

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

SOUTHERN POVERTY LAW CENTER
and LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
JUSTICE and FEDERAL BUREAU OF
PRISONS,

Defendants.

Case No. _____

COMPLAINT

1. This case arises from the failure of the United States Department of Justice (“Department”) and the Federal Bureau of Prisons (“Bureau”) to adequately respond—or respond at all—to a request for records under the Freedom of Information Act concerning the safe housing of transgender persons incarcerated in federal facilities.

2. On June 22, 2018, the Southern Poverty Law Center (“SPLC”) and Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) submitted a request to the Bureau and to several of the Department’s offices and divisions for records concerning the Bureau’s changes to its Transgender Offender Manual (“the Manual”).

3. The Bureau adopted the Manual on January 18, 2017, to properly identify, track, and provide services to the transgender population within its custody. Among other things, the Manual required that housing for transgender persons be made on a case-by-case basis considering whether a placement would ensure the person’s health and safety and whether the placement would present management or security problems. The Manual explicitly permitted housing by gender identity when appropriate.

4. The Manual was intended to and did give effect to the Prison Rape Elimination Act of 2003 and its implementing regulations (collectively, “PREA”), which recognize that transgender, intersex, and gender nonconforming individuals are particularly vulnerable to sexual assault. PREA prohibits, among other things, the housing of transgender persons simply based on anatomy or sex assigned at birth; it instead requires a case-by-case consideration that gives serious consideration to the individual’s own views regarding his or her own safety.

5. Back in December 2016, four non-transgender (*i.e.*, cisgender) women in Bureau custody—Charlsa Suzanne Little, Jeanette Driever, Brenda Rhames, and Rhonda Fleming—brought litigation against the Attorney General and the Bureau’s Acting Director, alleging that they might face an injury if housed with a transgender woman. The Department’s Civil Division represents the defendants, and the Alliance Defending Freedom (“ADF”) appeared on behalf of all the plaintiffs but now only represents Rhames. The litigation squarely challenges the Manual and PREA regulations. In September 2017, the parties agreed to stay the case during settlement negotiations.

6. On May 11, 2018, the Bureau published a Change Notice amending the Manual to require that transgender persons be housed according to “biological sex” and to provide that housing by gender identity is appropriate only in rare cases and where there has been “significant progress towards transition as demonstrated by medical and mental health history.” The Change Notice is devoid of any definition of “biological sex” and any guidance on how to determine a person’s “biological sex” or whether the person has undergone “significant progress towards transition.”

7. A Bureau official confirmed that Rhames’s case prompted the Change Notice.

8. The FOIA request submitted by the SPLC and Lambda Legal seeks records concerning the development, implementation, and projected scope of the Change Notice, including any communications about the Change Notice.

9. As of today, only two agencies have responded to state whether they will produce or not produce any documents: the Department's Civil Division and Civil Rights Division untimely responded that they could locate no responsive records.

10. The SPLC and Lambda Legal file this action to compel the Department and Bureau to respond to the request and to compel the Civil Division to conduct an adequate search.

PARTIES

11. The Southern Poverty Law Center is a tax-exempt, charitable organization incorporated under section 501(c)(3) of the Internal Revenue Code, headquartered at 400 Washington Avenue, Montgomery, Alabama 36104. SPLC is dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society.

12. Lambda Legal Defense and Education Fund, Inc. 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, NY 10005. 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 everyone living with HIV through impact litigation, education, and public policy work.

13. The United States Department of Justice is an executive department of the United States. 28 U.S.C. § 501. The Department comprises, in relevant part:

a. The Office of the Attorney General, who is the head of the Department, 28 U.S.C. § 503;

b. The Office of the Deputy Attorney General, who is an officer appointed by the President, by and with the advice and consent of the Senate, 28 U.S.C. § 504, to advise and assist the Attorney General in formulating and implementing Department policies and programs and in providing overall supervision and direction to all organizational units of the Department, including by overseeing, among others, the Federal Bureau of Prisons, the Office of Legal Counsel, the Office of Legal Policy, and the Office of Public Affairs;

c. The Office of the Associate Attorney General, who is an officer appointed by the President, by and with the advice and consent of the Senate, 28 U.S.C. § 504a, to advise and assist the Attorney General and Deputy Attorney General in formulating and implementing Departmental policies and programs pertaining to a broad range of civil justice, federal and local law enforcement, and public safety matters, including by overseeing, among others, the Civil Division, the Civil Rights Division, and the Office of Justice Programs;

