

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X	
Lambda Legal Defense and Education Fund, Inc.	:
	:
Plaintiff,	:
	:
v.	:
	:
United States Department of Education and United States Department of Justice,	:
	:
Defendants.	:
-----X	

No. 1:17-CV-6390

**COMPLAINT**

Plaintiff Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), by and through its undersigned attorneys, in support of its complaint against Defendants United States Department of Education (“ED”) and United States Department of Justice (“DOJ”), (collectively “Defendants”), 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 Defendants’ withdrawal of guidance relating to Title IX of the Education Amendments Act of 1972 (“Title IX”) and transgender students. Lambda Legal seeks injunctive and other appropriate relief with respect to Defendants’ unlawful withholding of this information.

2. Pursuant to the FOIA, Lambda Legal has requested records relating to Defendants’ rescission of two guidance documents pertaining to schools’ Title IX obligations with respect to transgender students: (i) an unpublished opinion letter from James A. Ferg-Cadima, Acting Deputy

Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, to Emily Prince dated January 7, 2015 (“January 2015 Opinion Letter”); and, (ii) the Dear Colleague Letter on Transgender Students jointly issued by Defendants on May 13, 2016 (“May 2016 Joint Guidance”) (collectively, “the Title IX Transgender Guidance Materials”). Lambda Legal also requested documents related to the Dear Colleague Letter jointly issued by Defendants on February 22, 2017 (“February 2017 Rescission Letter”).

3. The January 2015 Opinion Letter reaffirmed ED’s position that Title IX’s prohibition on sex discrimination requires schools to treat transgender students consistent with their gender identity, including with respect to sex-segregated facilities. The unpublished opinion letter responded to a December 14, 2014 inquiry for guidance on ED policies or rules for school districts regarding transgender students’ access to restrooms and other sex-segregated facilities.

4. On May 13, 2016, Defendants jointly issued the May 2016 Joint Guidance to assist schools in protecting transgender students from discrimination and complying with their obligations under Title IX and its implementing regulations. Deemed “significant guidance” by the issuing agencies, the May 2016 Joint Guidance responded to requests by schools across the country for assistance on providing equal educational opportunities to transgender students. The May 2016 Joint Guidance stated that Title IX’s prohibition of sex discrimination encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.

5. On February 22, 2017, Defendants jointly issued the February 2017 Rescission Letter. The February 2017 Rescission Letter withdrew the January 2015 Opinion Letter and the May 2016 Joint Guidance without taking a position on Title IX and its implementing regulations with respect to transgender students. As a result, the February 2017 Rescission Letter created

confusion for schools across the country and eliminated an important resource for ensuring that schools meet their Title IX obligations.

6. An estimated 150,000 youth between ages 13 and 17 are transgender. Jody L. Herman, et al, *Age of Individuals Who Identify as Transgender in the United States*, The Williams Institute, 2-3 (January 2017), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>. These transgender students, along with younger transgender children, experience alarming rates of harassment, bullying, and discrimination in their schools, which often goes unaddressed by school administrators. Many are denied access to sex-segregated facilities, such as school restrooms and locker rooms, in accordance with their gender identities. *See, e.g.*, Movement Advancement Project and GLSEN, *Separation and Stigma: Transgender Youth & School Facilities* (April 2017) (“*Separation and Stigma*”), <http://www.lgbtmap.org/file/transgender-youth-school.pdf>. This puts transgender students at risk of profound physical and emotional health consequences, and causes them daily humiliation in the schools that are a dominant and formative part of their lives. Transgender students’ success in school is closely correlated with whether their administrators and teachers accept them for who they are, including by allowing them access to sex-specific facilities consistent with their gender identities. *See, e.g., id.* at 4; Williams Institute, *Media Advisory: Fact Sheet on Guidance Protecting Over 350,000 Transgender Youth and Young Adults from Discrimination (Annotated Version)* (Feb. 27, 2017), <https://williamsinstitute.law.ucla.edu/uncategorized/media-advisory-fact-sheet-on-guidance-protecting-over-350000-transgender-youth-and-young-adults-from-discrimination-annotated-version/>. A recent study found that the majority of students identifying or perceived as transgender had negative experiences in school, correlating with higher rates of attempted suicide, homelessness, and psychological distress. S.E. James et al., Nat’l Center for

Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, 130-135 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

7. Defendants' rescission of the Title IX Transgender Guidance Materials leaves these children even more vulnerable to abuse and discrimination in their schools. It sends the troubling signal that Defendants will not follow through on their responsibility to enforce Title IX for transgender children. It sends the false message that schools may not be obligated under Title IX to respect and protect their transgender students, including when it comes to access to sex-segregated facilities consistent with students' gender identities.

8. Lambda Legal has therefore sought documents—including documents dated after the February 2017 Rescission Letter—concerning Defendants' decision to withdraw the Title IX Transgender Guidance Materials. This information is important to ensuring the health and safety of transgender students. 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).

9. On March 13, 2017, Lambda Legal filed FOIA requests with each of ED ("ED FOIA Request") and DOJ ("DOJ FOIA Request"), (collectively, "FOIA Requests").

10. To date, the ED has not processed Lambda Legal's ED FOIA Request, provided responsive documents, or asserted any applicable basis for withholding disclosure.

11. DOJ decided to split Lambda Legal's DOJ FOIA Request in two and handle each part separately. To date, DOJ has not processed Lambda Legal's DOJ FOIA Request to the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy and

Public Affairs. DOJ has processed Lambda Legal's DOJ FOIA Request to the Civil Rights Division and determined responsive documents exist but are exempt from production.

12. Lambda Legal is legally entitled to responses to the FOIA Requests that satisfy the statute's requirement that an agency provide a prompt and thorough search for and production of documents, which in this case were requested more than five months ago. Defendants have far exceeded the statutory and regulatory time limitations to conduct a search and produce the requested documents.

13. Lambda Legal seeks an injunction ordering Defendants to respond to Lambda Legal's 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**

14. The court has jurisdiction over this matter pursuant to 5 U.S.C. § 522(a)(4)(B) and 28 U.S.C. §§ 1331 and 1336.

15. 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**

16. 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, NY 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. According to its 2015 Annual Report, Lambda Legal organized over 200 community education events and trainings in that fiscal year, with 15,000 estimated participants. Lambda Legal also had over 750,000 unique visitors to its website, along with approximately 23,000 unique visitors to its Spanish-language website. It also spent over \$6.4 million on educational programming in its 2015 fiscal year.

17. Defendant ED 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). ED is the federal agency responsible for oversight of education. Among its responsibilities is enforcement of certain federal civil rights laws, including Title IX, which prohibits sex discrimination in federally funded education programs and activities. ED has possession of and control over the records sought by Lambda Legal.

18. Defendant DOJ 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). DOJ has possession of and control over the records sought by Lambda Legal.

