

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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LAMBDA LEGAL DEFENSE AND	:	
EDUCATION FUND, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. <u>19-cv-4707</u>
	:	
	:	
UNITED STATES DEPARTMENT OF	:	
HEALTH AND HUMAN SERVICES,	:	
	:	
Defendant.	:	
-----X	:	

COMPLAINT

Plaintiff Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), by and through its undersigned attorneys, in support of its complaint against Defendant United States Department of Health and Human Services (“HHS”), alleges as follows:

SUMMARY AND NATURE OF THE CASE

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to enforce the public’s right to information about Defendant’s actions regarding HHS’s decisions relating to lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) matters or people, including decisions made by political appointees and communications between HHS and outside organizations. Lambda Legal seeks injunctive and other appropriate relief with respect to Defendant’s unlawful withholding of this information.

2. Pursuant to the FOIA, on April 27, 2018, Lambda Legal submitted three requests for records to HHS (collectively, the “FOIA Requests”). Specifically, Lambda Legal requested records relating to Defendant’s decisions on whether to publish or enforce federal regulations or

internal policies that prohibit discrimination in Medicare or Medicaid on the basis of sex, sexual orientation, gender, identity, gender expression, sex stereotypes, or transgender status, and records of decisions made regarding internal nondiscrimination rules or policies covering HHS employees and contractors (the “Nondiscrimination Policies Request”). Lambda Legal also requested any records of communications between HHS and an enumerated list of outside organizations (the “Outside Organizations Request”), and any records held by politically appointed HHS officials that relate to LGBTQ matters or people (the “HHS Officials Request”).

3. Despite over a year elapsing since the FOIA Requests were filed, HHS has yet to produce a single record. HHS has failed to respond entirely to the Outside Organizations Request and the HHS Officials Request. With regard to the Nondiscrimination Policies Request, HHS has failed to respond to three sub-components, and for a fourth, stated that no responsive records were found—despite contemporaneous public statements that HHS was engaged in activities covered by Lambda Legal’s request.

4. Lambda Legal is legally entitled to responses to the FOIA Requests that satisfy the statute’s requirement for an agency to provide a prompt and thorough search for and production of documents, which in this case were requested more than a year ago. Defendants have far exceeded the statutory and regulatory time limitations to conduct a search and produce the requested documents.

5. Lambda Legal seeks an order directing Defendants to respond to Lambda Legal’s outstanding FOIA Requests, conduct a thorough search for all responsive records, and provide the requested documents in a timely manner. Lambda Legal also seeks attorney’s fees and other equitable relief as deemed appropriate by this Court.

JURISDICTION AND VENUE

6. The court has jurisdiction over this matter pursuant to 5 U.S.C. § 522(a)(4)(B) and 28 U.S.C. §§ 1331 and 1346.

7. Venue lies in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1391 because Lambda Legal is a resident of the Southern District of New York.

PARTIES

8. Plaintiff Lambda Legal is a tax-exempt, not-for-profit legal, educational, and charitable organization under section 501(c)(3) of the Internal Revenue Code, headquartered at 120 Wall Street, 19th Floor, New York, New York 10005. Founded in 1973, Lambda Legal is the nation's oldest and largest nonprofit legal organization working to secure the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and individuals living with HIV. Educating the public on LGBT issues and publishing information about the rights of LGBT people are among Lambda Legal's primary purposes.

9. Defendant HHS is a Department of the executive branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f). HHS is the federal agency responsible for administering federal programs dealing with health and human services, and supporting advances in medicine, public health, and social services. Among its responsibilities is enforcement of certain federal civil rights laws preventing discrimination in HHS-funded programs and activities, and in certain medical facilities. HHS has possession of and control over the records sought by Lambda Legal.

STATEMENT OF FACTS

Background of Lambda Legal's FOIA Requests to HHS

10. The purpose of the FOIA is to promote government transparency and accountability. It establishes the public's right to access all federal agency records unless such records may be withheld by the agency pursuant to one of nine narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9). Lambda Legal's requests under the FOIA are necessary to shed light on HHS's policies, operations and activities regarding LGBTQ issues and people, including agency decisions, activities of politically appointed officials, and coordination with outside organizations.

11. The ability to access medically necessary care on a nondiscriminatory basis is of particular concern to the communities that Lambda Legal represents. Indeed, according to a first-of-its-kind survey published by Lambda Legal in 2010, almost 56 percent of lesbian, gay, or bisexual respondents and 70 percent of transgender and gender-nonconforming respondents reported experiencing discrimination while attempting to access medical care. Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People Living with HIV 5* (2010), <https://perma.cc/CS5W-2UQB>.

12. Transgender patients particularly face discrimination when trying to access basic medical care: an analysis of complaints filed with HHS by transgender patients found that most complaints involved a provider denying general healthcare on the basis of gender identity. Sharita Gruberg & Frank J. Bewkes, Ctr. for Am. Progress, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial 2* (2018), <https://perma.cc/JEN8-RFKF>. This atmosphere of discrimination can deter transgender people from obtaining care entirely, as shown by a 2015 survey of transgender Americans, where 23 percent reported not seeking needed healthcare in the

past year due to a fear of gender-identity-based mistreatment. Sandy James et al., Nat'l Ctr. for Transgender Equal., *Executive Summary of the Report of the 2015 U.S. Transgender Survey 3* (2016), <https://perma.cc/QW7Y-ZJEM>.

13. The transparency sought by Lambda Legal through the FOIA Requests is urgently needed, as press reports and HHS's own statements indicate that the agency is preparing to announce proposed rules diminishing healthcare nondiscrimination protections for LGBTQ people. Specifically, HHS has indicated in federal court that it is undertaking decisions regarding federal regulations that prohibit discrimination in health programs or activities administered by HHS on bases relevant to LGBTQ issues, including sex, sex stereotyping, gender, gender identity, and transgender status.

14. On April 5, 2019, HHS disclosed that there are "ongoing efforts to amend" these regulations, and stated that HHS "expect[s] to be able to publish a proposed rule soon." Defendants' Memorandum in Response to Plaintiffs' Motions for Summary Judgment at 2, *Franciscan All. v. Azar*, No. 7:16-cv-00108-O (N.D. Tex. Apr. 5, 2019), ECF No. 154. Civil rights groups have expressed concern that the forthcoming rules "could essentially blow up the nondiscrimination protections of the Affordable Care Act for LGBTQ individuals." Ariana Eunjung Cha, *Trump administration prepares a rule civil rights groups worry may deny care to transgender patients*, Wash. Post (Apr. 24, 2019), <https://perma.cc/M5DQ-QENX>. In particular, the new rules could "make it easier for providers to refuse routine care for patients based on their gender identity," or to refuse care related to gender transition. Dan Diamond, *HHS nearing plan to roll back transgender protections*, Politico (Apr. 24, 2019), <https://perma.cc/7H7P-FLWM>.

15. Reports indicate that outside organizations have pressed for these rule changes. *Id.* However, the forthcoming rules are only one example of how outside groups have encouraged

HHS to undertake actions that jeopardize LGBTQ individuals' ability to access healthcare. For example, in October 2017, HHS made a formal rulemaking request for information in order to identify any requirements or conditions for grants or contracts that outside organizations argue present barriers for their participation in HHS-funded programs. Dan Diamond, *The religious activists on the rise inside Trump's health department*, Politico (Jan. 22, 2018), <https://perma.cc/K9FC-EP2K>; see also 82 Fed. Reg. 49,300 (Oct. 25, 2017). In addition, Defendant has removed or sought to remove questions from HHS-administered surveys that seek to collect data on the health and well-being of LGBT people. Press Release, Williams Institute, *CDC to roll back data collection on the health and well-being of LGBT people* (May 17, 2018), <https://perma.cc/4HL2-4HZK>; Matt Sedensky, *After outcry, an LGBT survey question is restored by HHS*, Associated Press (June 22, 2017), <https://perma.cc/HKJ2-TGNQ>; Matt Sedensky, *Federal surveys trim LGBT questions, alarming advocates*, Associated Press (Mar. 20, 2017), <https://perma.cc/3TXQ-J5Y3>. Thus, Lambda Legal's request seeking records of interactions between HHS and outside organizations is a key part of understanding HHS's activities related to LGBTQ people and issues.

16. Lambda Legal also seeks records on LGBTQ topics created or held by HHS's political appointees. These records are particularly important because public statements by certain HHS political appointees raise concerns about those individuals' willingness to enforce civil rights laws and protections on behalf of the LGBTQ community. See Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, Politico (Feb. 19, 2018), <https://perma.cc/P6UQ-DVKB> (describing anti-LGBT statements by HHS political appointees, including statements characterizing same-sex marriage as "wrong" and denouncing nondiscrimination protections for LGBTQ people as "a radical new gender ideology over and

above the[] right to privacy, safety, and religious freedom”). More generally, however, seeking the records of an executive agency’s political appointees is consistent with the purpose behind the FOIA, which is “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Rose v. Dep’t of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974).

17. All of Lambda Legal’s FOIA Requests serve the purpose of illuminating HHS’s actions relating to LGBTQ matters and people.

Lambda Legal’s April 27, 2018 FOIA Requests

The Nondiscrimination Policies Request

18. On April 27, 2018, Lambda Legal submitted the Nondiscrimination Policies Request to HHS, seeking any records that mention, discuss, reference or relate to:

- (i) HHS’s decision about whether to post, publish or enforce a rule or regulation prohibiting discrimination on the basis of sex, sexual orientation, gender, identity, gender expression, sex stereotypes, or transgender status in any part or aspect of Medicare or Medicaid;
- (ii) HHS’s decision about whether to post, publish, or enforce a rule or regulation prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status against HHS employees, staff, contractors, or subcontractors, including with regards to access to restrooms or other sex-designated facilities;
- (iii) HHS’s decision regarding whether to publish in the Federal Register, or any other manner, a rule or regulation signed prior to January 20, 2017, but that has since not been published; and

(iv) Any proposed rule or regulation that was signed on January 19, 2017 but that has not been published in the Federal Register.

19. A copy of the Nondiscrimination Policies Request is attached hereto as Exhibit A.

20. By letter dated May 10, 2018, HHS acknowledged receipt of the Nondiscrimination Policies Request. Exhibit B.

21. Lambda Legal, through counsel, attempted to follow up with HHS after filing the Nondiscrimination Policies Request. On September 6, 2018, Lambda Legal emailed HHS to note that the statutory period of twenty (20) working days had elapsed, and to request a status update. To date, HHS has not responded to this email.

22. On September 14, 2018, HHS informed Lambda Legal that no responsive records were found with regard to item (i) of the request. Exhibit C. With regard to the outstanding elements of the request, as of this date, HHS has not provided any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations.

23. By letter dated December 5, 2018, Lambda Legal contacted the HHS FOIA Public Liaison to request further information about the determination that HHS could not locate records responsive to item (i) of the request, and to request an update on the remaining items of the request. Exhibit D. To date, HHS has not acknowledged this correspondence.

