

August 10, 2018

VIA EMAIL

Freedom of Information Officer
Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue SW
Washington, DC 20201
FOIARequest@hhs.gov

Re: Expedited Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Health and Human Service (HHS), 45 C.F.R. Part 5, Lambda Legal makes the following request for records.

Requested Records

Lambda Legal requests that HHS produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

All records reflecting communications (including emails, email attachments, text messages, instant messages (such as AOL Instant Messenger), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between Brett Kavanaugh and Secretary Tommy Thompson, Secretary Michael Leavitt, or Assistant Secretary Wade Horn regarding media stories by Margaret (Maggie) Gallagher or Michael McManus. In addition to communications regarding published media stories, this request encompasses communications discussing proposals for media stories, solicitation of media stories, consultation on media stories, and actual or potential payment for writing media stories, regardless of whether each story was ultimately published.

In addition to the records requested above, Lambda Legal also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If HHS uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

Lambda Legal seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as

well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹ **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; Lambda Legal has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**²

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered DOJ’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**³ Furthermore, agencies that have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but HHS’s archiving tools would capture that email under Capstone. Accordingly, Lambda Legal insists that HHS use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. Lambda Legal is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or

¹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

³ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

“disclosure is prohibited by law.”⁴ If it is your position that any portion of the requested records is exempt from disclosure, Lambda Legal requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁵ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”⁶ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”⁷

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.⁸ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. Lambda Legal intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, HHS is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, Lambda Legal welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, Lambda Legal and HHS can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to Lambda Legal, 1875 I Street NW, Fifth Floor, Washington, DC 20006. If it will accelerate release of responsive records to Lambda Legal, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.54, Lambda Legal requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better

⁴ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁶ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

⁷ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

⁸ *Mead Data Central*, 566 F.2d at 261.

understanding of relevant government procedures by the general public in a significant way.⁹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁰

Lambda Legal requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding” of government operations and activities.¹¹ On July 9, 2018, President Trump announced his nomination of Judge Brett M. Kavanaugh to the Supreme Court seat that has been vacated due to Justice Anthony Kennedy’s retirement.¹² There has been significant and widespread public attention devoted to the nomination and impending confirmation hearings.¹³ The public has an interest in and a right to clear insight into Judge Kavanaugh’s record of public service to inform its understanding of his fitness to serve as a Supreme Court Justice. As discussed below, Lambda Legal has the capacity and intention to inform a broad audience about government activities that are the subject of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁴ As a 501(c)(3) nonprofit, Lambda Legal does not have a commercial purpose and the release of the information requested is not in Lambda Legal’s financial interest. Lambda Legal’s mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone with HIV, through impact litigation, education, and public policy work. As part of this mission, Lambda Legal regularly files FOIA requests to ensure the accountability of government officials.¹⁵ Lambda Legal uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media, as promoted on its website and social media platforms, such as Facebook and Twitter.¹⁶

⁹ 45 C.F.R. § 5.54.

¹⁰ *Id.*

¹¹ 45 C.F.R. § 5.54(a), (b)(1)–(2).

¹² Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump’s Pick for Supreme Court*, N.Y. TIMES, July 9, 2018, <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html>.

¹³ *See, e.g., id.; Democratic Lawmakers, Liberal Groups Rally Against Brett Kavanaugh, Trump’s Supreme Court Nominee*, PBS (July 9, 2018, 11:40 PM), <https://www.pbs.org/newshour/politics/democratic-lawmakers-liberal-groups-rally-against-brett-kavanaugh-trumps-supreme-court-nominee>; Amber Phillips, *Democrats Are Probably Fighting a Losing Battle Over Kavanaugh’s White House Documents*, WASH. POST (Aug. 1, 2018, 10:44 AM), https://www.washingtonpost.com/news/the-fix/wp/2018/08/01/the-senate-fight-over-brett-kavanaughs-white-house-documents-explained/?utm_term=.17e455c5f29f; Melissa Quinn, *Chuck Grassley Formally Requests Kavanaugh White House Records Amid Document Battle*, WASH. EXAMINER (July 27, 2018, 7:51 PM), <https://www.washingtonexaminer.com/policy/courts/grassley-formally-requests-kavanaugh-white-house-records-amid-document-battle>.

¹⁴ 5 U.S.C. § 552(a)(4)(A)(iii); 45 C.F.R. § 5.54(b)(3).

