

June 22, 2018

Via Email

FOIA/PA Section
Office of General Counsel
Federal Bureau of Prisons
DEPARTMENT OF JUSTICE
ogc_efoia@bop.gov

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
DEPARTMENT OF JUSTICE
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Via Email

Melissa Golden
Lead Paralegal and FOIA Specialist
Office of Legal Counsel
DEPARTMENT OF JUSTICE
usdoj-officeoflegalcounsel@usdoj.gov

Hirsh D. Kravitz
FOIA, Records, and E-Discovery Office
Civil Division
DEPARTMENT OF JUSTICE
Room 8314
1100 L Street, NW
Washington, DC 20530-0001

Nelson D. Hermilla
Chief, FOIA/PA Branch
Civil Rights Division
DEPARTMENT OF JUSTICE
BICN Bldg., Room 3234
950 Pennsylvania Avenue, NW
Washington, DC 20530

Via Email

Dorothy Lee
Government Information Specialist
Office of Justice Programs
DEPARTMENT OF JUSTICE
FOIAOJP@usdoj.gov

Via Email

FOIA/PA Mail Referral Unit
DEPARTMENT OF JUSTICE
MRUFOIA.Requests@usdoj.gov

Director of Public Affairs
Office of Public Affairs
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

**Re: Freedom of Information Act Request for Records Concerning the Change
Notice to the Transgender Offender Manual, 5200.04 CN-1**

FOIA Public Liaisons:

We write on behalf of the Southern Poverty Law Center (“SPLC”) and Lambda Legal Education and Defense Fund, Inc. (“Lambda Legal”) to request records pursuant to the Freedom of Information Act (“FOIA”),¹ and the implementing regulations of the U.S. Department of Justice

¹ 5 U.S.C. § 552.

(“the Department”),² concerning the Federal Bureau of Prisons’s (“BOP”) changes to the Transgender Offender Manual.

This request is directed to BOP—including all divisions, the Women and Special Populations Branch, and the Transgender Executive Council—the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the Office of Legal Counsel, the Office of Legal Policy, the Office of Public Affairs, the Civil Division, the Civil Rights Division, and the Office of Justice Programs (collectively, “the Department”).

Background

In response to well-documented evidence of vulnerability among incarcerated transgender persons, including “increased risk of suicide, mental health issues and [sexual] victimization,” BOP adopted the Transgender Offender Manual on January 18, 2017, to assist officials and staff charged with providing safe and respectful management of transgender people who are incarcerated.³

Risks have not declined for transgender persons in prison. Nonetheless, on May 11, 2018, BOP Director Mark S. Inch approved changes to the Transgender Offender Manual (“the Change Notice”) that place hundreds of transgender persons at heightened risk.⁴ Whereas the original Transgender Offender Manual permitted BOP to house transgender persons by gender identity, the Change Notice limits such assignments to “rare cases” and instead requires BOP to house transgender persons by “biological sex,” without defining the term or explaining how BOP will determine a person’s biological sex. The Change Notice also amends BOP’s obligation to provide medical treatment to transgender persons to “necessary” medical treatment, without defining what is “necessary.”⁵

Prior versions of the Change Notice have been presented in litigation brought by non-transgender prisoners represented by the Alliance Defending Freedom (“ADF”) challenging the original Transgender Offender Manual.⁶ An SPLC-designated hate group, ADF has defended state-sanctioned sterilization of transgender people abroad, and until 2014 recommended use of

² 28 C.F.R. pt. 16.

³ U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5200.04, TRANSGENDER OFFENDER MANUAL (Jan. 18, 2017) (“TRANSGENDER OFFENDER MANUAL”); *see also* SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 191 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (finding that 20% of transgender respondents who were incarcerated in the previous year reported being sexually assaulted by facility staff or other inmates, and 23% reported being physically assaulted).