d. The Office of Legal Counsel, a component within the Department that assists the Attorney General in carrying out the statutory responsibility of furnishing legal advice to the President and the heads of the executive and military departments, and to provide legal advice and assistance to other components of the Department upon request;

e. The Office of Legal Policy, a component within the Department that, among other things, develops and implements the Department's significant policy initiatives, handles special projects that implicate the interests of multiple Department components, coordinates with other interested Department components and other Executive Branch agencies, serves as the primary policy advisor to the Attorney General

and the Deputy Attorney General, and reviews and coordinates all regulations promulgated by the Department and all of its components;

f. The Office of Public Affairs, a component within the Department that coordinates the relations of the Department with the news media and serves as the center for information about all organizational units of the Department;

g. The Civil Division, a component within the Department that represents the United States in any civil or criminal matter within its scope of responsibility, including in *Rhames v. United States*, No. 7:17-cv-00009 (N.D. Tex.), and *Fleming v. United States*, No. 7:18-cv-00004 (N.D. Tex.);¹

h. The Civil Rights Division, a component within the Department that enforces civil rights provisions contained in federal laws and regulations; and

i. The Office of Justice Programs, a component of the Department that processes FOIA requests for the Bureau of Justice Assistance, the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking.

14. The Federal Bureau of Prisons is a federal agency that, “under the direction of the Attorney General,” “ha[s] charge of the management and regulation of all Federal penal and correctional institutions”; provide[s] suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise”; “provide[s] for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States”; and “provide[s]

¹ At Fleming’s request, the court severed her claims and opened this new action.

technical assistance to State, tribal, and local governments in the improvement of their correctional systems.” 18 U.S.C. § 4042(a)(1)–(4). The Bureau’s directors approved the Manual and Change Notice.

JURISDICTION AND VENUE

15. The Court has subject-matter jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 1346.

16. Plaintiffs are deemed under 5 U.S.C. § 552(a)(6)(C)(i) to have exhausted their administrative remedies with respect to their FOIA request because Defendants failed to comply with the applicable time limit provisions of 5 U.S.C. § 552(a)(6).

17. Venue is proper in the United States District Court for the Southern District of New York under 5 U.S.C. § 552(a)(4)(B) because Lambda Legal resides and has its principal place of business in the Southern District of New York.

FACTUAL ALLEGATIONS

I. Background

A. The Transgender Offender Manual

18. On January 18, 2017, then-Acting Director of the Federal Bureau of Prisons Thomas R. Kane approved Program Statement No. 5200.04, titled “Transgender Offender Manual.” A copy of the Manual is attached as Exhibit 1.

19. The stated purpose and scope of the Manual, as approved in 2017, was “[t]o ensure the Bureau of Prisons (Bureau) properly identifies, tracks, and provides services to the transgender population.” Ex. 1 § 1.

20. The stated objectives and expected results of the Manual were “to provide guidance to staff in dealing with the unique issues that arise when working with transgender

inmates”; to “ensure transgender inmates can access programs and services that meet their needs as appropriate, and prepare them to return to the community”; allocate “[s]ufficient resources . . . to deliver appropriate services to transgender inmates”; “offer[] training [to staff], enabling them to work effectively with transgender inmates”; and “[t]o support staff’s understanding of the increased risk of suicide, mental health issues and victimization of transgender inmates.” *Id.* § 1(a).

21. The Manual created a Transgender Executive Council that “meet[s] 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 [gender dysphoria], including designation issues.” *Id.* § 3(a)(5). The Manual required the Council to provide “advice and guidance on designation” of transgender persons entering the Bureau’s custody. *Id.* § 5. The Manual, as approved in 2017, further provided that the Council would “recommend housing by gender identity when appropriate.” *Id.*

22. The Manual gave effect to the Prison Rape Elimination Act of 2003, 34 U.S.C. § 30301 *et seq.*, and its implementing regulations, 28 C.F.R. pt. 115 (collectively, “PREA”). Specifically, it effectuated the Department’s National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106 (June 20, 2012) (codified at 28 C.F.R. pt. 115) (“National Standards”), published on June 20, 2012, to implement PREA. The National Standards recognized that lesbian, gay, bisexual, transgender, intersex, and gender-nonconforming persons are “particular[ly] vulnerab[le],” *id.* at 37,109, and required that, “[i]n deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, an agency may not simply assign the inmate to a facility based on genital status. Rather, the agency must consider on a case-by-case basis whether a

placement would ensure the inmate's health and safety, and whether the placement would present management or security problems, giving serious consideration to the inmate's own views regarding his or her own safety," *id.* at 37,110; *accord* 28 C.F.R. § 115.42.

