not issued a decision regarding plaintiff's June 30, 2017, appeal.

27. Paragraph 27 contains plaintiff's legal conclusions regarding the Education Department's obligations under the FOIA, to which no response is required. To the extent that a response is required, the Education Department denies the allegations in Paragraph 27, except admits and avers that it has not released records responsive to plaintiff's March 13, 2017, FOIA request.

28. Paragraph 28 contains plaintiff's legal conclusions regarding the Education Department's obligations under the FOIA, to which no response is required. To the extent that a response is required, the Education Department denies the allegations in Paragraph 28, except admits that it has not issued a decision regarding plaintiff's administrative appeal.

29. Paragraph 29 contains plaintiff's legal conclusions regarding the Education Department's obligations under the FOIA, to which no response is required.

Lambda Legal's Request to DOJ

30. Defendant DOJ admits that plaintiff submitted a FOIA request to DOJ on March 13, 2017. The Court is respectfully referred to that document for a true and accurate description of its contents.

31. Defendant DOJ admits that Exhibit F is a true and correct copy of the March 13, 2017, FOIA request.

32. Paragraph 32 contains a March 15, 2017, letter from DOJ's FOIA/Privacy Act Mail Referral Unit (MRU), notifying plaintiff that its request was directed to the Civil Rights

Division and OIP.¹ Defendants respectfully refer the Court to that letter for a true and accurate description of its contents.

The Civil Rights Division's Response

33. Paragraph 33 contains plaintiff's description of the Civil Rights Division's March 16, 2017, letter to plaintiff, to which the Court is respectfully referred for a true and accurate description of its contents.

34. Paragraph 34 contains plaintiff's description of the Civil Rights Division's June 19, 2017, letter to plaintiff, to which the Court is respectfully referred for a true and accurate description of its contents.

35. The Civil Rights Division denies knowledge or information sufficient to form a belief regarding the allegations in Paragraph 35, except admits and avers that its initial search yielded 109 pages of responsive records, all of which were withheld pursuant to 5 U.S.C. § 552(b)(5).

36. Defendant DOJ admits the allegations in Paragraph 36.

37. To the extent that Paragraph 37 contains plaintiff's legal conclusions regarding the Civil Rights Division's obligations under the FOIA, no response is required. To the extent that a response is required, DOJ admits that DOJ's Office of Information Policy ("OIP") has not yet rendered a response with respect to plaintiff's appeal.

¹ The Department of Justice's Office of Information Policy (OIP) is responsible for processing FOIA requests for records within OIP and from six senior leadership offices of the Department of Justice, specifically the Offices of the Attorney General (OAG), the Deputy Attorney General (ODAG), and the Associate Attorney General (OASG), and the Offices of Legislative Affairs (OLA), Legal Policy (OLP), and Public Affairs (PAO). The Civil Rights Division is responsible for processing FOIA requests for records within its own division. Here, plaintiff initially directed its request to the Department of Justice's FOIA/Privacy Act Mail Referral Unit (Justice Management Division).

38. To the extent that Paragraph 38 contains plaintiff's legal conclusions regarding the Civil Rights Division's obligations under the FOIA, no response is required. To the extent that a response is required, DOJ admits that OIP has not yet rendered a response with respect to plaintiff's appeal.

39. Paragraph 39 contains plaintiff's legal conclusions regarding DOJ's obligations under the FOIA, to which no response is required.

The Remaining DOJ Components' Response

40. Defendant DOJ admits that OIP sent plaintiff a letter on March 23, 2017, acknowledging receipt of plaintiff's FOIA request on behalf of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy, and Public Affairs. DOJ respectfully refers the Court to that letter for a true and accurate description of its contents.

41. Defendant DOJ admits that OIP communicated with plaintiff on April 17, 2017, and May 10, 2017, regarding the status of plaintiff's request, as well as the pending searches OIP sent to the Justice Management Division for compilation and storage of electronic records for further processing. DOJ respectfully refers the Court to the email exchange between plaintiff and OIP dated April 17, 2017, for a true and accurate description of its content.

