

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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