⁴ *See* U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, CHANGE NOTICE 5200.04 CN-1, TRANSGENDER OFFENDER MANUAL (May 11, 2018) (“CHANGE NOTICE”), *amending* TRANSGENDER OFFENDER MANUAL, *supra* note 3.

⁵ *Id.* § 9.

⁶ *See Little v. United States*, No. 7:17-cv-9 (N.D. Tex.), *originally filed sub nom., Fleming v. United States*, No. 7:17-cv-9 (N.D. Tex.).

“cross-dressing” and “sexually confused” in place of the term transgender.⁷ In August 2017, the Trump Administration notified the court hearing ADF’s case that it expected the then-newly appointed BOP Director would reevaluate the Transgender Offender Manual in light of ADF’s challenge.⁸

Numerous media outlets have reported on the Change Notice, including that the Change Notice was developed in response to ADF’s lawsuit against BOP, that the Change Notice places incarcerated transgender persons at higher risk for sexual assault, and that BOP refuses to define “biological sex.”⁹

The SPLC and Lambda Legal are nonprofit organizations that seek to protect and educate the general public about the civil rights of transgender people and other LGBT+ people, including those incarcerated in prisons and jails around the country. Both organizations have filed federal lawsuits on behalf of transgender individuals denied health care and subjected to sexual assault and other safety risks while in custody. We are intimately aware of the connection between sexual violence and the unsafe housing assignments often made for transgender people who are incarcerated. Additionally, the SPLC is renowned for tracking, exposing, and litigating against hate groups and other extremists. We share such information with the general public through, for example, our respective websites, social media profiles, email distribution lists, and press releases.

⁷ See *Alliance Defending Freedom*, SPLC, <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>; see also Alex Amend, *Anti-LGBT Hate Group Alliance Defending Freedom Defended State-Enforced Sterilization for Transgender Europeans*, SPLC (July 27, 2017), <https://www.splcenter.org/hatewatch/2017/07/27/anti-lgbt-hate-group-alliance-defending-freedom-defended-state-enforced-sterilization>.

⁸ Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 5 n.3, *Fleming*, No. 7:17-cv-9 (N.D. Tex. Aug. 12, 2017); see also Dominic Holden, *The Justice Department Is Evaluating Obama-Era Rules for Transgender Prisoners*, BUZZFEED NEWS (Aug. 13, 2017).

⁹ See, e.g., Dominic Holden, *Which Prisoners Are Considered Transgender? The Trump Administration Won’t Explain Its New Rules.*, BUZZFEED NEWS (May 16, 2018); German Lopez, *The Trump Administration Just Rescinded Obama-Era Protections for Transgender Prisoners*, VOX (May 14, 2018); Julie Moreau, *Bureau of Prisons Rolls Back Obama-Era Transgender Inmate Protections*, NBC NEWS (May 14, 2018); Emily Tillet, *Trump Administration Reverses Obama-Era Protections for Transgender Prisoners*, CBS NEWS (May 14, 2018); Daniel Politi, *Trump Administration Gets Rid of Obama-Era Rules That Protected Transgender Inmates*, SLATE (May 13, 2018); *Bureau of Prisons Rewrites Rules for Transgender Inmates*, AXIOS (May 12, 2018); Jenny Gathright, *The Guidelines for Protection of Transgender Prisoners Just Got Rewritten*, NPR (May 12, 2018); Alexa Liautaud, *Trump Administration Says Transgender Inmates Should Be Housed Based on Gender at Birth*, VICE NEWS (May 12, 2018); Katie Benner, *Federal Prisons Roll Back Rules Protecting Transgender People*, N.Y. TIMES (May 11, 2018); Dominic Holden, *The Trump Administration Just Rolled Back Rules That Protect Transgender Prisoners*, BUZZFEED NEWS (May 11, 2018).