42. Defendant DOJ admits the allegations in Paragraph 42 only to the extent that multiple updates regarding the status of plaintiff's FOIA request and the pending searches for responsive records were provided to plaintiff via telephone from May 10, 2017, to the date this complaint was filed. The remainder of Paragraph 42 contains plaintiff's characterizations of four phone calls made to OIP regarding the status of its request, to which no response is required.

43. DOJ admits that plaintiff submitted an administrative appeal to OIP's Administrative Appeals Staff regarding their request on July 23, 2017, and that OIP's Administrative Appeals Staff responded to plaintiff's appeal in a letter dated July 31, 2017.² DOJ respectfully refers the Court to those letters for a true and accurate description of their contents.

44. Paragraph 44 contains plaintiff's legal conclusions regarding DOJ's obligations under the FOIA, to which no response is required. To the extent a response is required, DOJ admits the allegations in Paragraph 44 only to the extent that as of the date of plaintiff's Complaint, for the reasons set forth in its March 23, 2017, acknowledgment letter, it had not yet produced the requested records or demonstrated that the requested records are exempt from production, or notified plaintiff of the scope of any responsive records it intended to produce or withhold and the reasons therefor within twenty days. DOJ respectfully refers the Court to that letter for a true and accurate description of its contents.

Lambda Legal's Entitlement to a Waiver of or Reduced Processing Fees

45. Paragraph 45 contains plaintiff's description of its March 13, 2017, FOIA requests to defendants, to which the Court is respectfully referred for a true and accurate description of their contents.

46. Paragraph 46 contains plaintiff's legal conclusions regarding defendants' obligations under the FOIA and regulations promulgated thereunder, to which no response is required. To the extent a response is required, deny the allegations in paragraph 46.

² OIP's Administrative Appeals Staff is a separate and distinct unit within OIP which handles the adjudication of administrative appeals of initial request responses made by DOJ components.

Causes of Action

47. Defendants repeat and incorporate every response to paragraphs 1 to 46 as though fully set forth herein.

48. Paragraph 48 contains plaintiff's legal conclusions regarding defendants' obligations under the FOIA and regulations promulgated thereunder, to which no response is required. To the extent a response is required, deny the allegations in paragraph 48.

49. Paragraph 49 contains plaintiff's legal conclusions regarding defendants' obligations under the FOIA and regulations promulgated thereunder, to which no response is required. To the extent a response is required, deny the allegations in paragraph 49.

50. Paragraph 50 contains plaintiff's legal conclusions regarding defendants' obligations under the FOIA and regulations promulgated thereunder, to which no response is required. To the extent a response is required, deny the allegations in paragraph 50.

The remainder of the complaint constitutes plaintiff's prayer for relief, to which no response is required. To the extent a response is required, defendants deny that plaintiff is entitled to the requested relief, or to any relief whatsoever.

DEFENSES

FIRST DEFENSE

The complaint should be dismissed in whole or in part for failure to state a claim upon which relief can be granted.

SECOND DEFENSE

Defendant has exercised due diligence in processing plaintiff's request under the FOIA, 5 U.S.C. § 552 *et seq.*, and exceptional circumstances exist that necessitate additional time for Defendant to complete its processing of plaintiff's request. *See id.* § 552(a)(6)(C).

THIRD DEFENSE

Some or all of the requested documents are exempt from disclosure. *See* 5 U.S.C. §552(b).

FOURTH DEFENSE

The Court lacks subject matter jurisdiction over plaintiff's requests for relief that exceed the relief authorized by statute under the FOIA, 5 U.S.C. §552 *et seq.*

FIFTH DEFENSE

Plaintiff is not entitled to expedited processing under 5 U.S.C. §552(a)(6)(E).

Defendants may have additional defenses which are not known at this time but which may become known. Accordingly, defendants reserve the right to assert each and every affirmative or other defense that may be available, including any defenses available pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure.

WHEREFORE, defendants demand judgment dismissing the complaint and granting such further relief as this Court deems just, including costs and disbursements.

Dated: New York, New York
October 6, 2017

Respectfully submitted,

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