¹⁵ *See, e.g., Lambda Legal Files FOIA Request After Trump Administration Restricts Use of Seven Words at CDC*, LAMBDA LEGAL, Dec. 20, 2017, https://www.lambdalegal.org/blog/dc_20171220_language-restrictions.

¹⁶ Lambda Legal currently has approximately 530,000 page likes on Facebook and 134,000 followers on Twitter. Lambda Legal, FACEBOOK, <https://www.facebook.com/lambdalegal> (last visited Aug. 9, 2018); Lambda Legal (@LambdaLegal), TWITTER, <https://twitter.com/LambdaLegal> (last visited Aug. 9, 2018); *see also Publications & Resources*, LAMBDA LEGAL, <https://www.lambdalegal.org/all> (last visited Aug. 6, 2018).

Lambda Legal has demonstrated its commitment to advocacy in the public interest, including through its Fair Courts project, which works to ensure that courts afford LGBTQ rights due consideration based on constitutional and legal principles.¹⁷

Accordingly, Lambda Legal qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 45 C.F.R. § 5.27(b)(2), Lambda Legal requests that HHS expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity. 45 C.F.R. § 5.27(b)(2). As discussed above, on July 9, 2018, President Trump announced Judge Kavanaugh's nomination to the Supreme Court.¹⁸ Senate Majority Leader Mitch McConnell had previously stated that the Senate will act quickly to confirm the president's nominee, calling for a vote in the fall, prior to the start of the Court's next term.¹⁹ The American public has a substantial and urgent interest in Judge Kavanaugh's lengthy career in public service to inform its understanding of his impending confirmation hearings. Indeed, if a request for records intended to inform the public regarding an imminent lifetime appointment to the Supreme Court fails to qualify for expedited processing, it is hard to imagine what would.

Furthermore, a FOIA request has become Lambda Legal's—and the public's—last resort to obtain the requested records. While judicial opinions reflecting Judge Kavanaugh's tenure as a federal judge are readily available, equally important records reflecting his credentials and conduct prior to his appointment to the federal bench are not. In particular, Judge Kavanaugh served as President George W. Bush's staff secretary from 2003–2006, a role in which he would have had access to “nearly every document that reached the Oval Office” during that timeframe.²⁰ But Senate Judiciary Committee Chairman Chuck Grassley, over objections from Senate Democrats, has refused to request documents from Judge Kavanaugh's tenure as staff secretary, claiming such records would provide little insight into Judge Kavanaugh's fitness to join the Supreme Court.²¹ However, as Senator Sheldon Whitehouse has pointed out, “Judge Kavanaugh said himself his time as President Bush's Staff Secretary was ‘in many ways among the most instructive’ for his career as a judge.”²² Certainly, to the extent any records from

¹⁷ *Fair Courts Project*, LAMBDA LEGAL, <https://www.lambdalegal.org/issues/fair-courts-project> (last visited Aug. 6, 2018).

¹⁸ Landler & Haberman, *supra* note 12.

¹⁹ *A Senate Deadline for Kavanaugh*, WALL ST. J. (July 10, 2018, 7:37 PM), <https://www.wsj.com/articles/a-senate-deadline-for-kavanaugh-1531265850> (“Mr. McConnell is saying he intends to have a vote in the fall, and the goal should be to have a Justice Kavanaugh ready to sit on the High Court when it opens its new term on Oct. 1.”).

²⁰ See Phillips, *supra* note 13. Judge Kavanaugh also served in the White House Counsel's office from 2001 to 2003, a period of his career also holding significant interest. See Quinn, *supra* note 13.

²¹ See Quinn, *supra* note 13.

²² See Jennifer Rubin, *The Senate Must Prevent Kavanaugh's Nomination from Corrupting the Supreme Court*, WASH. POST, July 30, 2018, <https://www.washingtonpost.com/blogs/right->

this time period reflect Judge Kavanaugh's views and advice to President Bush on any number of important and contentious issues, they are highly relevant to the confirmation process.