24. On December 13, 2018, Lambda Legal appealed HHS's failure to produce any documents in response to the first element of the request, and failure to respond to the remaining elements within the statutorily prescribed time frame. Exhibit E. Since then, Lambda Legal has not received a decision on its appeal.

The Outside Organizations Request

25. Lambda Legal filed the Outside Organization Request on April 27, 2018, requesting for the period from January 20, 2017 to the date of the search all records reflecting communications between any individual or office at HHS, including its component agencies, and individuals at any of the organizations listed in the request. Exhibit F.

26. On May 10, 2018, HHS asked for clarification of the request on the grounds that the original request was “overly broad.” Exhibit G. Lambda Legal replied on the same day, clarifying that the request was only for communications between political appointees at HHS and the specified groups, and providing the domain names for each group. Exhibit H.

27. Despite repeated follow-up, Lambda Legal has yet to receive a response from HHS. On September 6, 2018, Lambda Legal emailed HHS to note that the statutory period of twenty (20) working days had elapsed, and to request a status update. By letter dated December 5, 2018, Lambda Legal contacted the HHS FOIA Public Liaison and requested a status update on the Outside Organizations Request. Exhibit D.

28. On December 13, 2018, Lambda Legal appealed HHS’s failure to respond to the Outside Organizations Request within the statutorily prescribed time frame. Exhibit E. Since then, Lambda Legal has not received a decision on its appeal.

29. To date, HHS has not provided any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations.

The Political Appointees Request

30. On April 27, 2018, Lambda Legal filed the Political Appointees Request, seeking for the period from January 20, 2017 to the date of the search any records belonging to, created

by, addressed to, or sent to “political appointees” at HHS, including specific individuals listed in the request, that mention, discuss, reference, or relate to LGBTQ matters or people. Exhibit I.

31. By letter dated May 1, 2018, HHS acknowledged receipt of the Political Appointees Request. Exhibit J.

32. As with the Outside Organizations Request, HHS has not responded, despite Lambda Legal repeatedly following up. On September 6, 2018, Lambda Legal emailed HHS to note that the statutory period of twenty (20) working days had elapsed, and to request a status update. Subsequently, by letter dated December 5, 2018, Lambda Legal contacted the HHS FOIA Public Liaison and requested a status update on the Political Appointees Request. Exhibit D.

33. On December 13, 2018, Lambda Legal appealed HHS’s failure to respond to the Political Appointees Request within the statutorily prescribed time frame. Exhibit E. Since then, Lambda Legal has not received a decision on its appeal.

34. To date, HHS has not provided any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations.

HHS’s Failure to Comply with the FOIA

Failure to Conduct an Adequate Search

35. With respect to item (i) of the Nondiscrimination Policies Request, HHS has failed to conduct an adequate search that will uncover all responsive documents in violation of the FOIA, 5 U.S.C. §§ 552(a)(3)(A) and (a)(3)(C), and the regulations promulgated thereunder.

36. HHS informed Lambda Legal on September 14, 2018 that no responsive records were found. However, public information indicates that within the time period covered by the request, HHS had engaged in activities where the record documentation would be responsive to

this request. For example, on February 19, 2018, Politico reported that “upon taking office last year, the Trump administration swiftly froze a series of LGBT-friendly rules, including proposed new regulations to further ban discrimination in Medicare and Medicaid.” Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, Politico (Feb. 19, 2018), <https://perma.cc/P6UQ-DVKB>. Lambda Legal’s request would cover any records related to a decision by HHS to halt action on proposed regulations prohibiting discrimination in Medicare and Medicaid on the basis of sex, sexual orientation, gender, identity, gender expression, sex stereotypes, or transgender status.

37. Further, shortly after informing Lambda Legal on September 14, 2018 that no responsive records were found, HHS stated in federal court that it was undertaking decisions regarding the enforcement of 45 C.F.R. § 92, which contains regulations prohibiting discrimination in health programs or activities administered by HHS—e.g., Medicare and Medicaid—on bases relevant to LGBTQ issues, including sex, sex stereotyping, gender, gender identity, and transgender status. Specifically, on October 15, 2018, HHS informed the court that it was “reevaluating the reasonableness, necessity, and efficacy” of 45 C.F.R. § 92. Status Report at 1, *Franciscan All. v. Azar*, No. 7:16-cv-00108-O (N.D. Tex. Oct. 15, 2018), ECF No. 119. Records created during this reevaluation would be responsive to item (i) of the Nondiscrimination Policies Request. That HHS did not locate these records demonstrates that HHS failed to conduct an adequate search when responding to item (i) of the Nondiscrimination Policies Request.

38. It is possible that certain records created in connection with reevaluating a regulation may be subject to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), which exempts documents that would be privileged in civil litigation, and, in particular, extends to “documents ‘reflecting advisory opinions, recommendations and deliberations comprising part of a process by

which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966)). However, the potential availability of an exemption for some documents under the FOIA does not relieve HHS of the obligation to conduct an adequate search for documents responsive to a request. Further, if and when documents subject to an exemption are located, HHS must provide documentation “describ[ing] with reasonable specificity the nature of the documents at issue and the justification for nondisclosure.” *Halpern v. FBI*, 181 F.3d 279, 291 (2d Cir. 1999) (quoting *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980)) (internal quotation marks omitted). This may take the form of a *Vaughn* index that “lists the titles and descriptions of the responsive documents that the Government contends are exempt from disclosure.” *N.Y. Times Co. v. U.S. Dep’t of Justice*, 758 F.3d 436, 438-39 (2d Cir. 2014) (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)). Therefore, HHS must still conduct an adequate search in response to item (i) of the Nondiscrimination Policies Request, and furnish responsive documents or descriptions of withheld documents.

39. With respect to items (ii) through (iv) of the Nondiscrimination Policies Request, and the entirety of the Outside Organizations Request and Political Appointees Request, HHS has failed to provide any documents, or, indeed, any response at all. Therefore, HHS has not demonstrated that it has conducted an adequate search for materials responsive to these requests.

Failure to Respond within the Statutory Time Period

40. HHS has failed to comply with the time limits imposed by the FOIA. Although statutorily obligated to determine whether to comply with a request under the FOIA within twenty (20) days (excluding weekends and legal holidays) after receiving it, 5 U.S.C. § 522(a)(6)(A)(i),

HHS has not yet provided a response to the Outside Organizations Request, Political Appointees Request, or items (ii) through (iv) of the Nondiscrimination Policies Request.

41. Nor has HHS responded to Lambda Legal's appeal of the FOIA Requests, despite the statutorily mandated 20-day deadline (excluding weekends and legal holidays) to make a determination on an appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

42. Through HHS's failure to make substantive determinations as to Lambda Legal's FOIA Requests and appeal within the time period required by law, Lambda Legal is deemed to have exhausted administrative remedies. 5 U.S.C. § 522(a)(6)(C).

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

43. Lambda Legal also asked for a waiver or reduction of document search, review, and duplication fees because disclosure is "likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

44. The records sought in the FOIA Requests will significantly contribute to the public understanding of Defendant's "operations and activities," and the subject of the FOIA Requests has a "direct and clear" connection thereto. 45 C.F.R. § 5.54(b)(1). In addition, disclosure is not in Lambda Legal's commercial interest. Lambda Legal will evaluate the disclosed documents and, depending on what is contained in the documents, may well disseminate the information to the public. If Lambda Legal publicly discloses information obtained through the FOIA, it will do so at no cost to the public.

CAUSES OF ACTION

45. Lambda Legal repeats and incorporates every allegation contained in the foregoing paragraphs and incorporates them as though fully set forth herein.

46. HHS's failure to conduct an adequate search for records responsive to the FOIA Requests violates the FOIA, 5 U.S.C. §§ 552(a)(3)(A) and (a)(3)(C), as well as the regulations promulgated thereunder.

47. HHS's failure to determine whether to comply with the Outside Organizations Request, Political Appointees Request, or items (ii) through (iv) of the Nondiscrimination Policies Request within twenty (20) business days violates the FOIA, 5 U.S.C. § 522(a)(6)(A)(i), as well as the regulations promulgated thereunder.

48. HHS's failure to release responsive records for any of the FOIA Requests violates the FOIA, 5 U.S.C. § 522(a)(3)(A), as well as the regulations promulgated thereunder.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Lambda Legal requests that judgment be entered in its favor against Defendant HHS, and that the Court:

A. Order Defendant and any of its departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendant to conduct a reasonable search for all records responsive to Lambda Legal's FOIA Requests submitted on April 27, 2018;

B. Enjoin Defendant and any of its departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendant from improperly withholding records or portions of records responsive to Lambda Legal's FOIA Requests submitted on April 27, 2018 and order them to promptly produce the same;

C. Order Defendants to produce, within twenty (20) days of the Court's order, any and all non-exempt records responsive to Lambda Legal's FOIA Requests submitted on April 27, 2018 and *Vaughn* indexes of any responsive records withheld or redacted under claim of exemption;

D. Enjoin Defendant from charging Lambda Legal fees for the processing of its requests;

E. Award Lambda Legal its reasonable attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412; and

F. Grant all other such relief to Lambda Legal as the Court deems just and proper.

Dated: May 22, 2019
Washington, D.C.

/s/ Joshua M. Wesneski
Joshua M. Wesneski
Veronica Till Goodson (*pro hac vice application forthcoming*)

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Attorneys for Plaintiff Lambda Legal Defense and Education Fund, Inc.

Exhibit A



OMAR GONZALEZ-PAGAN, STAFF ATTORNEY
EMAIL: OGONZALEZ-PAGAN@LAMBDALEGAL.ORG

April 27, 2018

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
VIA ELECTRONIC MAIL

Freedom of Information Officer
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, D.C. 20201
FOIARequest@hhs.gov

Hugh Gilmore
Freedom of Information Officer
Centers for Medicare & Medicaid Services
North Building, Room N2-20-06
7500 Security Boulevard
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FOIA_Request@cms.hhs.gov
hugh.gilmore@cms.hhs.gov

Re: **Freedom of Information Act Request**

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations for the Department of Health and Human Services (HHS), 45 C.F.R. Part 5, Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) makes the following request for records.

Requested Records

Lambda Legal requests that HHS and its component, the Centers for Medicare & Medicaid Services (CMS), produce the following within twenty business days of this request:

1. Any records that mention, discuss, reference, or relate to HHS’s decision about whether to post, publish, or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status in any part or aspect of any Medicare or Medicaid program, plan, policy, contract, accreditation process, provider, facility, or service.

2. Any records that mention, discuss, reference, or relate to HHS's decision about whether to post, publish, or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status against HHS employees, staff, contractors, or subcontractors, including with regards to access to restrooms or other sex-designated facilities.
3. Any records that mention, discuss, reference, or relate to HHS's decision regarding whether to publish in the Federal Register, or any other manner, a rule or regulation signed prior to January 20, 2017, but that has since not been published.
4. Any records that mention, discuss, reference, or relate to any proposed rule or regulation that was signed on January 19, 2017 but that has not published in the Federal Register.