**Lambda Legal's FOIA Request to ED**

19. On March 13, 2017, Lambda Legal submitted the ED FOIA Request to ED requesting records, correspondence, and memos, in any and all formats, that mention, discuss, reference, or relate to:

- (i) The withdrawal of the January 2015 Opinion Letter;
- (ii) The withdrawal of the May 2016 Joint Guidance; and
- (iii) The February 2017 Rescission Letter.

20. A copy of Lambda Legal's March 13, 2017 ED FOIA Request is attached hereto as Exhibit A.

21. By letter dated March 28, 2017, ED acknowledged receipt of Lambda Legal's ED FOIA Request (the "ED Acknowledgement Letter"). Exhibit B. The ED Acknowledgement Letter instructed Lambda Legal to "check the status of [Lambda Legal's] FOIA request at the link provided . . . ." and furnished a phone number and email address to contact regarding future correspondence or questions about Lambda Legal's ED FOIA Request.

22. Lambda Legal, through its undersigned attorneys, attempted to follow up with ED several times after Lambda Legal filed the ED FOIA Request on March 13, 2017. On April 18, 2017, an attorney for Lambda Legal called ED's FOIA phone number advertised on its website and included in the ED Acknowledgement Letter—202-401-8365—but the number rang to a voice mailbox that was full and would not allow the attorney for Lambda Legal to leave a message. Afterward, an attorney for Lambda Legal e-mailed ED on April 19, 2017.

23. On April 25, 2017, ED sent Lambda Legal a boilerplate letter, attached hereto as Exhibit C, stating that it was "unable to respond" within the statutorily required timeline ("April 25 Letter"). The April 25 Letter noted that the agency had received Lambda Legal's ED FOIA Request on March 28, 2017. ED acknowledged that "FOIA requires that an agency make a determination on a FOIA request within 20 working days of the request in the appropriate office," but nonetheless explained that it would be unable to fulfill Lambda Legal's request by that deadline "due to the volume of [Lambda Legal's] request, the backlog of requests and the competing demands for the time of staff that are working to respond to [Lambda Legal's] request." Exhibit C.

24. The April 25 Letter instructed Lambda Legal to "check on the status of [Lambda Legal's] request on ED's FOIA Web page" by checking the previously provided link if Lambda

Legal has not “received [its] responsive documents within 30 days from receipt of this letter . . . .” However, the FOIA tracking number provided was not listed on the linked webpage until five months after the ED FOIA Request.

25. Since receiving the April 25 Letter, Lambda Legal, through its attorney, called ED’s FOIA office four times inquiring about the status of the Lambda Legal ED FOIA Request. On two occasions, an attorney for Lambda Legal was informed that certain of ED’s component offices subject to the ED FOIA Request have completed their search but that half still have not responded. Lambda Legal, through its attorney, was told the Institute of Education Sciences, Office of Elementary and Secondary Education, Office of the Deputy Secretary, and Office of the Under Secretary have no responsive documents. Lambda Legal, through its attorney, was also told responses have been pending for several months from the Office of the Secretary, Office for Civil Rights, Office of the General Counsel, and Office of Communications and Outreach.

26. On June 30, 2017, Lambda Legal appealed ED’s failure to expedite its Request and to produce any documents within the statutorily prescribed time frame. Exhibit D. On July 3, 2017, ED acknowledged receipt of the appeal. Exhibit E. Since then, Lambda Legal has not received a decision on its appeal.

27. ED has failed to comply with the time limits imposed by the FOIA and ED’s regulations. Although statutorily obligated to determine whether to comply with a FOIA request within 20 days (excluding weekends and legal holidays) after receiving it, 5 U.S.C. § 522(a)(6)(A)(i), ED has not responded to Lambda Legal’s ED FOIA Request within the meaning of the statute.



28. Nor has ED responded to Lambda Legal's appeal, 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).

29. Through ED's failure to make substantive determinations as to Lambda Legal's ED FOIA Request 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 FOIA Request to DOJ**

30. On March 13, 2017, Lambda Legal submitted the DOJ FOIA Request to DOJ requesting records, correspondence, and memos, in any and all formats, that mention, discuss, reference, or relate to:

- (i) The withdrawal of the January 2015 Opinion Letter;
- (ii) The withdrawal of the May 2016 Joint Guidance; and
- (iii) The February 2017 Rescission Letter.

31. A copy of Lambda Legal's March 13, 2017 DOJ FOIA Request is attached hereto as Exhibit F.

32. By letter dated March 15, 2017, DOJ acknowledged receipt of Lambda Legal's DOJ FOIA Request and indicated that it was processing the Civil Rights Division's response separately from the other components. Exhibit G.

***The Civil Rights Division's Response***

33. By letter dated March 16, 2017, the Civil Rights Division acknowledged receipt of Lambda Legal's DOJ FOIA Request and indicated that "some delay may be encountered in processing [Lambda Legal's] request" and that the Division "adopted a policy of processing requests in the approximate order of receipt." Exhibit H.

34. On June 19, 2017, the Civil Rights Division notified Lambda Legal that it had located responsive documents but that “access to the documents should be denied pursuant to 5 U.S.C. § 552(b)(5)” because the records contain “attorney work product and include intra-agency memoranda contain pre-decision, deliberative material.” Exhibit I. No additional explanation was given.

35. Lambda Legal, through its attorneys, contacted the Civil Rights Division on June 20, 2017 and inquired about the responsive documents. The Division reported that it had found 109 pages of responsive material and did not elaborate on the justification of its privilege claim.

36. On July 23, 2017, Lambda Legal appealed the Civil Rights Division’s determination to withhold the documents. Exhibit J.

37. The Civil Rights Division has failed to comply with the time limits imposed by the FOIA and DOJ’s regulations. Although statutorily obligated to determine whether to reach a determination of a FOIA appeal within 20 days (excluding weekends and legal holidays) after receiving it, 5 U.S.C. § 522(a)(6)(A)(ii), the Civil Rights Division has not responded to Lambda Legal’s DOJ FOIA Request appeal within the meaning of the statute.

38. Nor has the Civil Rights Division responded to Lambda Legal’s appeal, 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).

39. Through the Civil Rights Division’s failure to reach a determination as to Lambda Legal’s DOJ FOIA Request 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).

*The Remaining DOJ Components' Response*

40. By letter dated March 23, 2017, DOJ's remaining components acknowledged receipt of Lambda Legal's DOJ FOIA Request. Exhibit K. The remaining components denied Lambda Legal's request for expedited treatment and stated that the DOJ FOIA Request "falls within 'unusual circumstances'" because it "require[s] searches in other Offices . . . ." Exhibit K. DOJ advised that Lambda Legal "may wish to narrow the scope of [its] request to limit the number of potentially responsive records so that it can be placed in a different processing track." Exhibit K.

41. Lambda Legal, through its attorney, agreed with DOJ on April 17, 2017 to several limitations to the DOJ FOIA Request. Exhibit L. DOJ informed an attorney for Lambda Legal that DOJ's IT support would be gathering e-mails from potential custodians for review. On May 10, 2017, an attorney for Lambda Legal called DOJ's FOIA office and was told the request to DOJ's IT support to gather e-mails was sent April 18, 2017.