B. *Rhames v. United States*

23. The *Rhames* litigation was filed in December 2016 by Charlsa Suzanne Little, Jeanette Driever, Brenda Rhames, and Rhonda Fleming—cisgender women incarcerated in federal facilities in Texas who alleged that they might face an injury if housed with a transgender woman.

24. The women moved pro se to intervene in Texas's pending case against the United States challenging the federal government's interpretation of Title VII and Title IX to prohibit discrimination based on gender identity. *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex. filed Dec. 29, 2016) (ECF 101). The court severed the women's claims from Texas's case. *Id.* (ECF 126).

25. The women claimed that the federal government was violating their constitutional right to privacy by housing transgender women with them and requested injunctive relief. *Rhames v. United States*, No. 7:17-cv-00009 (N.D. Tex.) (ECF 2, 3).

26. ADF Attorneys Gary Stuart McCaleb, Jeana Hallock, and Christiana Holcomb appeared as counsel for all the plaintiffs starting in April 2017. *Id.* (ECF 58, 71, 92). ADF continues to represent Rhames but no longer represents Fleming as of January 2018, *id.* (ECF 152), Driever as of March 2018, *id.* (ECF 162), and Little as of April 2018, *id.* (ECF 174). The Department's Civil Division appeared on behalf of the defendants. *Id.* (ECF 82, 94, 130, 135).

27. ADF has supported the criminalization and recriminalization of homosexuality in the United States and abroad, defended state-sanctioned sterilization of transgender people abroad, attempted to link homosexuality to pedophilia, and claimed that a “homosexual agenda” will destroy Christianity and society. *See generally Alliance Defending Freedom*, SPLC, <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>.

28. ADF filed an amended complaint and a motion for preliminary injunction enjoining the federal government “from enforcing the Defendants’ Transgender Offender Manual.” *Rhames*, No. 7:17-cv-00009 (N.D. Tex.) (ECF 79).

29. On September 22, 2017, ADF moved to stay the case because the parties were engaged in settlement negotiations, *id.* (ECF 110), which the court granted, *id.* (ECF 111). Eight months later, the Department issued the Change Notice.

C. The Change Notice

30. On May 11, 2018, then-Director of the Bureau Mark S. Inch approved Change Notice No. 5200.04 CN-1. A copy of the Change Notice is attached as Exhibit 2.

31. The stated purpose of the Change Notice “is to ensure that the Transgender Executive Council (TEC) considers issues related to prison management and security in determining appropriate housing of transgender inmates, including risks posed to staff, other inmates, and members of the public,” and to “establish appropriate expectations for the inmate population concerning designations.” Ex. 2 at 1.

32. The Change Notice deleted the sentence that read: “The TEC will recommend housing by gender identity when appropriate.” In its stead, the Change Notice added in relevant part:

In deciding the facility assignment for a transgender or intersex inmate, the TEC should make the following assessments on a case-by-case basis:

- The TEC will use biological sex as the initial determination for designation;
- The TEC will consider the health and safety of the transgender inmate, exploring appropriate options available to assist with mitigating risk to the transgender offender, to include but not limited to cell and/or unit assignments, application of management variables, programming missions of the facility, etc.;
- The TEC will consider factors specific to the transgender inmate, such as behavioral history, overall demeanor, and likely interactions with other inmates; and
- The TEC will consider whether placement would threaten the management and security of the institution and/or pose a risk to other inmates in the institution (e.g., considering inmates with histories of trauma, privacy concerns, etc.).

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.

Id. at 2.

33. The Change Notice does not define “biological sex” or explain how the Council determines a person’s “biological sex.”

34. The Change Notice does not explain why the designation of a transgender person to a facility consistent with the person’s gender identity “would be appropriate only in rare cases” and only “where there has been significant progress towards transition.” Nor does it explain how those requirements are to be implemented.

35. Upon information and belief, the Change Notice was prompted by the *Rhames* litigation. In an August 21, 2018 letter to the American Psychological Association, Acting

Assistant Director Alix M. McLearen of the Bureau confirmed that ADF's case "highlighted the need" for the Change Notice. A copy of the letter is attached as Exhibit 3.

