

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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LAMBDA LEGAL DEFENSE AND))
EDUCATION FUND, INC.))
120 Wall Street))
19th Floor))
New York, NY 10005))
))
	<i>Plaintiff,</i>)
))
v.)	Case No. 18-cv-2073
))
OFFICE OF MANAGEMENT AND BUDGET,))
725 17th Street NW))
Washington, DC 20503))
))
	<i>Defendant.</i>)
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COMPLAINT

1. Plaintiff Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) brings this action against the Office of Management and Budget under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant has failed to respond to Lambda Legal's request for expedited processing, Lambda Legal is now entitled to judicial review of that claim under 5 U.S.C. § 552(a)(6)(E)(iii).

PARTIES

5. Plaintiff Lambda Legal is a non-profit, section 501(c)(3) organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV. To advance this mission, Lambda Legal leads high-impact public education campaigns, advocates for public policy at the local, state, and federal levels, and engages in impact litigation. Through its Fair Courts Project, Lambda Legal provides the public with information and tools to counter harmful attacks on the courts that threaten LGBT and HIV-related civil rights. Lambda Legal's Fair Courts Project advances this mission through creation and dissemination of reports, analysis, a curriculum for legal professionals, "Know Your Rights" materials, an advocacy toolkit, and other informational and education materials.

6. Defendant Office of Management and Budget (OMB) is an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1) headquartered in Washington, DC. OMB has possession, custody, and control of the records that Lambda Legal seeks.

STATEMENT OF FACTS

7. On August 10, 2018, Lambda Legal submitted three FOIA requests to OMB, all seeking records related to activities of Judge Brett Kavanaugh, who has been nominated to the U.S. Supreme Court, involving LGBT rights and protections during the time that Judge Kavanaugh served in the administration of President George W. Bush.

Federal Marriage Amendment Request

8. On August 10, 2018, Lambda Legal submitted a FOIA request to OMB (the “Federal Marriage Amendment FOIA Request”) seeking:

All records reflecting communications (including emails, email attachments, text messages, instant messages (such as AOL Instant Messenger), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between Brett Kavanaugh and any official listed below regarding any effort to amend the federal Constitution to define marriage:

- Joel Kaplan
- Joshua Bolten

A copy of the Federal Marriage Amendment FOIA Request is attached hereto as Exhibit A and incorporated herein.

9. Lambda Legal requested all responsive records from June 6, 2003 through July 12, 2004. *See Ex. A at 1.*

10. Lambda Legal indicated that OMB’s search should include all locations likely to yield responsive records but also provided the following search terms for inclusion in the search:¹

- “Federal Marriage Amendment”
- FMA
- Musgrave
- Allard
- “Res. 56”
- “Res 56”
- “Resolution 56”
- “Res. 30”
- “Res 30”
- “Resolution 30”

¹ Lambda Legal further clarified in its request that an asterisk in a search term was intended to signify a “wild card” search and that “/2” indicated a proximity search. Lambda Legal asked OMB to advise if it was unable to run these types of searches. *See Ex. A at 2.*

- “Res. 26”
- “Res 26”
- “Resolution 26”
- Sekulow
- Dobson
- (Tony or Anthony) /2 Perkins
- “Family Research Council”
- FRC
- “Traditional Values”
- DOMA
- “Defense of Marriage Act”
- Marriage /2 (resolution or proclamation or sanctity or sacred)
- “union of a man and a woman”
- “union of one man and one woman”
- Homosexual*
- “sexual orientation”
- (Alberto OR “Attorney General”) /2 (gonzales OR Ashcroft)
- McCallum
- Keisler
- Ralph /2 boyd
- Scholzman
- Acosta
- Wan /2 Kim

See id. at 2.

11. Lambda Legal requested expedited processing of the Federal Marriage Amendment FOIA Request pursuant to the FOIA statute and OMB regulations. *See id.* at 6-9.

12. Lambda Legal’s Federal Marriage Amendment FOIA Request relates to a matter for which there is urgency to inform the public about an actual or alleged federal government activity, and Lambda Legal is primarily engaged in disseminating information, including through its Fair Courts Project. *See id.* at 6-8.

13. Lambda Legal’s Federal Marriage Amendment FOIA Request also relates to a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence. *See id.* at 8-9.

14. By email dated August 14, 2018, OMB acknowledged receipt of Lambda Legal's Federal Marriage Amendment FOIA request and assigned it the tracking number 2018-479.

15. As of the date of this complaint, Lambda Legal has not received further communications from OMB regarding the Federal Marriage Amendment Request.

Johnson Communications FOIA Request

16. On August 10, 2018, Lambda Legal submitted a FOIA request to OMB (the "Johnson Communications FOIA Request") seeking:

All records reflecting communications (including emails, email attachments, text messages, instant messages (such as AOL Instant Messenger), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) regarding termination of employment for LGBT employees at the Office of Special Counsel (OSC) or interpretations of language extending or revoking employment protections for LGBT employees generally between Brett Kavanaugh and Clay Johnson.

A copy of the Johnson Communications FOIA Request is attached hereto as Exhibit B and incorporated herein.

17. Lambda Legal requested all responsive records from January 1, 2004 through March 31, 2005. *See* Ex. B at 1.

18. Lambda Legal indicated that OMB's search should include all locations likely to yield responsive records but also provided the following search terms for inclusion in the search:²

- Trefry
- Renne

² Lambda Legal further clarified in its request that an asterisk in a search term was intended to signify a "wild card" search. Lambda Legal asked OMB to advise if it was unable to run this type of search. *See* Ex. B at 2.

- Bloch
- Homosexual*
- “sexual orientation”
- “ship out”
- license

See id. at 1-2.