42. Since the May 10 phone call, Lambda Legal, through its attorney, called DOJ's FOIA office four times inquiring about the status of the DOJ FOIA Request. Each time, Lambda Legal's attorney was informed that DOJ's IT support had not even gathered e-mails from potential responsive custodians.

43. On July 23, 2017, Lambda Legal appealed the remaining DOJ components' failure to expedite its DOJ FOIA Request and to produce any documents within the statutorily prescribed time frame. Exhibit M. On July 31, 2017, DOJ denied Lambda Legal's appeal to expedite its DOJ FOIA Request and declined to rule on its failure to produce documents. Exhibit N.

44. DOJ has failed to comply with the time limits imposed by the FOIA and DOJ's regulations. Although statutorily obligated to determine whether to comply with a FOIA request within 20 days (excluding weekends and legal holidays) after receiving it, 5 U.S.C. §

522(a)(6)(A)(i), DOJ's remaining components have not produced nor searched for responsive documents to Lambda Legal's DOJ FOIA Request within the meaning of the statute. Through this failure to make substantive determinations as to Lambda Legal's DOJ FOIA Request 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**

45. 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).

46. The records sought in the FOIA Requests will significantly contribute to the public understanding of (i) the operations and activities of Defendants, and (ii) the federal protections afforded to transgender students. 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 disclosed information obtained through the FOIA, it will do so at no cost to the public.

**Causes of Action**

47. Lambda Legal repeats and incorporates every allegation contained in the foregoing paragraphs and incorporates them as though fully set forth herein.

48. Defendants' failure to conduct a reasonable search for records responsive to Lambda Legal's requests violates FOIA, 5 U.S.C. §§ 552(a)(3)(A), (a)(3)(C), and (a)(6)(A), as well as the regulations promulgated thereunder.

49. Defendants' failure to release responsive records violates FOIA, 5 U.S.C. § 522(a)(3)(A), as well as the regulations promulgated thereunder.

50. Defendants' failure to officially grant Lambda Legal's request for a reduction or waiver of fees violates FOIA, 5 U.S.C. §§ 552(a)(4)(ii)(II) and (a)(4)(iii), as well as the regulations promulgated thereunder.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Lambda Legal requests that judgment be entered in its favor against Defendants, and that the Court:

A. 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 Lambda Legal's FOIA Requests submitted on March 13, 2017;

B. Enjoin Defendants and any of its 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 Lambda Legal's FOIA Requests submitted on March 13, 2017 and order them to promptly produce the same;

C. Order Defendants to produce, within twenty days of the Court's order, any and all non-exempt records responsive to Lambda Legal's FOIA Requests submitted on March 13, 2017 and *Vaughn* indexes of any responsive records withheld or redacted under claim of exemption;

D. Enjoin Defendants 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.

F. Grant all other such relief to Lambda Legal as the Court deems just and proper.

Dated: August 22, 2017

/s/ Blair A. Silver

Blair A. Silver

Avi S. Garbow (*pro hac vice motion to be filed*)

Joseph P. Vardner (*pro hac vice motion to be filed*)

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, DC 11101

Telephone: 202.955.8500

/s/ Susan Sommer

Susan Sommer

LAMBDA LEGAL DEFENSE AND EDUCATION  
FUND, INC.

120 Wall Street, 19th Floor

New York, NY 10005

Telephone: 212.809.8585

Attorneys for Plaintiff Lambda Legal Defense and  
Education Fund, Inc.

# Exhibit A



March 13, 2017

By Certified Mail,  
Return Receipt Requested and  
Electronic Mail

U.S. Department of Education  
Office of Management  
Office of the Chief Privacy Officer  
400 Maryland Avenue, SW, LBJ 2E320  
Washington, DC 20202-4536  
ATTN: FOIA Public Liaison  
Email: EDFOIAManager@ed.gov

To Whom It May Concern:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, on behalf of Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"). Lambda Legal seeks documents relating to the Department of Justice's recently announced withdrawal of guidance relating to Title IX and transgender students.

We request a copy of any and all records, correspondence, and memos, in any and all formats, that mention, discuss, reference, or relate to:

1. the withdrawal of the letter from James A. Ferg-Cadema, Deputy Assistant Secretary for Policy, Office for Civil Rights, Department of Education, to Emily Prince dated Jan. 7, 2015;
2. the withdrawal of the Dear Colleague Letter: Transgender Students jointly issued by the Department of Education and Department of Justice on May 13, 2016; or
3. the Dear Colleague Letter relating to transgender students jointly issued by the Department of Education and Department of Justice on February 22, 2017.

(collectively, "the Title IX Transgender Guidance Materials").

We request that you produce responsive materials dated from January 20, 2017 to the present, except as specified below, in their entirety, including all attachments, appendices, enclosures, and/or exhibits. This request includes, but is not limited to:

- a. correspondence with non-government entities about the Title IX Transgender Guidance Materials;
- b. communications with employees of the Executive Office of the President about the Title IX Transgender Guidance Materials;



*Sommer Letter to Department of Education  
March 13, 2017  
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- c. communications with the Trump-Pence Transition Team pertaining to the Title IX Transgender Guidance Materials after November 9, 2016;
- d. talking points, press releases, letters, memoranda, or other documents communicating the Title IX Transgender Guidance Materials;
- e. reports, studies, or data relating to the Title IX Transgender Guidance Materials;
- f. guidance or instructions to staff about how to handle technical assistance requests, inquiries, and complaints regarding denial of access to sex-segregated facilities on the basis of gender identity; and
- g. guidance or instructions to staff about how to handle technical assistance requests, inquiries, and complaints for sex discrimination, harassment, or bullying based on gender identity or transgender status under Title IX.

To the extent that a response to this request would include multiple copies of identical material, we request only one copy of the identical material.

If you withhold any records, in part or whole, please explain in writing any such denial, including a description of the document being withheld and the statutory exemption to its mandatory disclosure. To the extent a document is segregable, please release all segregable material. 5 U.S.C. § 552(b).

The request is directed to the following components: (i) Office of the Secretary; (ii) Office of the Deputy Secretary; (iii) Office of the Under Secretary; (iv) Office of the General Counsel; (v) Office for Civil Rights; (vi) Office of Communications and Outreach; (vii) Institute of Education Sciences; and (viii) Office of Elementary and Secondary Education.

We are a “non-profit, non-partisan, public interest organization” and this request is not for commercial use. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003). To expedite the request, we are willing to pay \$500 for our request without an estimate of costs from the Department of Justice. Should the fee for disclosure exceed \$500, it should be waived. If you decide not to waive the fees over \$500, please provide us with prior notice so that we can discuss arrangements. We request that the information sought be provided in electronic format on a CD or DVD.