Given its mission of advancing LGBTQ equality, Lambda Legal is particularly interested in records from Judge Kavanaugh's tenure in the White House that bear on LGBTQ issues, which he would be likely to encounter in cases before the Supreme Court. For instance, during his 2004 reelection campaign, President Bush advocated for a constitutional amendment banning gay marriage.²³ As another example, less than a year after Judge Kavanaugh's tenure as staff secretary ended, a bill colloquially known as the Matthew Shepard Act, a revived version of LGBTQ hate crime legislation that had been in the works for years, was introduced as a bipartisan bill.²⁴ Despite versions of the bill passing in both the House and the Senate, President Bush indicated he would veto the legislation.²⁵ Judge Kavanaugh's views and advice concerning these issues have direct relevance to the public's understanding of his prospective treatment of similar issues likely to come before the Court in coming years. Justice Kennedy, whose seat Judge Kavanaugh has been nominated to fill, has been the author of and/or deciding voice in a number of crucial decisions advancing and defending LGBTQ rights.²⁶ Judge Kavanaugh's record, in contrast, has been criticized (by Lambda Legal and others) as hostile to LGBTQ and other civil rights.²⁷ Therefore, the requested records are vitally important to provide a robust picture of Judge Kavanaugh's positions on cases implicating LGBTQ issues that he is likely to encounter as a Supreme Court Justice.

I further certify that Lambda Legal is primarily engaged in disseminating information to the public.²⁸ As described above, as part of its mission to achieve equality for LGBTQ and HIV-positive individuals, Lambda Legal regularly files FOIA requests to ensure the accountability of government officials.²⁹ Lambda Legal uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media, as promoted on its website and social media platforms, such as

[turn/wp/2018/07/30/the-senate-must-prevent-kavanaughs-nomination-from-corrupting-the-supreme-court/?utm_term=.8a1e391a074f](http://www.lambdalegal.org/wp/2018/07/30/the-senate-must-prevent-kavanaughs-nomination-from-corrupting-the-supreme-court/?utm_term=.8a1e391a074f).

²³ See *Bush Calls for Ban on Same-Sex Marriage*, CNN (Feb. 25, 2004, 5:05 AM), <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/>.

²⁴ See Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong., (2007). The bill had been introduced on several other occasions during President Bush's presidency and Judge Kavanaugh's White House career. See Local Law Enforcement Hate Crimes Prevention Act of 2005, H.R. 2662, 109th Cong. (2005); Local Law Enforcement Hate Crimes Prevention Act of 2004, H.R. 4204, 108th Cong. (2004); Local Law Enforcement Hate Crimes Prevention Act of 2001, H.R. 1343, 107th Cong. (2001).

²⁵ See David Stout, *House Votes to Expand Hate-Crime Protection*, N.Y. TIMES, May 4, 2007, <https://www.nytimes.com/2007/05/04/washington/04hate.html>.

²⁶ See *Lawrence v. Texas*, 539 US 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²⁷ See, e.g., *We Reviewed All of Judge Kavanaugh's Record. Here's What We Found*, LAMBDA LEGAL, July 9, 2018, https://www.lambdalegal.org/blog/20180709_brett-kavanaugh-record; Charlotte Clymer, *HRC Opposes Kavanaugh, Trump's Pick to Undermine LGBTQ Rights, Reproductive Rights, and Health Care*, HUMAN RIGHTS CAMPAIGN, July 9, 2018, <https://www.hrc.org/blog/hrc-opposes-trumps-Supreme-Court-pick-brett-kavanaugh>.

²⁸ 45 C.F.R. § 5.27(b)(2).

²⁹ See, e.g., *Lambda Legal Files FOIA Request*, *supra* note 15.

Facebook and Twitter.³⁰ Lambda Legal has demonstrated its commitment to the public disclosure of documents and creation of editorial content.

Accordingly, Lambda Legal's request satisfies the criteria for expedition.

Conclusion

We share a common mission to promote transparency in government. Lambda Legal looks forward to working with HHS on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Sasha Buchert at 202.740.0914 or at sbuchert@lambdalegal.org. Also, if Lambda Legal's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Sharon McGowan
Chief Strategy Officer and Legal Director
Lambda Legal



Sasha Buchert
Staff Attorney
Lambda Legal

³⁰ Lambda Legal currently has approximately 530,000 page likes on Facebook and 134,000 followers on Twitter. Lambda Legal, FACEBOOK, *supra* note 16; Lambda Legal (@LambdaLegal), TWITTER, *supra* note 16; *see also Publications & Resources*, LAMBDA LEGAL, *supra* note 16.