We request that you produce responsive materials from June 1, 2016, through the date your search is conducted.

In addition to the records requested above, we also request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If HHS uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

Lambda Legal seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs. Records include but are not limited to memoranda, planning documents, statements, reports, studies, handwritten notes, budget documents, publications, working papers, letters, facsimiles, emails, text messages, messages on messaging platforms (such as Slack, GChat, and WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.¹ **It is not adequate to rely on policies and procedures that**

¹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149—50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955—56 (D.C. Cir. 2016).

require officials to move such information to official systems within a certain period of time; we have a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.²

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered HHS’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.³ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but HHS’s archiving tools would capture that email under Capstone. Accordingly, we insist that HHS use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. We are available to work with you to craft appropriate search terms. However, custodian searches are still required, as agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁴ If it is your position that any portion of the requested records is exempt from disclosure, we request that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁵ Moreover, the *Vaughn* index “must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after

² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

³ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidentialmemorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁴ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

Lambda Legal FOIA Request
April 27, 2018

information.”⁶ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”⁷

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.⁸ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. We intend to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, HHS is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, we welcome an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, we can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to Attn: Erin Kelley, Lambda Legal, 120 Wall Street, 19th Floor, New York, NY 10005. If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

Background of Request

On January 18, 2018, HHS announced the creation of a new “Conscience and Religious Freedom Division” (“Division”) within its Office for Civil Rights (“OCR”). The stated purpose of the new division is to “vigorously and effectively” enforce laws to protect “the rights of conscience and religious freedom” in the provision of health and human services.⁹ The next day, the Division announced a new proposed rule (the “Proposed Rule”) to protect healthcare providers involved in HHS-funded programs from being “coerced into participating in activities that violate their

⁶ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

⁷ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

⁸ *Mead Data Central*, 566 F.2d at 261.

⁹ See *HHS Announces New Conscience and Religious Freedom Division*, HHS.GOV (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

consciences, such as abortion, sterilization, or assisted suicide.”¹⁰ Medical researchers have warned that the new Division and Proposed Rule could reverse the advances that have only recently been made in improving health outcomes for LGBTQ individuals: “It’s only a matter of time before all the gains made under the Obama administration are reversed under the Trump administration, for purposes that have nothing to do with public health and have everything to do with politics.”¹¹

In addition, reports indicate that upon taking office, President Trump “swiftly froze a series of LGBT-friendly rules, including proposed new regulations to further ban discrimination in Medicare and Medicaid. A regulation that would have allowed transgender HHS staff more protections when using the department’s bathrooms and other facilities was ignored.”¹² According to one HHS staffer, the rule “was signed and technically finished on Jan. 19, 2017, but not posted online . . . And the new administration considered it unpublished and pulled it back.”¹³

Significantly, the Trump Administration has appointed several politically-prominent religious activists to positions of authority within HHS.¹⁴ The public statements of these individuals evidences an unwillingness to enforce laws and protections on behalf of the LGBTQ community. Indeed, reports indicate that political appointees have overruled or completely sidelined career experts within HHS regarding decisions about controversial issues like reproductive or LGBTQ health care.¹⁵

The administration’s actions and the appointment of these activists to key positions within HHS have prompted alarm among health experts and advocates for the rights of LGBTQ people, people living with HIV, those seeking access to reproductive healthcare, and countless other groups. Advocates and experts warn that the Division and the newly proposed rule will allow healthcare providers to harm, rather than help, LGBTQ individuals and other patients seeking medical treatment. For example, one advocate described the formation of the Division as “the use of

¹⁰ See *HHS Takes Major Actions to Protect Conscience Rights and Life*, HHS.GOV (Jan. 19, 2018), <https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html>.

¹¹ *Id.*

¹² Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, POLITICO (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>.

¹³ *Id.*

¹⁴ Dan Diamond, *The religious activists on the rise inside Trump’s health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735>.

¹⁵ Heidi Przybyla, *Notes, emails reveal Trump appointees’ war to end HHS teen pregnancy program*, NBC NEWS (Mar. 20, 2018), <https://www.nbcnews.com/politics/politics-news/notes-emails-reveal-trump-appointees-war-end-hhs-teen-pregnancy-n857686> (“The Trump administration’s abrupt cancellation of a federal program to prevent teen pregnancy last year was directed by political appointees over the objections of career experts in the Department of Health and Human Services, which administers the program, according to internal notes and emails obtained by NBC News.”); Dan Diamond, *The religious activists on the rise inside Trump’s health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735> (“The political leaders’ moves also worry career agency staff, who say that important decisions about controversial issues like abortion, contraception and transgender care are increasingly being kept secret at the nation’s largest government agency.”).

religion to hurt people because you disapprove of who they are”¹⁶ and a medical researcher warned that the new Division and Proposed Rule could reverse advances recently made that have improved health outcomes for LGBT individuals: “It’s only a matter of time before all the gains made under the Obama administration are reversed under the Trump administration, for purposes that have nothing to do with public health and have everything to do with politics.”¹⁷

As a result, advocates and career employees at HHS have expressed concern that the Trump administration’s actions are aimed at benefiting a specific set of religious and moral beliefs above all others. Said one longtime HHS staffer: “It’s supposed to be the faith-based partnership center, not the Christian-based partnership center.”¹⁸ Advocacy groups have highlighted the administration’s focus “on recognizing one set of religious beliefs” and efforts to “redefine religious freedom to impose one set of ultraconservative beliefs on all Americans.”¹⁹

The lack of public information regarding the role of religious activists within HHS and the uncertainty among experts, advocates, and the public about the decision-making process at HHS regarding LGBTQ matters has created concern among the public. Accordingly, a FOIA request is necessary to shed light on the influence of these religious activists in the development and creation of the new Division, Proposed Rule, and policies pertaining to LGBTQ issues and people. The requested disclosures would provide much-needed clarity to the public and those who serve it regarding the influence of religious activists over recent HHS actions and HHS’s decisions with regards to LGBTQ health care.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), Lambda Legal requests a waiver of fees associated with processing this request for records.²⁰ The requested disclosures “would shed light on the operations or activities of the government,” and the subject of the request has a “direct and clear” connection thereto.²¹ However, we are willing to pay \$500 without receiving an estimate of costs in order to expedite this request.

As discussed, the disclosures pertain to the decision-making processes used by HHS in setting policies of national importance, particularly for LGBTQ individuals. The requested disclosures thus would be “meaningfully informative about government operations or activities.”²² There is

¹⁶ Dan Diamond & Jennifer Haberkorn, *Trump to overhaul HHS office, shield health workers with moral objections*, POLITICO (Jan. 16, 2018), <https://www.politico.com/story/2018/01/16/conscience-abortion-transgender-patients-health-care-289542>.

¹⁷ Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, POLITICO (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>.

¹⁸ Dan Diamond, *The religious activists on the rise inside Trump’s health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735>.

¹⁹ *Id.*

²⁰ See also 45 C.F.R. § 5.54(b).

²¹ 45 C.F.R. § 5.54(b)(1).

²² 45 C.F.R. § 5.54(b)(2)(i).

little publically-available information regarding the individuals involved in HHS's decisions pertaining to LGBTQ matters, including HHS's decision to create the new its new "Conscience and Religious Freedom Division" and to promulgate the Proposed Rule.

The requested disclosures would "contribute to the understanding of a reasonably broad audience of persons interested in the subject."²³ The creation of a new unit within HHS dedicated to promoting religious exemptions would have wide-ranging effects for LGBTQ people, people living with HIV, those seeking access to reproductive healthcare, and countless other constituencies. The ability to access medically-necessary care on a non-discriminatory basis is of particular concern to the communities that Lambda Legal represents. Indeed, according to a first-of-its-kind survey published by Lambda Legal in 2010, almost 56 percent of lesbian, gay, or bisexual respondents and 70 percent of transgender and gender-nonconforming respondents reported experiencing discrimination while attempting to access medical care.²⁴

Lambda Legal has the ability and intent "to effectively convey [the requested] information to the public."²⁵ Educating the public about issues affecting LGBTQ people and people living with HIV and publishing information about the rights of those constituencies are among Lambda Legal's primary purposes. According to its 2015 Annual Report, Lambda legal organized over 200 community education events and trainings in that fiscal year, with 15,000 estimated participants. Lambda Legal also had over 750,000 unique visitors to its website, and spent over \$6.4 million on educational programming.

Finally, the requested disclosures are not "primarily in the commercial interest of the requester."²⁶ Lambda Legal is a tax-exempt, not-for-profit legal, education, and charitable organization organized under section 501(c)(3) of the Internal Revenue Code, and has no commercial interest in the requested disclosures.

If you decide not to grant our request for a fee waiver and the costs of production exceed \$500, please contact us immediately upon making such a determination so that we can discuss arrangements.

Conclusion

We share a common mission to promote transparency in government. We look forward to working with HHS on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Erin Kelley at ekelley@lambdalegal.org or (212) 809-8585.

²³ 45 C.F.R. § 5.54(b)(2)(ii).

²⁴ *When Health Care Isn't Caring: Lambda Legal's Survey of Survey of Discrimination Against LGBT People and People Living with HIV*, LAMBDA LEGAL, at 5 (2010), www.lambdalegal.org/health-care-report.

²⁵ 45 C.F.R. § 5.54(b)(2)(ii).

²⁶ 45 C.F.R. § 5.54(b)(3).

Lambda Legal FOIA Request
April 27, 2018

Thank you for your prompt response to this request. We look forward to your determination of this request within twenty business days.²⁷

Sincerely,

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
Staff Attorney
ogonzalez-pagan@lambdalegal.org

/s/ Cathren Cohen
Cathren Cohen
Law Fellow
ccohen@lambdalegal.org

²⁷ 5 U.S.C. § 552(a)(6)(A).

Exhibit B



Refer to: Request Number **2018-00935-FOIA-OS**

May 10, 2018

Omar Gonzalez-Pagan
Senior Attorney
Lambda Legal
120 Wall Street, 19th Floor
New York, NY 10005-3919
Via email: ogonzalez-pagan@lambdalegal.org

Dear Mr. Gonzalez-Pagan:

This acknowledges receipt of your April 27, 2018, Freedom of Information Act (FOIA) request, submitted to the Department of Health and Human Services (HHS), FOI/Privacy Acts Division. Specifically, you requested:

- “1. Any records that mention, discuss, reference or relate to HHS's decision about whether to post, publish or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status in any part or aspect of any Medicare or Medicaid program, plan, policy, contract, accreditation process, provider, facility or service.**
- 2. Any records that mention, discuss, reference, or relate to HHS's decision about whether to post, publish, or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status against HHS employees, staff, contractors, or subcontractors, including with regards to access to restrooms or other sex-designated facilities.**
- 3. Any records that mention, discuss, reference, or relate to HHS's decision regarding whether to publish in the Federal Register, or any other manner, a rule or regulation signed prior to January 20, 2017, but that has since not been published.**
- 4. Any records that mention, discuss, reference, or relate to any proposed rule or regulation that was signed on January 19, 2017 but that has not been published in the Federal Register.**

Date Range for Records Search: June 01, 2016, through the date your search is conducted.”