Disclosure of the documents in this request is in the public interest and a compelling need exists for expeditious handling:

- An urgency to educate concerned citizens about proper reporting techniques to stop discrimination, harassment, and the bullying of children, particularly those who are transgender and especially vulnerable;
- An urgency to inform the public concerning actual or alleged Federal Government activity;

*Sommer Letter to Department of Education  
March 13, 2017  
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- The information to be learned in response to the request is not already public knowledge; and,
- The information provided will be used for a time-sensitive project that may include information to be shared with the public.

Thank you for your prompt response to this request. We look forward to your determination of this request within ten working days. 28 CFR § 16.5.

Sincerely,



Susan Sommer  
Director of Constitutional Litigation  
Lambda Legal  
120 Wall Street, 19th Floor  
New York, New York 10005  
P: 212-809-8585  
ssommer@lambdalegal.org

# Exhibit B



**UNITED STATES DEPARTMENT OF EDUCATION**

**OFFICE OF MANAGEMENT**

Office of the Chief Privacy Officer

March 28, 2017

Susan Sommer  
Lambda Legal  
120 Wall Street  
19th Floor  
New York, NY 10005

RE: FOIA Request No. 17-01322-F

Dear: Susan Sommer

This is in response to your letter dated March 13, 2017, requesting information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was received in this office on March 28, 2017, and forwarded to the primary responsible office(s) for action.

You requested: a copy of any and all records, correspondence, and memos, in any and all formats, that mention, discuss, reference, or relate to: 1. the withdrawal of the letter from James A. Ferg-Cadema, Deputy Assistant Secretary for Policy, Office for Civil Rights, Department of Education, to Emily Prince dated Jan. 7, 2015; 2. the withdrawal of the Dear Colleague Letter: Transgender Students jointly issued by the Department of Education and Department of Justice on May 13, 2016; or 3. the Dear Colleague Letter relating to transgender students jointly issued by the Department of Education and Department of Justice on February 22, 2017.

Please refer to the FOIA tracking number to check the status of your FOIA request at the link provided below:

<http://www2.ed.gov/policy/gen/leg/foia/foiatoc.html>

Any future correspondence or questions regarding your request, please contact the FOIA Public Liaison at 202-401-8365 or [EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov)

Sincerely,

ED FOIA Manager

400 MARYLAND AVE., S.W., WASHINGTON, DC 20202-4500  
[www.ed.gov](http://www.ed.gov)



# Exhibit C



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

Office of the Chief Privacy Officer

April 25, 2017

Susan Sommer  
Director of Constitutional Litigation  
Lambda Legal  
120 Wall Street, 19<sup>th</sup> Floor  
New York, NY 10005

RE: FOIA Request No. 17-01322-F

Dear Ms. Sommer:

This is a 20 day notification in response to your request dated March 13, 2017, requesting information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was received in the FOIA Service Center (FSC) on March 28, 2017, and was forwarded to several offices within the Department of Education (the Department) for any responsive documents they may have.

The FOIA requires that an agency make a determination on a FOIA request within 20 working days of receipt of the request in the appropriate office.

This letter is to inform you that the Department is currently processing your request, but due to the volume of your request, the backlog of requests and the competing demands for the time of staff that are working to respond to your request, we will be unable to respond within 20 working days of having received the request.

If you haven't received your responsive documents within 30 days from receipt of this letter, please check on the status of your request on the Department's FOIA Web page at <http://www2.ed.gov/policy/gen/leg/foia/foiatoc.html> and click on the ***Requests Status Log*** link under "**More Resources.**"

If you have any questions, please contact the FOIA Service Center at (202) 401-8365 or via e-mail at [EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov).

Sincerely,

A handwritten signature in cursive script that reads "Elise Cook".

Elise Cook  
Government Information Specialist  
FOIA Service Center

# Exhibit D



**GIBSON DUNN**

Gibson, Dunn & Crutcher LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036-5306  
Tel 202.955.8500  
www.gibsondunn.com

Joseph P. Vardner  
Direct: +1 202.955.8520  
JVardner@gibsondunn.com

FREEDOM OF INFORMATION ACT APPEAL

June 30, 2017

VIA ELECTRONIC MAIL

Kathleen Styles  
Chief Privacy Officer  
Department of Education  
400 Maryland Ave SW  
Washington, DC 20202

Re: FOIA Request No. 17-01322-F

Ms. Styles:

This firm is co-counsel with Lambda Legal (“Lambda Legal”) and its Director of Constitutional Litigation, Susan Sommer, in connection with their above-referenced Freedom of Information Act (“FOIA”) request to the Department of Education (“Department”). I am writing to appeal the failure of the Department to respond to the request.

**I. The Request**

On March 13, 2017, Lambda Legal submitted a request under the FOIA (the “Request,” copy attached) to the Department seeking documents relating to:

1. the withdrawal of the letter from James A. Ferg-Cadema, Deputy Assistant Secretary for Policy, Office for Civil Rights, Department of Education, to Emily Prince dated Jan. 7, 2015;
2. the withdrawal of the Dear Colleague Letter: Transgender Students jointly issued by the Department of Education and Department of Justice on May 13, 2016; or
3. the Dear Colleague Letter relating to transgender students jointly issued by the Department of Education and Department of Justice on February 22, 2017.

Lambda Legal asked for expedited treatment of the Request. On March 28, 2017, the Department acknowledged receipt of the Request but provided no determination regarding the Request. Instead, in the acknowledgement, the Department stated that it had “forwarded [the Request] to the primary responsible office(s) for action.”

GIBSON DUNN

June 30, 2017

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We attempted to follow up with the Department several times since Lambda Legal filed its Request on March 13, 2017. On April 18, 2017, we tried calling the Department's FOIA phone number advertised on its website and its acknowledgement letter—202-401-8365—but the number rang to a voice mailbox that was full and would not allow us to leave a message. Afterward, we e-mailed the Department on April 19, 2017. In the Department's acknowledgement letter, we were instructed "to check the status of [our] FOIA request at the link provided . . . ." On April 25, 2017, the Department sent a boilerplate letter stating that it was "unable to respond within" the statutorily required timeline and instructed us to "check on the status of your request on the Department's FOIA Web page" by checking the same previously provided link if we "haven't received [our] response documents within 30 days from receipt of this letter . . . ." However, the FOIA tracking number provided is not listed on the linked webpage. And the linked document—the Department's FOIA Requests Status Log—has not been updated since March 10, 2017.

Since receiving the April 25 letter, we called the Department's FOIA office four times inquiring about our request's status. On two occasions, we were informed some components finished their search but that half of the requested components still have not responded. We were told the Institute of Education Sciences, Office of Elementary and Secondary Education, Office of the Deputy Secretary, and Office of the Under Secretary have no responsive documents. We were also told responses have been pending for over two months from the Office of the Secretary, Office for Civil Rights, Office of the General Counsel, and Office of Communications and Outreach. To date, the Department has not provided any documents responsive to the Request. However, in light of the recent release of the Department's Office of Civil Rights's guidance on transgender investigations, we are aware the Department has been working on the issue and responsive documents likely exist.