19. Lambda Legal requested expedited processing of the Johnson Communications FOIA Request pursuant to the FOIA statute and OMB regulations. *See id.* at 6-9.

20. Lambda Legal’s Johnson Communications FOIA Request relates to a matter for which there is urgency to inform the public about an actual or alleged federal government activity, and Lambda Legal is primarily engaged in disseminating information, including through its Fair Courts Project. *See id.* at 5-8.

21. Lambda Legal’s Johnson Communications FOIA Request also relates to a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence. *See id.* at 8-9.

22. By email dated August 14, 2018, OMB acknowledged receipt of Lambda Legal’s Johnson Communications FOIA Request and assigned it the tracking number 2018-478.

23. As of the date of this complaint, Lambda Legal has not received further communications from OMB regarding the Johnson Communications FOIA Request.

Hate Crimes Legislation Request

24. On August 10, 2018, Lambda Legal submitted a FOIA request to OMB (the “Hate Crimes Legislation FOIA Request”) seeking:

All records reflecting communications (including emails, email attachments, text messages, instant messages (such as AOL Instant Messenger), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other

materials) regarding hate crimes legislation, including but not limited to the Matthew Shepard and James Byrd Jr. Hate Crime Prevention Act, between Brett Kavanaugh and any of the following:

- Rob Portman
- Joshua Bolten
- Joel Kaplan

A copy of the Hate Crimes Legislation FOIA Request is attached hereto as Exhibit C and incorporated herein.

25. Lambda Legal requested all responsive records from (1) April 1, 2004, through May 31, 2004, and (2) May 1, 2005, through June 30, 2005. *See* Ex. C at 1.

26. Lambda Legal indicated that OMB's search should include all locations likely to yield responsive records but also provided the following search terms for inclusion in the search:³

- "Matthew Shepard"
- "hate crime"
- "hate crimes"
- "Gordon Smith"
- "Louie Gohmert"
- Homosexual*
- "sexual orientation"
- "gender identity"
- "Hope Christian Church"
- "Harry Jackson"
- "Bishop Jackson"
- "H.R. 2622"
- "HR 2622"
- "H.R. 4204"
- "HR 4204"
- "S. Amdt. 3183"
- "Amendment 3183"
- NDAA
- "National Defense Authorization Act"

³ Lambda Legal further clarified in its request that an asterisk in a search term was intended to signify a "wild card" search. Lambda Legal asked OMB to advise if it was unable to run this type of search. *See* Ex. C at 2.

- “S. 2400”

See id. at 1-2.

27. Lambda Legal requested expedited processing of the Hate Crimes Legislation FOIA Request pursuant to the FOIA statute and OMB regulations. *See id.* at 6-8.

28. Lambda Legal’s Hate Crimes Legislation FOIA Request relates to a matter for which there is urgency to inform the public about an actual or alleged federal government activity, and Lambda Legal is primarily engaged in disseminating information, including through its Fair Courts Project. *See id.* at 5-7.

29. Lambda Legal’s Hate Crimes Legislation FOIA Request also relates to a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence. *See id.* at 7-8.

30. By email dated August 14, 2018, OMB acknowledged receipt of Lambda Legal’s Hate Crimes Legislation FOIA request and assigned it the tracking number 2018-477.

31. As of the date of this complaint, Lambda Legal has not received further communications from OMB regarding the Hate Crimes Legislation FOIA Request.

Exhaustion of Administrative Remedies

32. Through OMB’s failure to respond to Lambda Legal’s requests for expedited processing within the time period required by law, Lambda Legal has exhausted its administrative remedies as to that issue and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Grant Expedited Processing

33. Lambda Legal repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

34. Lambda Legal properly requested records within the possession, custody, and control of OMB on an expedited basis.

35. OMB is an agency subject to FOIA, and it must process FOIA requests on an expedited basis pursuant to the requirements of FOIA and its regulations.

36. The records sought relate to an activity of the federal government about which there is an urgent need to inform the public, and Lambda Legal is primarily engaged in disseminating information to the public. Therefore, Lambda Legal's FOIA requests justified expedited processing under FOIA and OMB's regulations.

37. The records sought also relate to a subject of heightened media interest implicating questions concerning the government's integrity. Therefore, Lambda Legal's FOIA requests justified expedited processing under FOIA and OMB's regulations.

38. OMB failed to ensure that a determination of whether to provide expedited processing was made or that notice of such determination was provided to Lambda Legal within ten days after the date of the FOIA requests.

39. OMB's failure to grant expedited processing of the FOIA requests violated FOIA and OMB regulations.

40. Plaintiff Lambda Legal is therefore entitled to declaratory and injunctive relief requiring OMB to grant expedited processing of its FOIA requests

REQUESTED RELIEF

WHEREFORE, Lambda Legal respectfully requests the Court to:

- (1) Order Defendant to expedite the processing of Lambda Legal's FOIA requests identified in this Complaint;
- (2) Award Lambda Legal the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (3) Grant Lambda Legal such other relief as the Court deems just and proper.

Dated: September 4, 2018

Respectfully submitted,

/s/ Elizabeth France
Elizabeth France
D.C. Bar No. 999851

/s/ John E. Bies
John E. Bies
D.C. Bar No. 483730

/s/ Katherine M. Anthony
Katherine M. Anthony
MA Bar No. 685150*
Pro hac vice motion to be submitted

AMERICAN OVERSIGHT
1030 15th Street NW, B255
Washington, DC 20005
(202) 897-3918
beth.france@americanoversight.org
john.bies@americanoversight.org
katherine.anthony@americanoversight.org

*Member of the MA bar only; practicing in the District of Columbia under the supervision of members of the D.C. Bar while application for D.C. Bar membership is pending.

