

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZEN FOR RESPONSIBILITY AND)	
ETHICS IN WASHINGTON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No: 1:07-CV-00964 (CKK)
)	
OFFICE OF ADMINISTRATION,)	
)	
Defendant.)	
)	

**PLAINTIFF’S MOTION TO COMPEL OR ALTERNATIVELY TO
AMEND THE COURT’S ORDER OF MARCH 30, 2008 TO REQUIRE
DEFENDANT TO PRODUCE THE OLC OPINION ADDRESSING
OA’S AGENCY STATUS AND SUPPORTING MEMORANDUM**

STATEMENT

Rejecting the Office of Administration’s (“OA”) argument that when it purportedly ceased functioning as an agency is irrelevant to the legal issue of whether it is an agency, this Court ordered OA to produce any documents in its possession or control reflecting its final decision that it is subject to neither the Freedom of Information Act (“FOIA”) nor the Federal Records Act (“FRA”). In response, OA now claims no such documents exist, despite OA’s earlier representation that its extended deliberations on the agency question concluded with a final written decision. OA also asks this Court to accept its unsworn representation that a legal memorandum provided by the Department of Justice’s Office of Legal Counsel (“OLC”) on August 21, 2007 -- the very day that OA claims to have made its final decision on this issue -- is not responsive to this Court’s order and need not be produced.

What OA ignores, however, is that OLC opinions have a binding and conclusive effect on the executive branch; while the president, of course, was free to reject the OLC’s conclusion

OA was not. Accordingly, any final decision OA made as to its agency status under the FOIA necessarily incorporated the OLC opinion. In other words, absent a separate written final decision from OA, the OLC opinion is the final executive branch decision on OA's agency status. As such, it must be produced to plaintiff.

BACKGROUND

This latest discovery dispute stems from the Court's Order of March 31, 2008, requiring OA, *inter alia*, to produce the following:

any document(s) in OA's possession or control reflecting (1) OA's final decision after its deliberative process concluded regarding whether OA was an agency subject to FOIA; and (2) OA's final determination that it was subject to the PRA rather than the FRA . . ."

Order of March 31, 2008, p. 2. The Order further provides that if OA is asserting a privilege over any document responsive to the Order OA must, in lieu of producing the document, "produce a privilege log regarding those documents that sets forth the date of the documents in question and the legal grounds for any privilege(s) asserted . . ." Id.

The Court issued this order after conducting a conference call with the parties on March 28, 2008. During that call the Court posed a number of questions to OA's counsel related to plaintiff's motion to compel defendants to respond to plaintiff's third set of document requests. Plaintiff seeks documents that reflect when OA stopped functioning as an agency subject to the FOIA, the FRA and any other statute governing federal agencies.

During the call the Court pointed out that a 1978 memorandum concluded that OA was an agency subject to FOIA. Transcript of Conference Call (attached as Exhibit A), p. 5. From this the Court sought to learn whether a written document was ever created "that rescinded the

interpretation in the 1978 memorandum . . .” Id. at p. 6. In response, OA counsel stated “I do believe that there is,” referring to the existence of a written conclusion of OA’s deliberative process.¹ OA’s counsel also confirmed that “a decision was reached shortly before OA filed its dispositive motion August 2007.” Id. at p. 6.

On April 7, 2008, OA filed its first response to the Court’s order. Rather than producing any documents or otherwise claiming privilege, OA asserted for the first time -- and contrary to its earlier representation -- that OA “does not have a document that represents the final decision that OA is not subject to FOIA.” Defendant’s Response to the Court’s March 30, 2008 Order (Document 42) (D’s Resp.)” at p. 1. OA further confirmed that its final decision “was made on August 21, 2007” -- the same day it filed its dispositive motion in this case. Id. at p. 2. OA also revealed that before filing its motion the OLC “provided legal advice to the White House Counsel’s Office regarding OA’s status under FOIA,” and that this advice “was formalized in a memorandum . . . dated August 21, 2007,” which OA described as “not the final decision . . .” Id. OA termed the OLC memorandum “not responsive to the Court’s instructions ” and the Order of March 30, 2008, and therefore did not produce the OLC opinion Id.

