

**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,

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—



b. The Office of the Deputy Attorney General, who is an officer appointed  
by t

and the Deputy Attorney General, and reviews and coordinates all regulations



inmates”; to “ensure transgender inmates can access programs and services that meet their needs





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 at Icut9 (x)-10 (12t)-2 (he)-6 ( hou3p18bb)2 (c) trehat transThececc tcut9 (I)13 k-2 (E)1p2 (e)4 pd4n (e)4 ( e)/T



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))vounstd1-4ianvounstd

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 r tnngrmrocesda69 (ar)-9.11s(:l)]T,628Td(41.)Tj/TT1

2019-000145) of the Civil Division's response. The Civil Division did not make a determination

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.

il Rightei (i)8 (vi)-2 Rd idu (ppri)-2 d(not(e20 (our)3 (ppr(y)20 (our)3d ( )-1. t)-2 opi 4 (nc)4 ((g)

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

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.

November 20, 2018

Respectfully submitted,

/s/ Matthew J. Dolan  
SIDLEY AUSTIN LLP

Matthew J. Dolan  
mdolan@sidley.com  
1001 Page Mill Road, Building 1  
Falo Alto, Calif (20650)001 Jpa2 943J0

riionsu.mon