II. The FOIA Request

36. On June 22, 2018, the SPLC and Lambda Legal submitted a FOIA request by email to the Bureau and to the Department's Office of Legal Counsel (FY18-152) and Office of Justice Programs, and by United States mail to the Department's Office of the Attorney General (DOJ-2018-006329 (AG)), Office of the Deputy Attorney General (DOJ-2018-006339 (DAG)), Office of the Associate Attorney General (DOJ-2018-006339 (ASG)), Office of Legal Policy (DOJ-2018-006340 (OLP)), Office of Public Affairs (DOJ-2018-006341 (PAO)), Civil Division (145-FOI-16168 HDK), and Civil Rights Division (18-00346-F). A copy of the request is attached as Exhibit 4.

37. The FOIA request sought "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 [the Bureau's] development of and decision to adopt the Change Notice, and information related to communicating the Change Notice," including communications with ADF. Ex. 4 at 4.

38. The SPLC and Lambda Legal requested a waiver of fees because the FOIA request is not primarily in their 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.

39. In a letter dated June 22, 2018, the Office of Justice Programs acknowledged that it had received the FOIA request on that date, determined that unusual circumstances exist, purported to "extend[] the time limit to respond to your request beyond the ten additional days

provided by the statute,” and assigned the FOIA request to the Office’s complex track. A copy of the letter is attached as Exhibit 5. The Office of Justice Programs has neither responded to the FOIA request, as required by 5 U.S.C. § 552(a)(6), nor produced any records; it has not informed the SPLC and Lambda Legal of the scope of the documents that it will produce or the scope of the documents that it plans to withhold under any FOIA exemptions.

40. In a letter dated June 27, 2018, the Bureau acknowledged the FOIA request, assigned it to the Bureau’s complex track, determined that unusual circumstances exist, and extended the time limit to respond to the request by ten days. In a letter dated July 2, 2018, the Bureau denied expedited processing of the FOIA request. Copies of the letters are attached as Exhibits 6 and 7. The Bureau has neither responded to the FOIA request, as required by 5 U.S.C. § 552(a)(6), nor produced any records; it has not informed the SPLC and Lambda Legal of the scope of the documents that it will produce or the scope of the documents that it plans to withhold under any FOIA exemptions.

41. In a letter dated June 28, 2018, the Civil Division acknowledged that it had received the FOIA request on that date, denied expedited processing, and assigned it to the Civil Division’s complex track. The letter did not address whether unusual circumstances existed to warrant the ten-day extension permitted by FOIA, 5 U.S.C. § 552(a)(6)(B). On August 22, 2018—forty-two business days after the SPLC and Lambda Legal submitted the FOIA request and thirty-eight business days after the Civil Division had received it—the Civil Division issued a final response stating, in relevant part:

After a search of the Civil Division’s records, this Office could locate no responsive records subject to the FOIA in its files. Accordingly, this Office is closing your request at this time.

The Civil Division produced no records. Copies of the letters are attached as Exhibits 8 and 9, respectively. On October 10, 2018, the SPLC and Lambda Legal submitted an appeal (DOJ-AP-

2019-000145) of the Civil Division's response. The Civil Division did not make a determination on the appeal by the November 7, 2018 deadline. Nor did it toll the statutory twenty-day period by making a request for information or attempting to clarify issues regarding fee assessment.

42. In a letter dated July 3, 2018, the Office of Legal Counsel acknowledged that it had received the FOIA request on June 22, 2018, tentatively assigned it to the Office's complex track, denied expedited processing, and noted "that it also is likely that we will be unable to respond to your request within the twenty-day statutory deadline." The letter did not address whether unusual circumstances existed to warrant the ten-day extension permitted by FOIA, 5 U.S.C. § 552(a)(6)(B). A copy of the letter is attached as Exhibit 10. The Office of Legal Counsel has neither responded to the FOIA request, as required by 5 U.S.C. § 552(a)(6), nor produced any records; it has not informed the SPLC and Lambda Legal of the scope of the documents that it will produce or the scope of the documents that it plans to withhold under any FOIA exemptions.

43. In a letter dated July 5, 2018, the Office of Information Policy—on behalf of the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the Office of Legal Policy, and the Office of Public Affairs—acknowledged that it had received the FOIA request on June 28, 2018, denied expedited processing, determined that unusual circumstances exist, purported "to extend the time limit to respond to your request beyond the ten additional days provided by the statute," and assigned the FOIA request to the Office's complex track. A copy of the letter is attached as Exhibit 11. The Office of Information Policy has neither responded to the FOIA request, as required by 5 U.S.C. § 552(a)(6), nor produced any records; it has not informed the SPLC and Lambda Legal of the

scope of the documents that it will produce or the scope of the documents that it plans to withhold under any FOIA exemptions.