The media also has reported on Director Inch’s abrupt resignation, only a week after he approved the Change Notice, because of the Trump Administration’s “flouting [of] ‘departmental norms.’” Glen Thrush et al., *Turf War Between Kushner and Sessions Drove Federal Prisons Director to Quit*, N.Y. TIMES (May 24, 2018); see also Danielle Ivory, *Director of Bureau of Prisons Steps Down*, N.Y. TIMES (May 18, 2018); Kevin Johnson, *Federal Prisons Chief Mark Inch Abruptly Resigns from Job He Took Over in September*, USA TODAY (May 18, 2018).

Summary of Requests

The SPLC and Lambda Legal seek information about the development, implementation, and projected scope of the Change Notice, information about individuals and entities outside the federal government who participated or attempted to participate in BOP's development of and decision to adopt the Change Notice, and information related to communicating the Change Notice. We intend to disseminate this information to the public.

Requests

On behalf of our respective organizations, we request that the Department promptly make available in electronic format, via email or mail to the addresses listed below:

*Development of Transgender Offender Manual Before Amendment by the Change Notice*¹⁰

1. All records concerning the consideration and development of the Transgender Offender Manual before amendment by the Change Notice;
2. All records relied upon or consulted in the consideration and development of the Transgender Offender Manual before amendment by the Change Notice;

*Development of the Change Notice*¹¹

3. All records concerning the consideration and development of changes to Sections 1, 4, 5, 7, and 9 of the Transgender Offender Manual, including the changes made by the Change Notice;
4. All records relied upon or consulted in the consideration and development of changes to Sections 1, 4, 5, 7, and 9 of the Transgender Offender Manual, including the changes made by the Change Notice;
5. All Bureau of Justice Statistics records relied upon or consulted in the consideration and development of changes to Sections 1, 4, 5, 7, and 9 of the Transgender Offender Manual, including the changes made by the Change Notice;
6. All Bureau of Justice Statistics records provided to BOP concerning Transgender Prisoners;
7. All National Institute of Corrections records relied upon or consulted in the consideration and development of changes to Sections 1, 4, 5, 7, and 9 of the Transgender Offender Manual, including the changes made by the Change Notice;

¹⁰ The applicable timeframe for these requests is January 18, 2016, to January 18, 2017.

¹¹ The applicable timeframe for these requests is January 19, 2017, to the date on which this request is closed.

8. All National Institute of Corrections records provided to BOP concerning Transgender Prisoners;
9. All Attorney General reports, submitted pursuant to 34 U.S.C. § 30303, relied upon or consulted in the consideration and development of changes to Sections 1, 4, 5, 7, and 9 of the Transgender Offender Manual, including the changes made by the Change Notice;
10. All Attorney General records provided to BOP concerning Transgender Prisoners;
11. All records of communications with the Department's PREA Working Group concerning the consideration and development of changes to Sections 1, 4, 5, 7, and 9 of the Transgender Offender Manual, including the changes made by the Change Notice;
12. All records of communications with the Civil Rights Division concerning the consideration and development of changes to Sections 1, 4, 5, 7, and 9 of the Transgender Offender Manual, including the changes made by the Change Notice;
13. All records of communications with ADF or its current or former officers, directors, employees, partners, parents, subsidiaries, affiliates, agents, or consultants, or others purporting to act on its behalf, including but not limited to Christiana Holcomb, Gary Stuart McCaleb, and Jeana Hallock;¹²
14. All records of communications—with persons or entities not employed by, acting in an unpaid role in, or contracting with an agency within the meaning of FOIA—concerning BOP policy on:
 - a. training BOP staff in working with Transgender Prisoners;
 - b. making initial designations for Transgender Prisoners;
 - c. making housing and programming assignments for Transgender Prisoners; and
 - d. providing hormone or other medical treatment to Transgender Prisoners;

*Implementation of the Transgender Offender Manual Before Amendment by the Change Notice*¹³

15. All records concerning the implementation of the Transgender Offender Manual before amendment by the Change Notice;

¹² ADF's website lists its leadership, <https://www.adflegal.org/about-us/leadership>, attorneys, <https://www.adflegal.org/about-us/attorneys>, and allied organizations, <https://www.adflegal.org/about-us/allies>. This request is not limited to these listed individuals and organizations.

