

**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-2130
	)	
U.S. DEPARTMENT OF	)	
HEALTH AND HUMAN SERVICES,	)	
200 Independence Avenue SW	)	
Washington, DC 20201	)	
	<i>Defendant.</i>	
	)	
	)	
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**COMPLAINT**

1. Plaintiff Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) brings this action against the U.S. Department of Health and Human Services 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 comply with the applicable time-limit provisions of FOIA, Lambda Legal is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

5. 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**

6. 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.

7. Defendant the U.S. Department of Health and Human Services ("HHS") is a department of the executive branch of the U.S. government headquartered in Washington, D.C., and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). HHS has possession, custody, and control of the records that Lambda Legal seeks.

**STATEMENT OF FACTS**

8. On August 10, 2018, Lambda Legal submitted a FOIA request to HHS 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 Secretary Tommy Thompson, Secretary Michael Leavitt, or Assistant Secretary Wade Horn regarding media stories by Margaret (Maggie) Gallagher or Michael McManus. In addition to communications regarding published media stories, this request encompasses communications discussing proposals for media stories, solicitation of media stories, consultation on media stories, and actual or potential payment for writing media stories, regardless of whether each story was ultimately published.

A true and correct copy of this request is attached hereto as Exhibit A and incorporated herein.

9. Lambda Legal's request also sought expedited processing under the FOIA statute and HHS regulations. *See id.* at 6-8.

10. As of the date of this Complaint, Lambda Legal has not received any communications from HHS regarding its FOIA request.

*Exhaustion of Administrative Remedies*

11. As of the date of this complaint, HHS has failed to (a) notify Lambda Legal of any determination regarding Lambda Legal's request for expedited processing of its request; (b) notify Lambda Legal of any determination regarding its FOIA request, including the scope of any responsive records HHS intends to produce or withhold and the reasons for any withholdings; or (c) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

12. Through HHS's failure to respond to Lambda Legal's request 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.

13. Through HHS's failure to respond to Lambda Legal's FOIA requests within the time period required by law, Lambda Legal has constructively exhausted its administrative remedies and seeks immediate judicial review.

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

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

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

16. HHS 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.

17. 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 HHS's regulations.

18. HHS 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.

19. HHS's failure to grant expedited processing of the FOIA requests violated FOIA and HHS regulations.

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

**COUNT II**  
**Violation of FOIA, 5 U.S.C. § 552**  
**Failure to Conduct Adequate Search for Responsive Records**

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

22. Lambda Legal properly requested records within the possession, custody, and control of HHS.

23. HHS is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

24. HHS has failed to promptly review agency records for the purpose of locating those records which are responsive to Lambda Legal's FOIA requests.

25. HHS's failure to conduct an adequate search for responsive records violates FOIA.

26. Plaintiff Lambda Legal is therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to search for records responsive to Lambda Legal's FOIA requests.

**COUNT III**  
**Violation of FOIA, 5 U.S.C. § 552**  
**Wrongful Withholding of Non-Exempt Responsive Records**

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

28. Lambda Legal properly requested records within the possession, custody, and control of HHS.

29. HHS is an agency subject to FOIA and must therefore release in response to a FOIA requests any non-exempt records and provide a lawful reason for withholding any materials.

30. On information and belief, HHS is wrongfully withholding non-exempt agency records requested by Lambda Legal by failing to produce non-exempt records responsive to its FOIA requests.

31. On information and belief, HHS is wrongfully withholding non-exempt agency records requested by Lambda Legal by failing to segregate exempt information in otherwise non-exempt records responsive to Lambda Legal's FOIA requests.

32. HHS's failure to provide all non-exempt responsive records violates FOIA.

33. Plaintiff Lambda Legal is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

### **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) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to Lambda Legal's FOIA request;
- (3) Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to

Lambda Legal's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;

- (4) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Lambda Legal's FOIA requests;
- (5) 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
- (6) Grant Lambda Legal such other relief as the Court deems just and proper.

Dated: September 13, 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/ Austin R. Evers  
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