44. In a letter dated July 17, 2018, the Civil Rights Division acknowledged that it had received the FOIA request on that date and stated, in relevant part:

As a result of the large number of Freedom of Information and Privacy Acts requests received by the Civil Rights Division, some delay may be encountered in processing your request. In an attempt to treat each requester fairly, we have adopted a policy of processing requests in the approximate order of receipt. Please be assured that your request is being handled as equitably as possible. We appreciate your patience and will provide you with a response at the earliest possible date.

On October 30, 2018—130 business days after the SPLC and Lambda Legal submitted the FOIA request and 105 business days after the Civil Rights Division had received it—the Civil Rights Division issued a final response stating, in relevant part:

After a thorough search, I have determined that the Civil Rights Division has no records pertaining to the Transgender Offender Manual.

The Civil Rights Division produced no records. Copies of the letters are attached as Exhibits 12 and 13, respectively.

CAUSE OF ACTION

COUNT I

(Violation of FOIA's Response Deadline, 5 U.S.C. § 552(a)(6))
(By All Plaintiffs Against All Defendants)

45. Plaintiffs reallege paragraphs 1 through 44 as if fully set forth herein.

46. The Department's Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Counsel, Legal Policy, Public Affairs, and Justice Programs have violated 5 U.S.C. § 552(a)(6) by failing to "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of" the FOIA request "whether to comply

with such request and . . . immediately notify” the SPLC and Lambda Legal of “such determination and the reasons therefor,” or if unusual circumstances were properly determined to exist, by failing to so respond within thirty business days. They have not informed the SPLC and Lambda Legal of the scope of the documents that they will produce or the scope of the documents that they plan to withhold under any FOIA exemptions.

47. The Bureau has violated 5 U.S.C. § 552(a)(6) by failing to determine within thirty days after receipt of the FOIA request “whether to comply with such request and . . . immediately notify” the SPLC and Lambda Legal of “such determination and the reasons therefor.” It has not informed the SPLC and Lambda Legal of the scope of the documents that it will produce or the scope of the documents that it plans to withhold under any FOIA exemptions.

48. Because of these failures to comply with FOIA’s response deadlines, the SPLC and Lambda Legal are “deemed to have exhausted [their] administrative remedies with respect to” the FOIA request. 5 U.S.C. § 552(a)(6)(C)(i).

49. Because of these failures to comply with FOIA’s response deadlines, and because exceptional circumstances do not exist, the Department and Bureau may not assess any search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

COUNT II

(Failure to Adequately Search)

(By All Plaintiffs Against Defendant U.S. Department of Justice)

50. Plaintiffs reallege paragraphs 1 through 44 as if fully set forth herein.

51. The Department’s Civil Division has failed to make a good faith effort to conduct a search for the records requested by the SPLC and Lambda Legal.

52. For example, the Civil Division claims to have no records responsive to the SPLC and Lambda Legal’s specific request for all records of communications with ADF, including

Christiana Holcomb, Gary Stuart McCaleb, and Jeana Hallock, who litigated a case against defendants represented by the Civil Division, and all records of communications with non-government employees concerning Bureau policy regarding transgender persons in custody.

53. The Civil Division failed to comply with FOIA's requirement that the Division "make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal." 5 U.S.C. § 552(a)(6)(A)(ii).

54. Because the Civil Division failed to comply with FOIA's response deadlines, the SPLC and Lambda Legal are "deemed to have exhausted [their] administrative remedies with respect to" the FOIA request. 5 U.S.C. § 552(a)(6)(C)(i).

55. Because the Civil Division failed to comply with FOIA's response deadlines, and because exceptional circumstances do not exist, it may not assess any search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

PRAYER FOR RELIEF

For the foregoing reasons, the Southern Poverty Law Center and Lambda Legal respectfully request that judgment be entered in their favor against Defendants, and that the Court:

1. Order Defendants and any of their departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants to conduct a reasonable search for all records responsive to the SPLC and Lambda Legal's FOIA request;

2. Enjoin and order the United States Department of Justice and the Federal Bureau of Prisons and any of their departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants from improperly withholding

records or portions of records responsive to the SPLC and Lambda Legal's FOIA request and order them to promptly produce the same;

3. Enjoin Defendants from charging the SPLC or Lambda Legal fees for the processing of the FOIA request;
4. Award the SPLC and Lambda Legal reasonable attorney's fees and costs; and
5. Grant such other relief as the Court might deem just and proper.

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Respectfully submitted,

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