**II. The Department's Failure to Respond to the Request Within the Time Period Required by the FOIA Constitutes a Constructive Denial of the Request**

The FOIA requires an agency to respond to a request for records within 20 days. 5 U.S.C. § 552(a)(6)(A)(i). Therefore, the Department's response to the Request was due on April 25, 2017. The FOIA also requires an agency to respond to a request for expedited processing within 10 days. 5 U.S.C. § 552(a); 34 C.F.R. Part § 5.21(i)(2)(iv). Therefore, the Department's response to the Request's expedited processing was due on April 7, 2017. Merely acknowledging the request within the statutory time period is insufficient. 5 U.S.C. § 522(a)(6)(A)(i); *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 65 (D.C. Cir. 1990); FOIA Update, Vol. XIII, No. 3, at 5 (Jan. 1992), *available at*: <https://www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-4>. And the Department has not asserted that "extraordinary circumstances" exist to justify its refusal to respond to the Request within the time period required by the FOIA. The Department's

GIBSON DUNN

June 30, 2017

Page 3

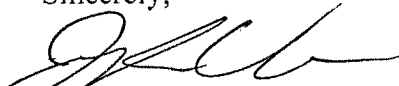
failure to respond to the Request within the time period required by the FOIA serves as a constructive denial of the Request, and Lambda Legal is deemed to have exhausted its administrative remedies. 5 U.S.C. § 522(a)(6)(C)(i).

**III. Requested Remedy**

To date the Department has not produced the requested documents. The Department also claims that documents related to three letters about the safety of transgender students at elementary schools and secondary schools do not exist in the Office of Elementary and Secondary Education. Such a claim strains credulity. We ask that the Department expedite our Request, complete its search of the remaining sections, produce any responsive documents, and produce the required privilege log for any documents being withheld. As mentioned several times in our calls, we ask that the Department produce documents on a rolling basis and not wait until the end of its search.

We look forward to the Department's decision on this appeal within the time provided by statute, 20 business days. 5 U.S.C. § 552(a)(6)(A)(ii). If you have any questions or require any additional information, please contact Joseph Vardner directly at (202) 955-8520.

Sincerely,



Joseph P. Vardner

Sincerely,

/s/ Susan Sommer

Susan Sommer  
Lambda Legal

# Exhibit E



**UNITED STATES DEPARTMENT OF EDUCATION**

OFFICE OF MANAGEMENT

Office of the Chief Privacy Officer

July 3, 2017

Susan Sommer  
Lambda Legal  
120 Wall Street  
19th Floor  
New York, NY 10005

RE: Appeal – FOIA Request No. 17-01322-F/ Appeal – 17-00042-A

Dear Ms. Sommer:

This is to acknowledge receipt of your June 30, 2017 letter appealing the Department's inadequacy to respond to your request within the statutory time limit for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, which was received by this office on July 3, 2017.

An administrative review of our response is underway, and the Department's Chief Privacy Officer will issue a determination on the appeal once it is completed. If you have a question or concern, please contact the FOIA Office at (202) 401-8365 or [EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov).

Sincerely,

A handwritten signature in cursive script, appearing to read "Angela Arrington", is positioned above the typed name.

Angela Arrington  
Deputy Director  
Office of the Chief Privacy Officer

# Exhibit F



March 13, 2017

By Certified Mail,  
Return Receipt Requested and  
Electronic Mail

Nelson D. Hermilla, Chief  
FOIA/PA Branch  
Civil Rights Division  
Department of Justice  
BICN Bldg., Room 3234  
950 Pennsylvania Avenue, NW  
Washington, DC 20530  
Phone: (202) 514-4209  
Email: CRT.FOIArequests@usdoj.gov

FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, DC 20530-0001  
Phone: (202) 616-3837  
Email: MRUFOIA.Requests@usdoj.gov

Laurie Day  
Chief, Initial Request Staff  
Office of Information Policy  
Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, DC 20530-0001  
Phone: (202) 514-FOIA  
Email: laurie.day@usdoj.gov

To Whom It May Concern:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, on behalf of Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"). Lambda Legal seeks documents relating to the Department of Justice's recently announced withdrawal of guidance relating to Title IX and transgender students.

We request a copy of any and all records, correspondence, and memos, in any and all formats, that mention, discuss, reference, or relate to:

*Sommer Letter to Department of Justice  
March 13, 2017  
Page 2 of 3*

1. the withdrawal of the letter from James A. Ferg-Cadema, Deputy Assistant Secretary for Policy, Office for Civil Rights, Department of Education, to Emily Prince dated Jan. 7, 2015;
2. the withdrawal of the Dear Colleague Letter: Transgender Students jointly issued by the Department of Education and Department of Justice on May 13, 2016; or
3. the Dear Colleague Letter relating to transgender students jointly issued by the Department of Education and Department of Justice on February 22, 2017.

(collectively, "the Title IX Transgender Guidance Materials").

We request that you produce responsive materials dated from January 20, 2017 to the present, except as specified below, in their entirety, including all attachments, appendices, enclosures, and/or exhibits. This request includes, but is not limited to:

- a. correspondence with non-government entities about the Title IX Transgender Guidance Materials;
- b. communications with employees of the Executive Office of the President about the Title IX Transgender Guidance Materials;
- c. communications with the Trump-Pence Transition Team pertaining to the Title IX Transgender Guidance Materials after November 9, 2016;
- d. talking points, press releases, letters, memoranda, or other documents communicating the Title IX Transgender Guidance Materials;
- e. reports, studies, or data relating to the Title IX Transgender Guidance Materials;
- f. guidance or instructions to staff about how to handle technical assistance requests, inquiries, and complaints regarding denial of access to sex-segregated facilities on the basis of gender identity; and
- g. guidance or instructions to staff about how to handle technical assistance requests, inquiries, and complaints for sex discrimination, harassment, or bullying based on gender identity or transgender status under Title IX.

To the extent that a response to this request would include multiple copies of identical material, we request only one copy of the identical material.

If you withhold any records, in part or whole, please explain in writing any such denial, including a description of the document being withheld and the statutory exemption to its mandatory disclosure. To the extent a document is segregable, please release all segregable material.  
5 U.S.C. § 552(b).



*Sommer Letter to Department of Justice  
March 13, 2017  
Page 3 of 3*

The request is directed to the following components: (i) Office of the Attorney General; (ii) Office of the Deputy Attorney General; (iii) Office of the Associate Attorney General; (iv) Office of Legal Policy; (v) Office of Legal Counsel; (vi) Office of Public Affairs; (vii) Office of the Assistant Attorney General for Civil Rights; (viii) Education Opportunities Section of the Civil Rights Division; (ix) Policy and Strategy Section of the Civil Rights Division; (x) LGBTI Working Group organized within the Civil Rights Division; and (xi) Federal Coordination and Compliance Section of the Civil Rights Division.