You also requested a fee waiver. We received your request on **April 27, 2018**.

We have initiated a search to locate records falling within the scope of your request. If our searching units advise us that you have requested a voluminous amount of records that require extensive search and examination, my staff will contact you shortly to discuss your willingness to modify your request.

Gonzalez-Pagan – Page 2 of 3
2018-00935-FOIA-OS

The FOIA requires that we respond to your request within 20 working days of its receipt in this office. Please note the following unusual and exceptional circumstances that will impact our response time: (1) we will need to search for and collect records from components and/or field offices external to this office; and (2) because we receive a very heavy volume of FOIA requests, we will process your request in line with our established policy of "first in, first out" case processing. If either of these circumstances prevents our office from responding within the 20 working day timeframe, we will utilize a 10 working day extension to process your request, as permitted pursuant to the FOIA. This policy is consistent with court decisions regarding FOIA's time limits.

The law authorizes us to collect fees for responding to FOIA requests. However, because we are uncertain that applicable fees will exceed our minimum charge (\$25.00), we are not addressing your request for a fee waiver at this time. Nevertheless, if we determine there will be fees associated with processing your request, we will contact you at that time.

Please note the following:

If you believe that we should expedite the processing of your request because the requested records are needed in light of a compelling need; i.e., an imminent threat to the life and safety of an individual; an urgency to inform the public concerning government activity (provided you are a member of the media); a deadline in litigation; a deadline for commenting on proposed regulations; or other urgent matters, you must ask for expedited processing in writing and provide to this office as much relevant information as possible. In line with 5 U.S.C. § 552(a)(6)(E)(vi), you must demonstrate the compelling need in a statement certified to be true and correct to the best of your knowledge and belief. Attach any supporting documentation to your statement, including a court scheduling order if your request is based upon a litigation deadline. (Fax supporting documentation to the FOIA/PA Division at (202) 690-8320).

When submitting this additional information, please refer to the case number listed at the top left-hand corner of this letter, and send it to:

FOI/Privacy Acts Division
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Room 729H
Washington, DC 20201

If you are not satisfied with any aspect of the processing and handling of this request, you have the right to seek dispute resolution services from:

Michael Bell
HHS FOIA Public Liaison
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Affairs
Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201

Telephone: (202) 260-0793
E-mail: HHS_FOIA_Public_Liaison@hhs.gov

and/or:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001

Telephone: 202-741-5770
Toll-Free: 1-877-684-6448
E-mail: ogis@nara.gov
Fax: 202-741-5769

Any questions regarding the status of this request should be directed to our office at 202-690-7453.

Sincerely yours,

For


Michael S. Marquis
Director
FOI/Privacy Acts Division

Exhibit C



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Assistant Secretary for Public Affairs
Washington, D.C. 20201

Case No. 2018-00935-FOIA-OS

September 14, 2018

Omar Gonzalez-Pagan
Senior Attorney
Lambda Legal
120 Wall Street, 19th Floor
New York, NY 10005-3919

Dear Mr. Gonzalez-Pagan:

This letter is the final response to your April 27, 2018, Freedom of Information Act (FOIA) request. Specifically, you requested the following records:

“... any records that mention, discuss, reference or relate to HHS's decision about whether to post, publish or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender, identity, gender expression, sex stereotypes, or transgender status in any part or aspect of any Medicare or Medicaid program, plan, policy, contract, accreditation process, provider, facility or service.”

A representative from the Office for Civil Rights (OCR) conducted a search and reports that there are no records responsive to your request.

While we believe that an adequate search of the appropriate files was conducted for the records requested, you have the right to appeal this finding that no responsive records exist within OCR. By filing an appeal, you preserve your rights under FOIA and give the agency a chance to review and reconsider your request and the agency's decision.

Your appeal must be mailed within 90 days from the date of receipt of this letter, to:

Ms. Kim Hutchinson
Deputy Agency Chief FOIA Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Affairs
Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201

Please clearly mark both the envelope and your letter “Freedom of Information Act Appeal.” You may also e-mail your appeal to: HHS.ACFO@hhs.gov.

If you would like to discuss our response before filing an appeal to attempt to resolve your

dispute without going through the appeals process, you may contact the HHS FOIA Public Liaison for assistance at:

Michael Bell
HHS FOIA Public Liaison
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Affairs
Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201

Telephone: (202) 260-0793
E-mail: [HHS FOIA Public Liaison@hhs.gov](mailto:HHS_FOIA_Public_Liaison@hhs.gov)

If you are unable to resolve your FOIA dispute through our FOIA Public Liaison, the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740-6001

Telephone: 202-741-5770
Toll-Free: 1-877-684-6448
E-mail: ogis@nara.gov
Fax: 202-741-5769

There are no charges in this instance because the billable costs are less than our threshold of \$25.

Sincerely yours,



Michael S. Marquis
Director
FOI/Privacy Acts Division

Exhibit D

December 5, 2018

VIA E-MAIL

Michael Bell
HHS FOIA Public Liaison
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Health
Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201

Re: Freedom of Information Act Request, Case No. 2018-00935-FOIA-OS

Dear Mr. Bell:

I am writing regarding Freedom of Information Act (FOIA) request Case No. 2018-00935-FOIA-OS, filed by Lambda Legal (Lambda) on April 27, 2018 and received by the Department of Health and Human Services (HHS) on the same date. Gibson Dunn represents Lambda with regard to this request.

On September 14, 2018, HHS informed Lambda that no responsive records were found with regard to the following request:

“... any records that mention, discuss, reference or relate to HHS’s decision about whether to post, publish or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender, identity, gender expression, sex stereotypes, or transgender status in any part or aspect of any Medicare or Medicaid program, plan, policy, contract, accreditation process, provider, facility or service.”

Based on media reports regarding HHS’s activities, we believe that responsive documents exist. Lambda is considering whether to administratively appeal this finding; however, in an attempt to resolve this matter informally, we would like further information on the search.

As an initial matter, the September 14 correspondence from HHS states that a representative from the Office for Civil Rights (OCR) conducted a search. How was the OCR selected as the office to search? Did this search cover the entire OCR, including the Office of the Deputy Director for Conscience and Religious Freedom?

GIBSON DUNN

December 5, 2018

Page 2

We also would like to know whether searches were conducted for other offices. Because our request relates to rules or regulations prohibiting discrimination in Medicare or Medicaid, we believe responsive documents may be in the Centers for Medicare & Medicaid Services (CMS). Was this office searched as part of this request?

In addition, since our request covers decisions about whether to post, publish or enforce rules or regulations, we think the Office of Intergovernmental and External Affairs (IEA) may have responsive records in its role of intergovernmental policy liaison. Was this office searched?

We further kindly request that you provide us with information about how the search was conducted: using paper records, via an electronic system or database, etc. If an electronic search tool was used, please provide us with the list of search terms.

Finally, HHS's September 14, 2018 correspondence only addressed item 1 of request number 2018-00935-FOIA-OS. Specifically, in 2018-00935-FOIA-OS, Lambda also requested that HHS provide:

"2. Any records that mention, discuss, reference, or relate to HHS's decision about whether to post, publish, or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status against HHS employees, staff, contractors, or subcontractors, including with regards to access to restrooms or other sex-designated facilities."

"3. Any records that mention, discuss, reference, or relate to HHS's decision regarding whether to publish in the Federal Register, or any other manner, a rule or regulation signed prior to January 20, 2017, but that has since not been published."

"4. Any records that mention, discuss, reference, or relate to any proposed rule or regulation that was signed on January 19, 2017 but that has not published in the Federal Register."

Are these requests still being processed? If so, which offices will be or have been searched in response to these requests? Specifically, with respect to item 2, has the Office of the Assistant Secretary for Administration been searched?

Thank you very much for your prompt attention to this request.

GIBSON DUNN

December 5, 2018

Page 3

Sincerely,

A handwritten signature in black ink, appearing to read "Veronica Till Goodson". The signature is fluid and cursive, with the first name being the most prominent.

Veronica Till Goodson

VTG/vtg

cc Omar Gonzalez-Pagan

Avi Garbow

Minh Nguyen-Dang

Exhibit E

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Veronica Till Goodson
Direct: +1 202.887.3719
VTillGoodson@gibsondunn.com

Minh Nguyen-Dang
Direct: +1 202.887.3681
MNguyen-Dang@gibsondunn.com

December 13, 2018

VIA E-MAIL

Kim Hutchinson
Deputy Agency Chief FOIA Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Affairs
Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201
HHS.ACFO@hhs.gov

Re: Freedom of Information Act Appeal, Case Nos. 2018-00935-FOIA-OS, 2018-00936-FOIA-OS, and 2018-00937-FOIA-OS.

Dear Ms. Hutchinson:

We represent Lambda Legal (“Lambda”) with regard to three requests made by Lambda pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552: Case Nos. 2018-00935-FOIA-OS, 2018-00936-FOIA-OS, and 2018-00937-FOIA-OS. We write today to appeal HHS’s failure to produce any documents in response to Item #1 of Case No. 2018-00935-FOIA-OS, and HHS’s undue delay in responding to Items #2 through #4 of Case No. 2018-00935-FOIA-OS and the entirety of Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS.

I. Background of the Requests

A. Case No. 2018-00935-FOIA-OS

Lambda filed Case No. 2018-00935-FOIA-OS on April 27, 2018. The request comprised of four items:

1. Any records that mention, discuss, reference or relate to HHS’s decision about whether to post, publish or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender, identity, gender expression, sex stereotypes, or transgender status in any part or aspect of any

GIBSON DUNN

December 13, 2018

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Medicare or Medicaid program, plan, policy, contract, accreditation process, provider, facility or service.

2. Any records that mention, discuss, reference, or relate to HHS's decision about whether to post, publish, or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status against HHS employees, staff, contractors, or subcontractors, including with regards to access to restrooms or other sex-designated facilities.

3. Any records that mention, discuss, reference, or relate to HHS's decision regarding whether to publish in the Federal Register, or any other manner, a rule or regulation signed prior to January 20, 2017, but that has since not been published."

4. Any records that mention, discuss, reference, or relate to any proposed rule or regulation that was signed on January 19, 2017 but that has not published in the Federal Register.

HHS acknowledged receipt of this request on May 3, 2018.

On September 14, 2018, HHS informed Lambda that no responsive records were found with regard to Item #1. HHS has not provided any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations with regard to Items #2 through #4.

Correspondence related to Case No. 2018-00935-FOIA-OS is appended in Attachment 1.