¹³ The applicable timeframe for these requests is January 18, 2016, to May 10, 2018.

16. All institutional and facility supplements to the Transgender Offender Manual before amendment by the Change Notice;
17. All records concerning institutional and facility supplements to the Transgender Offender Manual before amendment by the Change Notice;

*Implementation of the Change Notice*¹⁴

18. All records concerning the implementation of the Transgender Offender Manual after amendment by the Change Notice;
19. All records of communications within BOP concerning the Transgender Offender Manual after amendment by the Change Notice;
20. All institutional and facility supplements to the Transgender Offender Manual after amendment by the Change Notice;
21. All records concerning institutional and facility supplements to the Transgender Offender Manual after amendment by the Change Notice;
22. All agendas and minutes of meetings of the Transgender Executive Council;¹⁵
23. All records of “advice” or “guidance” offered by the Transgender Executive Council “on unique measures related to treatment and management needs of transgender inmates and/or inmates with [gender dysphoria], including designation issues”;¹⁶
24. All records concerning how BOP determines what is “necessary medical treatment” for Transgender Prisoners;¹⁷
25. All records concerning how BOP determines a prisoner’s “biological sex”;¹⁸
26. All records concerning how BOP determines the “biological sex” of an individual employed by, acting in an unpaid role in, or contracting with BOP;

¹⁴ The applicable timeframe for these requests is January 19, 2017, to the date on which this request is closed.

¹⁵ See TRANSGENDER OFFENDER MANUAL § 3(a)(5) (“The Transgender Executive Council (TEC) . . . will meet a minimum of quarterly to offer advice and guidance on unique measures related to treatment and management needs of transgender inmates and/or inmates with GD, including designation issues.”), *amended by* CHANGE NOTICE, *supra* note 4.

¹⁶ *Id.*

¹⁷ *Id.* § 9 (“Hormone or other necessary medical treatment may be provided after an individualized assessment of the requested inmate by institution medical staff. Medical staff should request consultation from Psychology Services regarding the mental health benefits of hormone or other necessary medical treatment.”).

¹⁸ *Id.* § 5 (“The TEC will use biological sex as the initial determination for designation”).

27. All records concerning how BOP determines how many “self-identified” Transgender Prisoners it has in its custody;¹⁹
28. All records concerning the “training materials and current information on the management of transgender inmates” developed by the Women and Special Populations Branch;²⁰
29. All records concerning how to communicate to the public about the Change Notice or the Transgender Offender Manual after amendment by the Change Notice, including but not limited to talking points, press releases, memoranda, and strategic communications plans;
30. All records concerning how to communicate within BOP about the Change Notice or the Transgender Offender Manual after amendment by the Change Notice, including but not limited to talking points, press releases, memoranda, and training materials.

*Scope of the Effect of the Change Notice*²¹

31. Records sufficient to show the number of Transgender Prisoners currently housed on the basis of the prisoner’s “biological sex”;
32. Records sufficient to show the number of Transgender Prisoners currently housed on the basis of the prisoner’s “identified gender”;²²
33. Records sufficient to show the number of Transgender Prisoners currently housed in facilities for males on the basis of the Transgender Prisoner’s “biological sex”;
34. Records sufficient to show the number of Transgender Prisoners currently housed in facilities for males on the basis of the Transgender Prisoner’s “identified gender”;
35. Records sufficient to show the number of Transgender Prisoners currently housed in facilities for females on the basis of the Transgender Prisoner’s “biological sex”;

¹⁹ See U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, FY 2019 PERFORMANCE BUDGET 22 (2018), <https://www.justice.gov/jmd/page/file/1034421/download> (“BOP has approximately 345 self-identified transgender offenders, but this subpopulation is expected to grow in number and demand for resources.”).