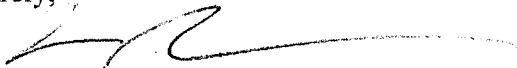
We are a "non-profit, non-partisan, public interest organization" and this request is not for commercial use. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003). To expedite the request, we are willing to pay \$500 for our request without an estimate of costs from the Department of Justice. Should the fee for disclosure exceed \$500, it should be waived. If you decide not to waive the fees over \$500, please provide us with prior notice so that we can discuss arrangements. We request that the information sought be provided in electronic format on a CD or DVD.

Disclosure of the documents in this request is in the public interest and a compelling need exists for expeditious handling:

- An urgency to educate concerned citizens about proper reporting techniques to stop discrimination, harassment, and the bullying of children, particularly those who are transgender and especially vulnerable;
- An urgency to inform the public concerning actual or alleged Federal Government activity;
- The information to be learned in response to the request is not already public knowledge; and,
- The information provided will be used for a time-sensitive project that may include information to be shared with the public.

Thank you for your prompt response to this request. We look forward to your determination of this request within ten working days. 28 CFR § 16.5.

Sincerely,



Susan Sommer  
Director of Constitutional Litigation  
Lambda Legal  
120 Wall Street, 19th Floor  
New York, New York 10005  
P: 212-809-8585  
ssommer@lambdalegal.org

# Exhibit G



Washington, D.C. 20530

March 15, 2017

Kaitlyn Gentile  
120 Wall Street, 19<sup>th</sup> Floor  
New York, NY 10005

Dear Sir/Madam:

This is in response to your request for records, Tracking Number, EMRUFOIA031517. Your Freedom of Information Act and/or Privacy Act (FOIA/PA) request was received by this office which serves as the receipt and referral unit for FOIA/PA requests addressed to the Department of Justice (DOJ). Federal agencies are required to respond to a FOIA request within 20 business days. This period does not begin until the request is actually received by the component within the DOJ that maintains the records sought, or ten business days after the request is received in this office, whichever is earlier.

We have referred your request to the DOJ component(s) you have designated or, based on descriptive information you have provided, to the component(s) most likely to have the records. All future inquiries concerning the status of your request should be addressed to the office(s) listed below:

FOIA/PA  
Civil Rights Division  
Department of Justice  
BICN Building, Room 3234  
950 Pennsylvania Ave., NW  
Washington, DC 20530  
(202) 514-4209

FOIA/PA  
Office of Information Policy  
Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, DC 20530-0001  
(202) 514-FOIA

Sincerely,

Evie Sassok, Assistant Director  
Logistics Management  
Facilities and Administrative Services Staff  
Justice Management Division



# Exhibit H



U.S. Department of Justice  
Civil Rights Division

NDH:ANF:AKL

*Freedom of Information/Privacy Acts Branch -BICN  
950 Pennsylvania Ave., NW  
Washington, DC 20530*

Ms. Susan Sommer  
Lambda Legal  
120 Wall Street, 19th Floor  
New York, NY 10005  
[ssommer@lambdalegal.org](mailto:ssommer@lambdalegal.org)

**MAR 16 2017**

Date Received: March 15, 2017

FOI/PA No.17-00208-F

Subject of Request: Information pertaining to the Department of Justice withdrawal of guidance to Title IX and transgender students

Dear Ms. Sommer:

This is to inform you that your request for records from the files of the Civil Rights Division was received by the Division's Freedom of Information/Privacy Acts (FOI/PA) Branch on the date indicated above. Your request has been assigned the FOI/PA number shown above. Please refer to this number in any future correspondence concerning this request. In connection with review of your FOI/PA request, the following paragraph(s) are applicable:

\_\_\_\_\_ In searching its file for records responsive to your request, \_\_\_\_\_

located records that originated with the Civil Rights Division. These records were referred to the Civil Rights Division as the originating component for review and release determination. Upon completion of our review, the releasable document(s) will be sent directly to you.

XX 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.

Please note that the Civil Rights Division utilizes multi-track processing in which processing ranges from faster tracks for requests (seeking access to documents already processed for prior requests) to much slower tracks for complex requests involving voluminous amounts of responsive documents or extensive consultation. At your option, you may wish to call the number below and limit the scope of your request to enable your request to be handled in the most expeditious manner available to fulfill your interests.

---

Since your letter did not include authorization or a certification of identity, we will close your file for now. We will re-open your request on receipt of the required authorization forms. The Privacy Act, and the Department of Justice Privacy Act regulation, 28 C.F.R. §16.41, require each person requesting records indexed or maintained under his or her name or another person's name, to furnish the Department with proof of identity/consent to disclosure. Please complete the enclosed form and return it directly to the Freedom of Information/Privacy Acts Branch, Civil Rights Division, US Department of Justice, Washington, D.C. 20530.

Should you wish to appeal the identification/consent requirement, you may do so by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 1425 New York Avenue, N.W. Building, Suite 11050, Washington, D.C. 20530. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope should be marked "FOI/PA Appeal." You may also submit your appeal via OIP's electronic portal (at <http://www.justice.gov/oip/efoia-portal.html>). Following review by the Department, judicial review of the decision of the Attorney General is available in the United States District Court in the judicial district in which you reside, in which you have your principal place of business, or in the District of Columbia.

If you have any further questions, contact this office by calling (202) 514-4210.

Sincerely,

*April N. Freeman*

for

Nelson D. Hermilla, Chief  
Freedom of Information/Privacy Acts Branch  
Civil Rights Division

# Exhibit I





Civil Rights Division

NDH:ANF:RG3  
17-00208-F

Freedom of Information/Privacy Acts Branch - BCIN  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Via Electronic Mail Only

Ms. Susan Sommer  
Lambda Legal  
120 Wall Street, 19th Floor  
New York, NY 10005  
ssommer@lambdalegal.org

JUN 19 2017

Dear Ms. Sommer:

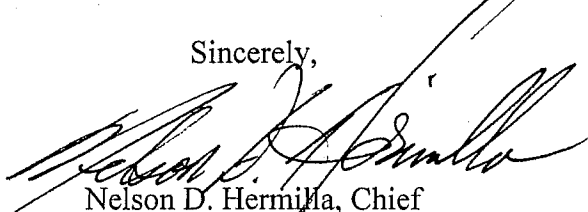
This is in further response to your March 13, 2017, Freedom of Information Act request seeking access to records pertaining to the Department of Justice withdrawal of guidance to Title IX and transgender students.

After review of the responsive Civil Rights Division documents, I have determined that access to the documents should be denied pursuant to 5 U.S.C. §552(b)(5), since the records consist of attorney work product and include intra-agency memoranda containing pre-decisional, deliberative material. Although we have considered a discretionary release of the information, we have determined that the withheld information is not appropriate for such disclosure.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

I hope the Civil Rights Division has been of some assistance to you in this matter.