B. Case No. 2018-00936-FOIA-OS

Lambda also filed Case No. 2018-00936-FOIA-OS on April 27, 2018, requesting for the period from January 20, 2017 to the date of the search

[a]ll records reflecting communications (including emails, email attachments, text messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any responsive communications, summaries of any responsive communications, or other materials reflecting communications) between (a) any individual or office at HHS, including its component agencies, and (b) individuals at any of the organizations listed [Table A in the request].

GIBSON DUNN

December 13, 2018

Page 3

On May 10, 2018, HHS asked for clarification of the request on the grounds that the original request was “overly broad.” Lambda replied on the same day, clarifying that the request was only for communications between political appointees at HHS and the specified groups and providing the domain names for each group. Despite repeated follow up, HHS has not acknowledged Lambda’s clarification of the request. Nor has HHS provided any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations.

Correspondence related to Case No. 2018-00936-FOIA-OS is appended in Attachment 2.

C. Case No. 2018-00937-FOIA-OS

Also on April 27, 2018, Lambda filed Case No. 2018-00937-FOIA-OS, requesting for the period from January 20, 2017 to the date of the search

[a]ny records belonging to, created by, addressed to, or sent to “political appointees” at HHS, including those listed in [Table A in the request], that mention, discuss, reference, or relate to lesbian, gay, bisexual, transgender, or queer (“LGBTQ”) matters or people, from January 20, 2017, through the date the search is conducted.

HHS acknowledged receipt of the request on May 1, 2018. But since then, as with Case No. 2018-00936-FOIA-OS and despite Lambda’s repeated follow up, HHS has not provided any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations.

Correspondence related to Case No. 2018-00937-FOIA-OS is appended in Attachment 3.

II. Item #1 of Case No. 2018-00935-FOIA-OS

Lambda hereby administratively appeals HHS’s September 14, 2018 finding relating to Item #1 of Case No. 2018-00935-FOIA-OS. Based on public information regarding HHS’s activities, we believe that responsive records exist. Further, the correspondence from HHS indicates that only one office was searched, when other offices are likely to hold responsive records. We therefore also challenge the adequacy of the search that did not locate any responsive records.

A. Existence of Responsive Records

As described below, press reporting, HHS’s own statements in federal court, and public records regarding HHS’s regulatory activities all indicate that HHS has been making decisions about whether to post, publish or enforce rules or regulations prohibiting

GIBSON DUNN

December 13, 2018

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discrimination on the bases covered by Lambda's request, including sex, gender, and transgender status. HHS's response that no records were found indicates that its search was not adequate.

Media reporting indicates that since 2017, HHS has undertaken decisions where the record documentation would be responsive to Item #1 of request 2018-00935-FOIA-OS. For example, on February 19, 2018, Politico reported that "upon taking office last year, the Trump administration swiftly froze a series of LGBT-friendly rules, including proposed new regulations to further ban discrimination in Medicare and Medicaid." Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, Politico (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>. Item #1 of Case No. 2018-00935-FOIA-OS would cover records related such a decision by HHS to halt action on proposed regulations prohibiting discrimination in Medicare and Medicaid on the basis of sex, sexual orientation, gender, identity, gender expression, sex stereotypes, or transgender status. The Politico article indicates that HHS made such decisions in 2017, and, thus, that HHS holds records responsive to Lambda's request. HHS must make these records promptly available pursuant to its FOIA obligations. *See* 5 U.S.C. § 552(a)(3)(A).

HHS has also indicated in federal court that it is undertaking decisions regarding the enforcement of regulations prohibiting discrimination in all health programs or activities administered by HHS on the basis of (among others), sex, sex stereotyping, gender, gender identity, and transgender status. *See* 45 C.F.R. §§ 92.2, 92.4. Specifically, HHS is involved in active litigation regarding whether to enforce the gender identity-related provisions of 45 C.F.R. § 92, a nondiscrimination regulation applicable to all health programs or activities administered by HHS, including the Medicare Part D program. *See Franciscan All. v. Price*, No. 7:16-cv-00108-O (N.D. Tex.). On October 15, 2018, HHS informed the court in this proceeding that HHS is "reevaluating the reasonableness, necessity, and efficacy" of 45 C.F.R. § 92. Status Report at 1, *Franciscan All.*, No. 7:16-cv-00108-O (N.D. Tex. Oct. 15, 2018), ECF No. 119. In the process of this evaluation, it would be reasonable to assume that HHS has created records related to decisions on whether to enforce the rule. Because the specific context of the litigation is a regulation regarding prohibiting gender identity discrimination, these decisions would relate to the bases for discrimination outlined in Item #1. Insofar as these decisions also impact nondiscrimination in Medicare or Medicaid and related programs, the associated records are responsive to Lambda's request, and, therefore, must be made available promptly. *See* 5 U.S.C. § 552(a)(3)(A).

Further, the public rulemaking docket indicates that HHS is also active in creating new nondiscrimination rules and regulations related to 45 C.F.R. § 92. Because 45 C.F.R. § 92 prohibits discrimination in HHS's programs, such as Medicare and Medicaid, on bases including sex, sex stereotyping, gender, gender identity, and transgender status, records

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documenting HHS's decisions about whether to post or publish this new proposed rule are responsive to Item #1. In particular, on April 13, 2018, HHS submitted a draft proposed rule to the Office of Management and Budget ("OMB") entitled "Nondiscrimination in Health Programs and Activities." OMB, Pending EO 12866 Regulatory Review, RIN 0945-AA11, <https://www.reginfo.gov/public/do/eoDetails?rrid=127999>. HHS cited this draft proposed rule to the court in *Franciscan Alliance* as related to the issues in that litigation, which include nondiscrimination provisions barring discrimination related to gender identity that would apply to HHS's health programs—such as Medicare and Medicaid programs. See Status Report at 1, *Franciscan All.*, No. 7:16-cv-00108-O (N.D. Tex. Oct. 15, 2018), ECF No. 119. This rulemaking demonstrates that records responsive to Lambda's request exist, and they must promptly be made available as required by 5 U.S.C. § 552(a)(3)(A).

B. Adequacy of the Search

When an agency responds to a request under FOIA by stating that no responsive records were found, the requester can challenge the adequacy of the search. See *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 67-68 (D.C. Cir 1990). The agency must then show that its search was "reasonably expected to produce the information requested." *Id.* at 68. Although an agency is not required to "search every division . . . when the agency believes that responsive documents are located in one place," *Defenders of Wildlife v. U.S. Dep't of Agric.*, 311 F. Supp. 2d 44, 56 (D.D.C. 2004), a agency's search is "not sufficiently thorough" if it does not cover offices that are "likely repositories of responsive records," *Defenders of Wildlife v. U.S. Dep't of Interior*, 314 F. Supp. 2d 1, 13-14 (D.D.C. 2004).

With respect to the search carried out for Item #1 of request 2018-00935-FOIA-OS, the specific examples outlined above suggest that HHS has been engaged in decision-making that would generate records relevant to Lambda's request. Although we do not have information regarding the search terms and methods used originally, we hope that the information provided here may assist with renewed searches that are "reasonably calculated" to locate responsive records. See *Dep't of Agric.*, 311 F. Supp. 2d at 54.

Furthermore, HHS's September 14 correspondence states that a representative from the Office for Civil Rights (OCR) conducted the search to locate materials responsive to for Item #1 of request 2018-00935-FOIA-OS. It appears from the correspondence that this was the only office searched. However, at least two other HHS offices are "likely repositories of responsive records." *Dep't of Interior*, 314 F. Supp. 2d at 13.

First, because Lambda's request relates to rules or regulations prohibiting discrimination in Medicare or Medicaid, responsive documents would likely be in the custody of the Centers for Medicare & Medicaid Services ("CMS"). Second, since the request covers decisions about whether to post, publish or enforce rules or regulations, it is reasonable to expect that

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the Office of Intergovernmental and External Affairs (“IEA”) would have responsive records due to its role of intergovernmental policy liaison.

Based on HHS’s response that no responsive records were located, despite public information indicating that HHS has undertaken decisions that would generate records responsive to the request, the search was not reasonably calculated to find the information sought. Further, offices likely to have records were not searched, indicating that the search was not sufficiently thorough. As a result, HHS did not make reasonable efforts to search for records responsive to Item #1 of request number 2018-00935-FOIA-OS.

III. Items #2 Through #4 of Case No. 2018-00935-FOIA-OS and Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS

Lambda also hereby appeals HHS’s undue delay in failing to respond to Items #2 through #4 of Case No. 2018-00935-FOIA-OS and Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS. As explained, HHS has failed to provide Lambda with any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations as to these requests. Indeed, HHS has not even acknowledged receipt of Lambda’s clarification to Case No. 2018-00936-FOIA-OS.

Lambda appreciates that HHS may currently face a large number of FOIA requests relative to its capacity to respond to those requests. Nonetheless, HHS remains under a statutory duty to respond to FOIA requests within thirty working days. 5 U.S.C. § 552(a)(6). It has now been over six months since Lambda filed the three requests, yet Lambda still has not received any substantive response as to Items #2 through #4 of Case No. 2018-00935-FOIA-OS or to Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS—or even an indication of when HHS expects to provide a substantive response. The delays are particularly confounding as to Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS because of the limited nature of the requests. Both requests relate to a limited number of identified individuals and/or organizations, for a period of less than two years.

HHS’s failure to discharge its statutory obligations is unacceptable. HHS’s failure to respond to these requests within the time period required by the FOIA serves as a constructive denial of the requests, and Lambda is deemed to have exhausted its administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C)(i). Lambda insists that HHS exercise the diligence required by law and provide the records responsive to Items #2 through #4 of Case No. 2018-00935-FOIA-OS and Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS by Friday, January 18, 2019. *See* 5 U.S.C. § 552(a)(6)(A)(ii).

GIBSON DUNN

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Thank you very much for your consideration of this appeal. If you have any questions or require any additional information, please contact Veronica Till Goodson directly at (202) 887-3719 or Minh Nguyen-Dang at (202) 887-3681.

Sincerely,

A handwritten signature in black ink, appearing to read "Veronica Till Goodson".

Veronica Till Goodson
Minh Nguyen-Dang

cc: Omar Gonzalez-Pagan
Avi Garbow
Minh Nguyen-Dang

Exhibit F



OMAR GONZALEZ-PAGAN, STAFF ATTORNEY
EMAIL: OGONZALEZ-PAGAN@LAMBDALEGAL.ORG

April 27, 2018

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
VIA ELECTRONIC MAIL

Freedom of Information Officer
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, D.C. 20201
FOIARequest@hhs.gov

Re: **Freedom of Information Act Request**

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations for the Department of Health and Human Services (HHS), 45 C.F.R. Part 5, Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) makes the following request for records.

Requested Records

Lambda Legal requests that HHS produce the following within twenty business days of this request:

All records reflecting communications (including emails, email attachments, text messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any responsive communications, summaries of any responsive communications, or other materials reflecting communications) between (a) any individual or office at HHS, including its component agencies, and (b) individuals at any of the organizations listed in Table A below.