²⁰ TRANSGENDER OFFENDER MANUAL § 4 (“The Women and Special Populations Branch will be responsible for developing training materials and current information on the management of transgender inmates. Training will include information concerning best practices for maintaining the safety of transgender inmates, while also ensuring security and good order in Federal prisons and the safety of staff, inmates, and the public. This information will be made available to staff on the Women and Special Populations Branch Sallyport page.”), *amended by* CHANGE NOTICE, *supra* note 4.

²¹ The applicable timeframe for these requests is January 19, 2017, to the date on which this request is closed.

²² *Id.* § 5 (“The designation to a facility of the inmate’s identified gender would be appropriate only in rare cases after consideration of all of the above factors and where there has been significant progress towards transition as demonstrated by medical and mental health history.”).

36. Records sufficient to show the number of Transgender Prisoners currently housed in facilities for females on the basis of the Transgender Prisoner's "identified gender";²³
37. Records sufficient to show the number of Transgender Prisoners currently in solitary confinement and the length of time Transgender Prisoners are in solitary confinement;
38. Records sufficient to show the number of Transgender Prisoners currently in administrative segregation and the length of time Transgender Prisoners are in administrative segregation;
39. Records sufficient to show the number of Transgender Prisoners currently in protective custody and the length of time Transgender Prisoners are in protective custody;

Definitions

- "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise), including but not limited to documents; letters; memoranda; emails (including any attachments) in official Department email accounts or in the personal accounts of Department staff to the extent they are subject to FOIA; notes; calendar invitations; calendar appointments; text or SMS messages; phone logs; and voicemail recordings on Department-issued mobile or landline phones or on personal phones to the extent they are subject to FOIA.
- "Concerning" means relating to, referring to, describing, evidencing, or constituting.
- "Record" is defined to be synonymous in meaning and equal in scope to the usage of the term "record" in FOIA.
- "Transgender Prisoner" is defined to include all incarcerated persons who self-identify as transgender and all incarcerated persons with a transgender SENTRY code.²⁴

Rules of Construction

- The terms "all," "any," and "each" shall each be construed as encompassing any and all.
- The connectives "and" and "or" are to be construed either disjunctively or conjunctively as necessary to bring within the scope of this request all responses that might otherwise be construed to be outside of its scope.
- The use of the singular form of any word includes the plural and vice versa.

²³ *Id.*

²⁴ *See id.* § 8(b)-(c).

Claims of Privilege or Exemption

These requests include any reasonably segregable portion of a record after deletion of the portions exempt under FOIA, 5 U.S.C. § 552(b). We request that BOP justify, in relative detail, the reasons for denying any portion of these requests, including any privilege or FOIA exemption that purportedly applies, by *Vaughn* index.²⁵

Request for Expedited Processing

We request expedited processing of this request because it involves “[c]ircumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual”; “[a]n urgency to inform the public about an actual or alleged Federal Government activity”; “[t]he loss of substantial due process rights”; and “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.”²⁶

A delay in processing this request would both preclude the public from timely obtaining information vital to the public’s understanding of the development, implementation, and projected scope of the Change Notice and hinder efforts to prevent the sexual victimization of incarcerated transgender persons that the Change Notice is expected to facilitate.

Request for Fee Waiver

We also request a waiver of fees. This request is in the public interest because it is not primarily in our commercial interest and it is likely to contribute significantly to public understanding of the federal government’s respect for the dignity, health, and safety of the transgender people it incarcerates and its compliance with federal law and the Constitution.²⁷

Sincerely,



David C. Dinielli
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, Ala. 36104
(334) 956-8200
david.dinielli@splcenter.org



Richard Saenz
LAMBDA LEGAL
120 Wall St., 19th Floor
New York City, NY 10005
(212) 809-8585
rsaenz@lambdalegal.org

²⁵ *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *see also* 28 C.F.R. § 16.6(e)(2), (f).

²⁶ 28 C.F.R. § 16.5(e)(1).

²⁷ *See* 28 C.F.R. § 16.10(k)(1).