Sincerely,

  
Nelson D. Hermilla, Chief  
Freedom of Information/Privacy Acts Branch  
Civil Rights Division

# Exhibit J

GIBSON DUNN

Gibson, Dunn & Crutcher LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036-5306  
Tel 202.955.8500  
www.gibsondunn.com

Joseph P. Vardner  
Direct +1 202.955.8520  
JVardner@gibsondunn.com

FREEDOM OF INFORMATION ACT APPEAL

July 23, 2017

VIA ELECTRONIC MAIL

Melanie Ann Pustay  
Director  
Office of Information Policy (OIP)  
Department of Justice  
Suite 11050  
1425 New York Ave NW  
Washington, DC 20530-0001

Re: Freedom of Information Act Appeal of No. EMRUFOIA031517

Dear Director Pustay:

This firm is co-counsel with Lambda Legal ("Lambda Legal") and its Director of Constitutional Litigation, Susan Sommer, in connection with their above-referenced Freedom of Information Act ("FOIA") requests to the Civil Rights Division of the Department of Justice ("Division"). On March 13, 2017, we requested documents under the FOIA and were assigned the above-referenced number. On June 19, 2017, we received the Civil Rights Division's written response to the FOIA request and its determination to withhold all information responsive to the request on attorney work product and deliberative process grounds.

Pursuant to the FOIA, we hereby appeal that denial. We request that the Division segregate and disclose any non-exempt portions of the requested records and specify the particular basis for withholding any record or portion thereof that is not disclosed. A copy of our FOIA request and the agency determination are attached for your convenience.

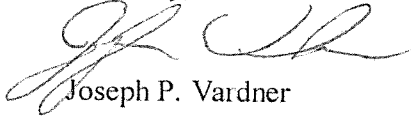
We look forward to your office's decision on this appeal within the time provided by statute, 20 business days. 5 U.S.C. § 552(a)(6)(A)(ii). If you have any questions or require any additional information, please contact me directly at (202) 955-8520.

GIBSON DUNN

July 23, 2017


Page 2

Sincerely,



Joseph P. Vardner

Sincerely,



Susan Sommer  
Lambda Legal

# Exhibit K



**U.S. Department of Justice**  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

March 23, 2017

Ms. Kaitlyn Gentile  
Lamda Legal  
120 Wall Street, 19<sup>th</sup> Floor  
New York, NY 10005  
[kgentile@lamdalegal.lorg](mailto:kgentile@lamdalegal.lorg)

Re: DOJ-2017-002953 (AG)  
DOJ-2017-003114 (DAG)  
DOJ-2017-003115 (ASG)  
DOJ-2017-003116 (OLP)  
DOJ-2017-003117 (PAO)  
VRH:DRH:ERH

Dear Ms. Gentile:

This is to acknowledge receipt of your letter dated and received in this Office on March 13, 2017, in which you requested records pertaining to "the Title IX Transgender Guidance Materials" as described in your request. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy, and Public Affairs.

You have requested expedited processing of your request pursuant to the Department's standard permitting expedition for requests involving "[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information." See 28 C.F.R. § 16.5(e)(1)(ii) (2015). Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied. The primary activity of your organization does not appear to be information dissemination, which is required for a requester to qualify for expedited processing under this standard.

The records you seek require searches in other Offices, and so your request falls within "unusual circumstances." See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii). Because of these unusual circumstances, we need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our records search to discuss either of these options. You may also contact the Office of Government Information Services (OGIS) of the National Archives and Records Administration to inquire into the FOIA mediation services they provide. OGIS can be contacted at the following:

-2-

Office of Government Information Services  
National Archives and Records Administration  
Room 2510  
8601 Adelphi Road  
College Park, MD 20740-6001

Telephone: (202) 741-5770  
Facsimile: (202) 741-5769  
Toll-Free: (877) 684-6448  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)

In note that you agree to pay fees up to \$500.

If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact Eric Hotchkiss the analyst processing your request, by telephone at the above number or you may write to him at the above address. In addition, you may contact our FOIA Public Liaison at the telephone number listed above to discuss any aspect of your request.

You may contact our FOIA Public Liaison at the telephone number listed above for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to your request for expedited processing, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal at <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically submitted within ninety days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in dark ink, appearing to read "Vanessa R. Brinkmann", with a small "BR" monogram at the end.

Vanessa R. Brinkmann  
Senior Counsel

# Exhibit L



**Vardner, Joseph P.**

---

**From:** Kaitlyn Gentile <kgentile@lambdalegal.org>  
**Sent:** Monday, April 17, 2017 1:16 PM  
**To:** Susan Sommer; Vardner, Joseph P.  
**Subject:** FW: Your FOIA Request DOJ-2017-002953 (AG) et. al.

**From:** Hotchkiss, Eric (OIP) [mailto:Eric.Hotchkiss@usdoj.gov]  
**Sent:** Monday, April 17, 2017 1:07 PM  
**To:** Kaitlyn Gentile <kgentile@lambdalegal.org>  
**Subject:** Your FOIA Request DOJ-2017-002953 (AG) et. al.

Good afternoon Mr. Vardner,

This is to memorialize our conversation of this afternoon. You agreed that you did not want us to process the three letters (numbered 1, 2, and 3 in your request) collectively termed "the Title IX Transgender Guidance Materials." Additionally, you agreed to limit the time-scope of your request to January 20, 2017 through the date on which we conducted our first search (March 22, 2017). Finally, the search terms we will use are as follows:

"Title IX"  
"Transgender"  
"Bathroom"  
"LGBTQ"  
"Dear Colleague"  
"Gender Identity"

As discussed, in order to streamline our search, while processing the data pull we will initially concentrate on the Component Head and #2 at each component. We will then follow leads to other individuals as the content of the data pull becomes more clear.

Please let me know if you have any questions regarding the processing of your request, or our FOIA process in general.

Thank you for your time,

Eric Hotchkiss  
Government Information Specialist  
Office of Information Policy  
202-616-5456

# Exhibit M

GIBSON DUNN

Gibson, Dunn & Crutcher LLP

1050 Connecticut Avenue, N.W.  
Washington, DC 20036-5306  
Tel 202.955.8500  
www.gibsondunn.com

Joseph P. Vardner  
Direct +1 202.955.8520  
JVardner@gibsondunn.com

FREEDOM OF INFORMATION ACT APPEAL

July 23, 2017

VIA ELECTRONIC MAIL

Melanie Ann Pustay  
Director  
Office of Information Policy (OIP)  
Department of Justice  
Suite 11050  
1425 New York Ave NW  
Washington, DC 20530-0001

Re: FOIA Request Nos. 2017-002953 and Related Requests

Dear Director Pustay:

This firm is co-counsel with Lambda Legal ("Lambda Legal") and its Director of Constitutional Litigation, Susan Sommer, in connection with their above-referenced Freedom of Information Act ("FOIA") requests to the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy and Public Affairs within the Department of Justice ("Department"). I am writing to appeal the failure of the Department to respond to the request consistent with the statute and governing regulations.