Table A
<ul style="list-style-type: none">• American Center for Law and Justice• American Civil Rights Union• American College of Pediatricians• Alliance Defending Freedom

- American Family Association
- Americans United for Life
- American Values
- Becket Fund for Religious Liberty
- Center for Constitutional Jurisprudence
- Claremont Institute
- Eagle Forum Education and Legal Defense Fund
- Family Research Council
- First Liberty
- Freedom of Conscience Defense Fund
- Heritage Foundation
- Liberty Counsel
- Liberty, Life, and Law Foundation
- National Legal Foundation
- National Organization for Marriage
- National Right to Life
- Pacific Legal Foundation
- The Rutherford Institute
- Thomas More Society
- United States Conference of Catholic Bishops

We request that you produce responsive materials from January 20, 2017, through the date your search is conducted.

In addition to the records requested above, we also request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If HHS uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

Lambda Legal seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs. Records include but are not limited to memoranda, planning documents, statements, reports, studies, handwritten notes, budget documents, publications,

Lambda Legal FOIA Request
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working papers, letters, facsimiles, emails, text messages, messages on messaging platforms (such as Slack, GChat, and WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.¹ **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; we have a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**²

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered HHS’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.³ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but HHS’s archiving tools would capture that email under Capstone. Accordingly, we insist that HHS use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. We are available to work with you to craft appropriate search terms. However, custodian searches are still required, as agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

¹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149—50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955—56 (D.C. Cir. 2016).

² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

³ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidentialmemorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

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Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁴ If it is your position that any portion of the requested records is exempt from disclosure, we request that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁵ Moreover, the *Vaughn* index “must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information.”⁶ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”⁷

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.⁸ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. We intend to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, HHS is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, we welcome an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, we can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to Attn: Erin Kelley, Lambda Legal, 120 Wall Street, 19th Floor, New York, NY 10005. If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

⁴ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁶ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

⁷ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

⁸ *Mead Data Central*, 566 F.2d at 261.

Background of Request

On January 18, 2018, HHS announced the creation of a new “Conscience and Religious Freedom Division” (“Division”) within its Office for Civil Rights (“OCR”). The stated purpose of the new division is to “vigorously and effectively” enforce laws to protect “the rights of conscience and religious freedom” in the provision of health and human services.⁹ The next day, the Division announced a new proposed rule (the “Proposed Rule”) to protect healthcare providers involved in HHS-funded programs from being “coerced into participating in activities that violate their consciences, such as abortion, sterilization, or assisted suicide.”¹⁰ Medical researchers have warned that the new Division and Proposed Rule could reverse the advances that have only recently been made in improving health outcomes for LGBTQ individuals: “It’s only a matter of time before all the gains made under the Obama administration are reversed under the Trump administration, for purposes that have nothing to do with public health and have everything to do with politics.”¹¹

In addition, reports indicate that upon taking office, President Trump “swiftly froze a series of LGBT-friendly rules, including proposed new regulations to further ban discrimination in Medicare and Medicaid. A regulation that would have allowed transgender HHS staff more protections when using the department’s bathrooms and other facilities was ignored.”¹² According to one HHS staffer, the rule “was signed and technically finished on Jan. 19, 2017, but not posted online . . . And the new administration considered it unpublished and pulled it back.”¹³

Significantly, the Trump Administration has appointed several politically-prominent religious activists to positions of authority within HHS.¹⁴ The public statements of these individuals evidences an unwillingness to enforce laws and protections on behalf of the LGBTQ community. Indeed, reports indicate that political appointees have overruled or completely sidelined career experts within HHS regarding decisions about controversial issues like reproductive or LGBTQ health care.¹⁵

⁹ See *HHS Announces New Conscience and Religious Freedom Division*, HHS.GOV (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

¹⁰ See *HHS Takes Major Actions to Protect Conscience Rights and Life*, HHS.GOV (Jan. 19, 2018), <https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html>.

¹¹ *Id.*

¹² Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, POLITICO (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>.

¹³ *Id.*

¹⁴ Dan Diamond, *The religious activists on the rise inside Trump’s health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735>.

¹⁵ Heidi Przybyla, *Notes, emails reveal Trump appointees’ war to end HHS teen pregnancy program*, NBC NEWS (Mar. 20, 2018), <https://www.nbcnews.com/politics/news/notes-emails-reveal-trump-appointees-war-end-hhs-teen-pregnancy-n857686> (“The Trump administration’s abrupt cancellation of a federal program to prevent teen pregnancy last year was directed by political appointees over the objections of career experts in the Department of Health and Human Services, which administers the program, according to internal notes and emails obtained by NBC News.”); Dan Diamond, *The religious activists on the rise inside Trump’s health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735> (“The political leaders’

The administration's actions and the appointment of these activists to key positions within HHS have prompted alarm among health experts and advocates for the rights of LGBTQ people, people living with HIV, those seeking access to reproductive healthcare, and countless other groups. Advocates and experts warn that the Division and the newly proposed rule will allow healthcare providers to harm, rather than help, LGBTQ individuals and other patients seeking medical treatment. For example, one advocate described the formation of the Division as "the use of religion to hurt people because you disapprove of who they are"¹⁶ and a medical researcher warned that the new Division and Proposed Rule could reverse advances recently made that have improved health outcomes for LGBT individuals: "It's only a matter of time before all the gains made under the Obama administration are reversed under the Trump administration, for purposes that have nothing to do with public health and have everything to do with politics."¹⁷

As a result, advocates and career employees at HHS have expressed concern that the Trump administration's actions are aimed at benefiting a specific set of religious and moral beliefs above all others. Said one longtime HHS staffer: "It's supposed to be the faith-based partnership center, not the Christian-based partnership center."¹⁸ Advocacy groups have highlighted the administration's focus "on recognizing one set of religious beliefs" and efforts to "redefine religious freedom to impose one set of ultraconservative beliefs on all Americans."¹⁹

The lack of public information regarding the role of religious activists within HHS and the uncertainty among experts, advocates, and the public about the decision-making process at HHS regarding LGBTQ matters has created concern among the public. Accordingly, a FOIA request is necessary to shed light on the influence of these religious activists in the development and creation of the new Division, Proposed Rule, and policies pertaining to LGBTQ issues and people. The requested disclosures would provide much-needed clarity to the public and those who serve it regarding the influence of religious activists over recent HHS actions and HHS's decisions with regards to LGBTQ health care.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), Lambda Legal requests a waiver of fees associated with processing this request for records.²⁰ The requested disclosures

moves also worry career agency staff, who say that important decisions about controversial issues like abortion, contraception and transgender care are increasingly being kept secret at the nation's largest government agency.").

¹⁶ Dan Diamond & Jennifer Haberkorn, *Trump to overhaul HHS office, shield health workers with moral objections*, POLITICO (Jan. 16, 2018), <https://www.politico.com/story/2018/01/16/conscience-abortion-transgender-patients-health-care-289542>.

¹⁷ Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, POLITICO (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>.

¹⁸ Dan Diamond, *The religious activists on the rise inside Trump's health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735>.

¹⁹ *Id.*

²⁰ See also 45 C.F.R. § 5.54(b).

“would shed light on the operations or activities of the government,” and the subject of the request has a “direct and clear” connection thereto.²¹ However, we are willing to pay \$500 without receiving an estimate of costs in order to expedite this request.

As discussed, the disclosures pertain to the decision-making processes used by HHS in setting policies of national importance, particularly for LGBTQ individuals. The requested disclosures thus would be “meaningfully informative about government operations or activities.”²² There is little publically-available information regarding the individuals involved in HHS’s decisions pertaining to LGBTQ matters, including HHS’s decision to create the new its new “Conscience and Religious Freedom Division” and to promulgate the Proposed Rule.

The requested disclosures would “contribute to the understanding of a reasonably broad audience of persons interested in the subject.”²³ The creation of a new unit within HHS dedicated to promoting religious exemptions would have wide-ranging effects for LGBTQ people, people living with HIV, those seeking access to reproductive healthcare, and countless other constituencies. The ability to access medically-necessary care on a non-discriminatory basis is of particular concern to the communities that Lambda Legal represents. Indeed, according to a first-of-its-kind survey published by Lambda Legal in 2010, almost 56 percent of lesbian, gay, or bisexual respondents and 70 percent of transgender and gender-nonconforming respondents reported experiencing discrimination while attempting to access medical care.²⁴

Lambda Legal has the ability and intent “to effectively convey [the requested] information to the public.”²⁵ Educating the public about issues affecting LGBTQ people and people living with HIV and publishing information about the rights of those constituencies are among Lambda Legal’s primary purposes. According to its 2015 Annual Report, Lambda legal organized over 200 community education events and trainings in that fiscal year, with 15,000 estimated participants. Lambda Legal also had over 750,000 unique visitors to its website, and spent over \$6.4 million on educational programming.

Finally, the requested disclosures are not “primarily in the commercial interest of the requester.”²⁶ Lambda Legal is a tax-exempt, not-for-profit legal, education, and charitable organization organized under section 501(c)(3) of the Internal Revenue Code, and has no commercial interest in the requested disclosures.

If you decide not to grant our request for a fee waiver and the costs of production exceed \$500, please contact us immediately upon making such a determination so that we can discuss arrangements.

²¹ 45 C.F.R. § 5.54(b)(1).

²² 45 C.F.R. § 5.54(b)(2)(i).

²³ 45 C.F.R. § 5.54(b)(2)(ii).

²⁴ *When Health Care Isn’t Caring: Lambda Legal’s Survey of Survey of Discrimination Against LGBT People and People Living with HIV*, LAMBDA LEGAL, at 5 (2010), www.lambdalegal.org/health-care-report.

²⁵ 45 C.F.R. § 5.54(b)(2)(ii).

²⁶ 45 C.F.R. § 5.54(b)(3).

Lambda Legal FOIA Request
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Conclusion

We share a common mission to promote transparency in government. We look forward to working with HHS on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Erin Kelley at ekelley@lambdalegal.org or (212) 809-8585.

Thank you for your prompt response to this request. We look forward to your determination of this request within twenty business days.²⁷

Sincerely,

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
Staff Attorney
ogonzalez-pagan@lambdalegal.org

/s/ Cathren Cohen
Cathren Cohen
Law Fellow
ccohen@lambdalegal.org

²⁷ 5 U.S.C. § 552(a)(6)(A).

Exhibit G



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Assistant Secretary for Public Affairs
Washington, D.C. 20201

Case No. 2018-00936-FOIA-OS

May 10, 2018

Omar Gonzalez-Pagan
Senior Attorney
Lambda Legal
120 Wall Street, 19th Floor
New York, NY 10005-3919
Via email: ogonzalez-pagan@lambdalegal.org

Dear Mr. Gonzalez-Pagan:

This letter is in response to your April 27, 2018, Freedom of Information Act (FOIA) request. Specifically, you requested the following:

“All records reflecting communications (including emails, email attachments, text messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any responsive communications, summaries of any responsive communications, or other materials reflecting communications) between (a) any individual or office at HHS, including its component agencies, and (b) individuals at any of the organizations listed in Table A below.

Table A

- American Center for Law and Justice
- American Civil Rights Union
- American College of Pediatricians
- Alliance Defending Freedom
- American Family Association
- Americans United for Life
- American Values
- Becket Fund for Religious Liberty
- Center for Constitutional Jurisprudence
- Claremont Institute
- Eagle Forum Education and Legal Defense Fund
- Family Research Council
- First Liberty
- Freedom of Conscience Defense Fund
- Heritage Foundation
- Liberty Counsel
- Liberty, Life, and Law Foundation
- National Legal Foundation

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- National Organization for Marriage
- National Right to Life
- Pacific Legal Foundation
- The Rutherford Institute
- Thomas More Society
- United States Conference of Catholic Bishops.”

This letter is to notify you that we interpret your request to be overly broad in that any of the 79,000+ employees in the Department of Health and Human Services may have possession of responsive records. Additionally, the organizations listed in "table A" lack email domains.

The FOIA allows the public to request access to "reasonably described" existing agency records (subject to any applicable FOIA exemptions to disclosure). This means you must describe the category of records you are seeking or the actual document(s), and provide sufficient details to permit a search with reasonable effort, utilizing existing indices and search tools. Unfortunately, your request leaves too much open to interpretation as to which employee's email accounts should be searched for records responsive to your request. Additionally, the office of Information Technology Infrastructure Operations (ITIO) is unable to perform an adequate search lacking the email domains of the external entities named in table A of your request.

At this time, we have placed your request in "tolled" status. Therefore, please clarify and describe the records you are seeking, by sending an email to FOIARequest@hhs.gov.

After you further advise us what records you are seeking, we can begin to process your FOIA request.

If you have not contacted our office within 20 business days from the date of this letter, your request will be administratively closed. Therefore, no action on your part is needed, if you no longer have a need for the records.

Sincerely yours,



Michael S. Marquis
Director
FOI/Privacy Acts Division

Exhibit H



OMAR GONZALEZ-PAGAN, STAFF ATTORNEY
EMAIL: OGONZALEZ-PAGAN@LAMBDALEGAL.ORG

May 10, 2018

VIA ELECTRONIC MAIL

Freedom of Information Officer
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, D.C. 20201
FOIARequest@hhs.gov

Re: **Clarification Regarding Freedom of Information Act Request,
Case No. 2018-00936-FOIA-OS**

Dear Freedom of Information Officer:

This letter is in response to the clarification letter from Michael S. Marquis, Director of the FOI/Privacy Acts Division at the Department of Health and Human Services (“HHS”), dated May 10, 2018. Specifically, the letter requests clarification of the records sought by Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) through its Freedom of Information Act (“FOIA”) request, Case No. 2018-00936-FOIA-OS.

In its May 10, 2018 letter, HHS objected to the original request as “overly broad” because “any of the 79,000+ employees in the Department of Health and Human Services may have possession of responsive records” and “the organizations listed in ‘table A’ lack email domains.” In order to address HHS’s concerns, please be advised that Lambda Legal’s FOIA Request (Case No. 2018-00936-FOIA-OS) is clarified as follows:

Clarification of Requested Records

Lambda Legal requests that HHS produce the following within twenty business days of this request:

All records reflecting communications (including emails, email attachments, text messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any responsive communications, summaries of any responsive communications, or other materials reflecting communications) between (a) any **political appointee** at HHS, including its component agencies, and (b) individuals at any of the organizations listed in Table A below.

TABLE A	
Organization	Email Domain
American Center for Law and Justice	@aclj.org
American Civil Rights Union	@theacru.org
American College of Pediatricians	@acpeds.org
Alliance Defending Freedom	@adflegal.org
American Family Association	@afa.net
Americans United for Life	@aul.org
American Values	@amvalue.org
Becket Fund for Religious Liberty	@becketlaw.org
Center for Constitutional Jurisprudence	@claremont.org
Claremont Institute	@claremont.org
Eagle Forum Education and Legal Defense Fund	@eagleforum.org
Family Research Council	@frc.org
Federalist Society	@fedsoc.org
First Liberty	@firstliberty.org
Freedom of Conscience Defense Fund	@fcdfllegal.org
Heritage Foundation	@heritage.org
Liberty Counsel	@lc.org
Liberty, Life, and Law Foundation	debcpalaw@earthlink.net
National Legal Foundation	@nlf.net
National Organization for Marriage	@nationformarriage.org
National Right to Life	@nrlc.org
Pacific Legal Foundation	@pacificlegal.org
The Rutherford Institute	@rutherford.org
Thomas More Society	@thomasmoresociety.org
United States Conference of Catholic Bishops	@usccb.org

“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

We request that you produce responsive materials from January 20, 2017, through the date your search is conducted.

Lambda Legal Clarification of FOIA Request
Case No. 2018-00936-FOIA-OS
May 10, 2018

We understand that the aforementioned limitation of custodians and provision of email domains should address the concerns expressed in your May 10, 2018 clarification letter. Specifically, the specification of political appointees as custodians to be searched addresses HHS's concern that the request left "too much open to interpretation as to which employee's email accounts should be searched for records responsive to your request." Similarly, the provision of email domains for the organizations listed in Table A addresses HHS's concern that the office of Information Technology Infrastructure Operations (ITIO) would be "unable to perform an adequate search lacking the email domains of the external entities named in table A of your request."

Conclusion

In light of the clarification herein, we expect that HHS will no longer consider our FOIA Request (Case No. 2018-00936-FOIA-OS) to be "tolled" and that HHS will begin to process our FOIA Request promptly.

We look forward to working with HHS on this request. If you do not understand any part of the request, have any further questions, or foresee any problems in fully releasing the requested records as clarified herein, please contact Omar Gonzalez-Pagan at ogonzalez-pagan@lambdalegal.org or Erin Kelley at ekelley@lambdalegal.org.

Thank you for your prompt response to this request. We look forward to your determination of this request within twenty business days.¹

Sincerely,

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
Senior Attorney
ogonzalez-pagan@lambdalegal.org

/s/ Cathren Cohen
Cathren Cohen
Law Fellow
ccohen@lambdalegal.org

¹ 5 U.S.C. § 552(a)(6)(A).

Exhibit I



OMAR GONZALEZ-PAGAN, STAFF ATTORNEY
EMAIL: OGONZALEZ-PAGAN@LAMBDALEGAL.ORG

April 27, 2018

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
VIA ELECTRONIC MAIL

Freedom of Information Officer
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, D.C. 20201
FOIARequest@hhs.gov

Re: **Freedom of Information Act Request**

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations for the Department of Health and Human Services (HHS), 45 C.F.R. Part 5, Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) makes the following request for records.

Requested Records

Lambda Legal requests that HHS produce the following within twenty business days of this request:

Any records belonging to, created by, addressed to, or sent to “political appointees” at HHS, including those listed in Table A below, that mention, discuss, reference, or relate to lesbian, gay, bisexual, transgender, or queer (“LGBTQ”) matters or people, from January 20, 2017, through the date the search is conducted.

Table A
<ul style="list-style-type: none">• Jerome Adams• Alex Azar• Matthew Bowman• Garet Grigsby• Valerie Huber• Teresa Manning• Lance Robertson• Shannon Royce• Roger Severino• Katy Talento• Steven Valentine• Steven Wagner• Charmaine Yoest• All other political appointees within HHS• Any other person acting on behalf of anyone listed above (such as an administrative assistant or chief of staff)

“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

We believe that a reasonable search would include at least the following search terms, though HHS should also use any other additional terms or methods it believes are likely to produce responsive records: “lesbian,” “gay,” “bisexual,” “homosexual,” “sexual orientation,” “transgender,” “transsexual,” “gender identity,” “gender expression,” “gender-nonconforming,” “LGBT,” “LGBTQ,” “queer,” and “intersex.”

In addition to the records requested above, we also request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If HHS uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

Lambda Legal FOIA Request
April 27, 2018

Lambda Legal seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs. Records include but are not limited to memoranda, planning documents, statements, reports, studies, handwritten notes, budget documents, publications, working papers, letters, facsimiles, emails, text messages, messages on messaging platforms (such as Slack, GChat, and WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.¹ **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; we have a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**²

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered HHS’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.³ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but HHS’s archiving tools would capture that email under Capstone. Accordingly, we insist that HHS use the most up-

¹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149—50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955—56 (D.C. Cir. 2016).

² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

³ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidentialmemorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. We are available to work with you to craft appropriate search terms. However, custodian searches are still required, as agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁴ If it is your position that any portion of the requested records is exempt from disclosure, we request that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁵ Moreover, the *Vaughn* index “must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information.”⁶ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”⁷

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.⁸ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. We intend to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, HHS is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, we welcome an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, we can decrease the likelihood of costly and time-consuming litigation in the future.

⁴ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁶ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

⁷ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

⁸ *Mead Data Central*, 566 F.2d at 261.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to Attn: Erin Kelley, Lambda Legal, 120 Wall Street, 19th Floor, New York, NY 10005. If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

Background of Request

On January 18, 2018, HHS announced the creation of a new “Conscience and Religious Freedom Division” (“Division”) within its Office for Civil Rights (“OCR”). The stated purpose of the new division is to “vigorously and effectively” enforce laws to protect “the rights of conscience and religious freedom” in the provision of health and human services.⁹ The next day, the Division announced a new proposed rule (the “Proposed Rule”) to protect healthcare providers involved in HHS-funded programs from being “coerced into participating in activities that violate their consciences, such as abortion, sterilization, or assisted suicide.”¹⁰ Medical researchers have warned that the new Division and Proposed Rule could reverse the advances that have only recently been made in improving health outcomes for LGBTQ individuals: “It’s only a matter of time before all the gains made under the Obama administration are reversed under the Trump administration, for purposes that have nothing to do with public health and have everything to do with politics.”¹¹

In addition, reports indicate that upon taking office, President Trump “swiftly froze a series of LGBT-friendly rules, including proposed new regulations to further ban discrimination in Medicare and Medicaid. A regulation that would have allowed transgender HHS staff more protections when using the department’s bathrooms and other facilities was ignored.”¹² According to one HHS staffer, the rule “was signed and technically finished on Jan. 19, 2017, but not posted online . . . And the new administration considered it unpublished and pulled it back.”¹³

Significantly, the Trump Administration has appointed several politically-prominent religious activists to positions of authority within HHS.¹⁴ The public statements of these individuals evidences an unwillingness to enforce laws and protections on behalf of the LGBTQ community. Indeed, reports indicate that political appointees have overruled or completely sidelined career

⁹ See *HHS Announces New Conscience and Religious Freedom Division*, HHS.GOV (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

¹⁰ See *HHS Takes Major Actions to Protect Conscience Rights and Life*, HHS.GOV (Jan. 19, 2018), <https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html>.