**I. The Request**

On March 13, 2017, Lambda Legal submitted a request under the FOIA (the "Request," copy attached) to the Department seeking documents relating to:

1. the withdrawal of the letter from James A. Ferg-Cadema, Deputy Assistant Secretary for Policy, Office for Civil Rights, Department of Education, to Emily Prince dated Jan. 7, 2015;
2. the withdrawal of the Dear Colleague Letter: Transgender Students jointly issued by the Department of Education and Department of Justice on May 13, 2016; or
3. the Dear Colleague Letter relating to transgender students jointly issued by the Department of Education and Department of Justice on February 22, 2017.

GIBSON DUNN

July 23, 2017

Page 2

Lambda Legal asked for expedited treatment of the Request. On March 15, 2017, the Department acknowledged receipt of the Request, and on March 23, the Department denied our request for expedited treatment. Instead, the Department stated that it “need[ed] to extend the time limit to respond to [our] request beyond the ten additional days provided by the statute.”

We followed up with OIP several times. On April 17, 2017, we agreed to limit the scope of the Request by reducing the time-scope of the request, waiving request numbers 1, 2, and 3, and implementing search terms to ease the Department’s burden in searching for relevant documents. Since then, we have followed up with the Department an additional five times about the status of our Request. We have been told as recently as June 12, 2017 that no progress has been made on our Request, including that searches of the electronic documents of relevant custodians have not been performed.

**II. The Department’s Failure to Respond to the Request Within The Time Period Required by the FOIA Constitutes a Constructive Denial of the Request**

The FOIA requires an agency to respond to a request for records within 20 days. 5 U.S.C. § 552(a)(6)(A)(i). Therefore, the Department’s response to the Request was due on April 25, 2017. Merely acknowledging the request within the statutory time period is insufficient. 5 U.S.C. § 552(a)(6)(A)(i); *Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 65 (D.C. Cir. 1990); FOIA Update, Vol. XIII, No. 3, at 5 (Jan. 1992), *available at*: <https://www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-4>. The Department’s lack of a substantive response in over four months serves as a constructive denial of the Request, and Lambda Legal is deemed to have exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

OIP’s March 23 letter asserts that “unusual circumstances” exist because “[t]he records [sought] require searches in other Offices” and therefore justifies OIP’s failure to respond within the time period required by the FOIA. However, the Request does not ask for searches “from field facilities or other establishments that are separate from the office processing the request” as specified by the statute. 5 U.S.C. § 552(a)(6)(B)(iii); 25 C.F.R. § 16.5(c). All of the offices addressed in this request are located in the same building. OIP’s justification is also in error because the Department separated its search of “other establishments” by assigning document collection from the Civil Rights Division to that Division and having it handled separately. *See* FOIA Request EMRUFOIA031517. Therefore, no “unusual circumstances” exist to justify the Department’s failure to respond to the Request within the time period required by the FOIA.

GIBSON DUNN

July 23, 2017

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**III. Requested Remedy**

The Department has not produced the requested documents more than four months after the request was made. We respectfully request that OIP decide the appeal and grant the following relief:

- Approve expedition of the request;
- Complete the search and produce any responsive documents within 30 days; and
- Produce documents on a rolling basis.


We look forward to the Department's decision on this appeal within the time provided by statute, 20 business days. 5 U.S.C. § 552(a)(6)(A)(ii). If you have any questions or require any additional information, please contact me directly at (202) 955-8520.

Sincerely,



Joseph P. Vardner

Sincerely,



Susan Sommer  
Lambda Legal

# Exhibit N



**U.S. Department of Justice**  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

Joseph P. Vardner, Esq.  
Gibson, Dunn & Crutcher, LLP  
Suite 200  
1050 Connecticut Avenue, NW  
Washington, DC 20036  
[jvardner@gibsondunn.com](mailto:jvardner@gibsondunn.com)

Re: Appeal No. DOJ-AP-2017-005521<sup>1</sup>  
Request No. DOJ-2017-002953 (AG)  
SRO:MTC

**VIA: FOIAonline**

Dear Mr. Vardner:

This is to advise you that your administrative appeal<sup>2</sup> from the action of the Initial Request Staff (IR Staff) of the Office of Information Policy, acting on behalf of the Office of the Attorney General and four other offices was received in this Office on July 24, 2017.<sup>3</sup> You appealed from the IR Staff's denial of your request for expedited treatment of your Freedom of Information Act request. You also appeal from the IR Staff's failure to respond to your requests.

In your request and appeal letters, you appear to assert that your request is entitled to expedited treatment pursuant to the second standard enumerated in the Department of Justice's regulations. Under the second standard, you must show that there is "[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II). See also 28 C.F.R. § 16.5(e)(1)(ii) (2016). This Office makes determinations regarding the first three standards, while the Department's Director of Public Affairs makes determinations regarding the fourth standard. See id. at § 16.5(e)(2).

With regard to whether you are "primarily engaged in disseminating information," although Lambda Legal may well engage in the dissemination of information, you have not demonstrated that you are "primarily engaged" in disseminating information. See Landmark Legal Found. v. EPA, 910 F. Supp. 2d 270 (D.D.C. 2012) (noting that plaintiff must be "primarily, and not just incidentally, engaged in information dissemination"); ACLU of N. Cal.

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<sup>1</sup> Please be advised this letter also responds to your Appeal Nos. DOJ-AP-2017-005551, DOJ-AP-2017-005552, DOJ-AP-2017-005553, and DOJ-AP-2017-005554, made from Request Nos. DOJ-2017-003114 (DAG), DOJ-2017-003115 (ASG), DOJ-2017-003116 (OLP), and DOJ-2017-003117 (PAO), respectively.

<sup>2</sup> I note that you are jointly appealing along with Susan Sommer, Director of Constitutional Litigation at Lambda Legal.

<sup>3</sup> Specifically, you are appealing from action taken by the IR Staff 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.

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v. DOJ, No. 04-4447, 2005 WL 588354, at \*14 (N.D. Cal. Mar. 11, 2005) (holding that information dissemination must be "*the* main activity" rather than merely "*a* main activity" of plaintiff to satisfy expedition standard). Without such a showing, expedited processing pursuant to the second standard is not warranted.

Additionally, you attempted to appeal from the failure of the IR Staff to respond to your request. Department of Justice regulations provide for an administrative appeal to the Office of Information Policy only after there has been an adverse determination by a component. See 28 C.F.R. § 16.8(a) (2016). As no final adverse determination has yet been made by the IR Staff, there is no further action for this Office to consider on appeal.

As you may know, the FOIA authorizes requesters to file a lawsuit when an agency takes longer than the statutory time period to respond. See 5 U.S.C. § 552(a)(6)(C)(i). However, I can assure you that this Office has contacted the IR Staff and has determined that your request is still pending. If you are dissatisfied with the IR Staff's final response, you may appeal again to this Office.

This Office has forwarded a copy of your letter to the IR Staff. You should contact the IR Staff's Requester Service Center at 202-514-3642 for further updates regarding the status of your request.

If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal for expedited treatment of your request, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(6)(E)(iii).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

7/31/2017

X 

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Sean R. O'Neill  
Chief, Administrative Appeals Staff  
Signed by: OIP