¹¹ *Id.*

¹² Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, POLITICO (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>.

¹³ *Id.*

¹⁴ Dan Diamond, *The religious activists on the rise inside Trump’s health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735>.

experts within HHS regarding decisions about controversial issues like reproductive or LGBTQ health care.¹⁵

The administration's actions and the appointment of these activists to key positions within HHS have prompted alarm among health experts and advocates for the rights of LGBTQ people, people living with HIV, those seeking access to reproductive healthcare, and countless other groups. Advocates and experts warn that the Division and the newly proposed rule will allow healthcare providers to harm, rather than help, LGBTQ individuals and other patients seeking medical treatment. For example, one advocate described the formation of the Division as "the use of religion to hurt people because you disapprove of who they are"¹⁶ and a medical researcher warned that the new Division and Proposed Rule could reverse advances recently made that have improved health outcomes for LGBT individuals: "It's only a matter of time before all the gains made under the Obama administration are reversed under the Trump administration, for purposes that have nothing to do with public health and have everything to do with politics."¹⁷

As a result, advocates and career employees at HHS have expressed concern that the Trump administration's actions are aimed at benefiting a specific set of religious and moral beliefs above all others. Said one longtime HHS staffer: "It's supposed to be the faith-based partnership center, not the Christian-based partnership center."¹⁸ Advocacy groups have highlighted the administration's focus "on recognizing one set of religious beliefs" and efforts to "redefine religious freedom to impose one set of ultraconservative beliefs on all Americans."¹⁹

The lack of public information regarding the role of religious activists within HHS and the uncertainty among experts, advocates, and the public about the decision-making process at HHS regarding LGBTQ matters has created concern among the public. Accordingly, a FOIA request is necessary to shed light on the influence of these religious activists in the development and creation of the new Division, Proposed Rule, and policies pertaining to LGBTQ issues and people. The requested disclosures would provide much-needed clarity to the public and those who serve it

¹⁵ Heidi Przybyla, *Notes, emails reveal Trump appointees' war to end HHS teen pregnancy program*, NBC NEWS (Mar. 20, 2018), <https://www.nbcnews.com/politics/politics-news/notes-emails-reveal-trump-appointees-war-end-hhs-teen-pregnancy-n857686> ("The Trump administration's abrupt cancellation of a federal program to prevent teen pregnancy last year was directed by political appointees over the objections of career experts in the Department of Health and Human Services, which administers the program, according to internal notes and emails obtained by NBC News."); Dan Diamond, *The religious activists on the rise inside Trump's health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735> ("The political leaders' moves also worry career agency staff, who say that important decisions about controversial issues like abortion, contraception and transgender care are increasingly being kept secret at the nation's largest government agency.").

¹⁶ Dan Diamond & Jennifer Haberkorn, *Trump to overhaul HHS office, shield health workers with moral objections*, POLITICO (Jan. 16, 2018), <https://www.politico.com/story/2018/01/16/conscience-abortion-transgender-patients-health-care-289542>.

¹⁷ Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, POLITICO (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>.

¹⁸ Dan Diamond, *The religious activists on the rise inside Trump's health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735>.

¹⁹ *Id.*

regarding the influence of religious activists over recent HHS actions and HHS's decisions with regards to LGBTQ health care.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), Lambda Legal requests a waiver of fees associated with processing this request for records.²⁰ The requested disclosures “would shed light on the operations or activities of the government,” and the subject of the request has a “direct and clear” connection thereto.²¹ However, we are willing to pay \$500 without receiving an estimate of costs in order to expedite this request.

As discussed, the disclosures pertain to the decision-making processes used by HHS in setting policies of national importance, particularly for LGBTQ individuals. The requested disclosures thus would be “meaningfully informative about government operations or activities.”²² There is little publically-available information regarding the individuals involved in HHS's decisions pertaining to LGBTQ matters, including HHS's decision to create the new its new “Conscience and Religious Freedom Division” and to promulgate the Proposed Rule.

The requested disclosures would “contribute to the understanding of a reasonably broad audience of persons interested in the subject.”²³ The creation of a new unit within HHS dedicated to promoting religious exemptions would have wide-ranging effects for LGBTQ people, people living with HIV, those seeking access to reproductive healthcare, and countless other constituencies. The ability to access medically-necessary care on a non-discriminatory basis is of particular concern to the communities that Lambda Legal represents. Indeed, according to a first-of-its-kind survey published by Lambda Legal in 2010, almost 56 percent of lesbian, gay, or bisexual respondents and 70 percent of transgender and gender-nonconforming respondents reported experiencing discrimination while attempting to access medical care.²⁴

Lambda Legal has the ability and intent “to effectively convey [the requested] information to the public.”²⁵ Educating the public about issues affecting LGBTQ people and people living with HIV and publishing information about the rights of those constituencies are among Lambda Legal's primary purposes. According to its 2015 Annual Report, Lambda legal organized over 200 community education events and trainings in that fiscal year, with 15,000 estimated participants.

²⁰ See also 45 C.F.R. § 5.54(b).

²¹ 45 C.F.R. § 5.54(b)(1).

²² 45 C.F.R. § 5.54(b)(2)(i).

²³ 45 C.F.R. § 5.54(b)(2)(ii).

²⁴ *When Health Care Isn't Caring: Lambda Legal's Survey of Survey of Discrimination Against LGBT People and People Living with HIV*, LAMBDA LEGAL, at 5 (2010), www.lambdalegal.org/health-care-report.

²⁵ 45 C.F.R. § 5.54(b)(2)(ii).

Lambda Legal FOIA Request
April 27, 2018

Lambda Legal also had over 750,000 unique visitors to its website, and spent over \$6.4 million on educational programming.

Finally, the requested disclosures are not “primarily in the commercial interest of the requester.”²⁶ Lambda Legal is a tax-exempt, not-for-profit legal, education, and charitable organization organized under section 501(c)(3) of the Internal Revenue Code, and has no commercial interest in the requested disclosures.

If you decide not to grant our request for a fee waiver and the costs of production exceed \$500, please contact us immediately upon making such a determination so that we can discuss arrangements.

Conclusion

We share a common mission to promote transparency in government. We look forward to working with HHS on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Erin Kelley at ekelley@lambdalegal.org or (212) 809-8585.

Thank you for your prompt response to this request. We look forward to your determination of this request within twenty business days.²⁷

Sincerely,

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
Staff Attorney
ogonzalez-pagan@lambdalegal.org

/s/ Cathren Cohen
Cathren Cohen
Law Fellow
ccohen@lambdalegal.org

²⁶ 45 C.F.R. § 5.54(b)(3).

²⁷ 5 U.S.C. § 552(a)(6)(A).

Exhibit J



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Assistant Secretary for Public Affairs
Washington, D.C. 20201

Refer to: Request Number **2018-00937-FOIA-OS**

May 01, 2018

Omar Gonzalez-Pagan
Staff Attorney
Lambda Legal Defense and Education Fund, Inc.
120 Wall Street, 19th Floor
New York, NY 10005-3919
Via email: OGONZALEZ-PAGAN@LAMBDALEGAL.ORG

Dear Mr. Gonzalez-Pagan:

This acknowledges receipt of your April 27, 2018, Freedom of Information Act (FOIA) request, submitted to the Department of Health and Human Services (HHS), FOI/Privacy Acts Division. Specifically, you requested:

“Any records belonging to, created by, addressed to, or sent to "political appointees" at HHS, including those listed in Table A below, that mention, discuss, reference, or relate to lesbian, gay, bisexual, transgender, or queer ("LGBTQ") matters or people, from January 20, 2017 through the date the search is conducted.”

Table A included the following names: Jerome Adams, Alex Azar, Matthew Bowman, Garet Grigsby, Valerie Huber, Teresa Manning, Lance Robertson, Shannon Royce, Roger Severino, Katy Talento, Steven Valentine, Steven Wagner, Charmaine Yoest, All other political appointees within HHS, Any other person acting on behalf of anyone listed above (such as an administrative assistant or chief of staff). You also included the following search terms: “lesbian,” “gay,” “bisexual,” “homosexual,” “sexual orientation,” “transgender,” “transsexual,” “gender identity,” “gender expression,” gender-nonconforming,” “LGBT,” “LGBTQ,” “queer,” and “intersex.”

You also requested a fee waiver. We received your request on **April 27, 2018**.

We have initiated a search to locate records falling within the scope of your request. If our searching units advise us that you have requested a voluminous amount of records that require extensive search and examination, my staff will contact you shortly to discuss your willingness to modify your request.

The FOIA requires that we respond to your request within 20 working days of its receipt in this office. Please note the following unusual and exceptional circumstances that will impact our response time: (1) we will need to search for and collect records from components and/or field offices external to this office; and (2) because we receive a very heavy volume of FOIA requests, we will process your request in line with our established policy of "first in, first out" case processing. If either of these circumstances prevents our office from responding within the 20 working day timeframe, we will utilize a 10 working day extension to process your request, as permitted pursuant to the FOIA. This policy is consistent with court decisions regarding FOIA's time limits.

The law authorizes us to collect fees for responding to FOIA requests. However, because we are uncertain that applicable fees will exceed our minimum charge (\$25.00), we are not addressing your request for a fee waiver at this time. Nevertheless, if we determine there will be fees associated with processing your request, we will contact you at that time.

Gonzalez-Pagan – Page 2 of 3
2018-00937-FOIA-OS

Please note the following:

If you believe that we should expedite the processing of your request because the requested records are needed in light of a compelling need; i.e., an imminent threat to the life and safety of an individual; an urgency to inform the public concerning government activity (provided you are a member of the media); a deadline in litigation; a deadline for commenting on proposed regulations; or other urgent matters, you must ask for expedited processing in writing and provide to this office as much relevant information as possible. In line with 5 U.S.C. § 552(a)(6)(E)(vi), you must demonstrate the compelling need in a statement certified to be true and correct to the best of your knowledge and belief. Attach any supporting documentation to your statement, including a court scheduling order if your request is based upon a litigation deadline. (Fax supporting documentation to the FOIA/PA Division at (202) 690-8320).

When submitting this additional information, please refer to the case number listed at the top left-hand corner of this letter, and send it to:

FOI/Privacy Acts Division
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Room 729H
Washington, DC 20201

If you are not satisfied with any aspect of the processing and handling of this request, you have the right to seek dispute resolution services from:

Michael Bell
HHS FOIA Public Liaison
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Affairs
Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201

Telephone: (202) 260-0793
E-mail: HHS_FOIA_Public_Liaison@hhs.gov

and/or:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001

Telephone: 202-741-5770
Toll-Free: 1-877-684-6448
E-mail: ogis@nara.gov
Fax: 202-741-5769

Gonzalez-Pagan – Page 3 of 3
2018-00937-FOIA-OS

Any questions regarding the status of this request should be directed to our office at 202-690-7453.

Sincerely yours,



For

Michael S. Marquis
Director
FOI/Privacy Acts Division