ARGUMENT

THE COURT SHOULD COMPEL DEFENDANT TO PRODUCE THE OLC OPINION, WHICH IS THE FINAL DECISION OF THE EXECUTIVE BRANCH ON THE ISSUE OF OLC’S AGENCY STATUS.

This Court has already recognized that documents establishing when OA ceased complying with the FOIA and the FRA are relevant and must be considered by the Court,

¹ Id. at p. 9.

because they “give[] the context of determining whether OA is or is not an agency subject to FOIA.” Transcript of Conference Call at p. 4. The Court has also recognized that the factual record in this regard “is not as crystal clear as it might be.” Id. This need for context and lack of clarity underlie the Court’s order requiring OA to produce all final decision documents.

The OLC opinion, while not generated internally by OA, represents the final legal opinion of the Department of Justice’s Office of Legal Counsel. As such, it also represents the final decision of the executive branch on OA’s agency status under the FOIA and must be treated as the final decision document on this issue.

The OLC is charged with providing definitive legal advice “to the President and all the executive branch agencies,” and issuing written opinions in response to requests from, among others, the Counsel to the President. USDOJ: Office of Legal Counsel Homepage, available at <http://www.usdoj.gov/olc/index.html>. OLC opinions “typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement.” Id. OLC’s authority to issue these definitive opinions stems from the authority of the attorney general to render opinions to heads of executive departments “on questions of law arising in the administration of his department.” 5 U.S.C. § 512. The attorney general, in turn, has delegated this authority to the OLC by virtue of the delegation authority contained in 5 U.S.C. § 510. Specifically, the attorney general has assigned to the OLC the responsibility to, *inter alia*, “[p]repar[e] the formal opinions of the Attorney General . . .” 28 C.F.R. § 0.25(a).²

² The official Department of Justice website describes OLC’s authority as follows:

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789, the Attorney General was

While OLC opinions are not binding on the courts,³ they are binding on the executive branch “until withdrawn by the Attorney General or overruled by the courts.” Public Citizen v. Burke, 655 F.Supp. 318, 321-22 and n.5 (D.D.C. 1987), *citing* Smith v. Jackson, 246 U.S. 388, 390-91 (1918); U.S. Bedding Co. v. U.S., 55 Ct.Cl. 459, 460-61 (1920).⁴ See also Randolph D. Moss, Recent Developments Federal Agency Focus: The Department of Justice: Executive Branch Legal Interpretation: A Perspective From The Office of Legal Counsel, 52 ADMIN. L. Rev. 1303, 1305 (Fall 2000) (“The legal advice of the Office [of Legal Counsel], often embodied in formal written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General.”).⁵

The seminal role that the OLC opinion had here on the position of the White House that the OA is not an agency is confirmed by the date of its issuance and the absence of any countervailing decision by the president. OA identified August 21, 2007 as the date on which “the final decision on that issue [OA’s agency status under the FOIA] was made.” D’s Resp. at

authorized to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511-513. Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General . . .

<http://www.usdoj.gov/olc/opinions.htm>.

³ See, e.g., Nat’l Mining Ass’n v. Slater, 167 F.Supp.2d 265, 284 n.18 (D.D.C. 2001).

⁴ While these cases address the binding effect of attorney general opinions they are equally applicable to OLC opinions where OLC is exercising the authority of the attorney general.

⁵ At the time that he wrote this article Mr. Moss was an assistant attorney general in the Department of Justice and head of the OLC.

p. 2. That date is also when OLC issued its written opinion and OA filed its motion for judgment on the pleadings arguing, for the first time, that OA is not subject to the FOIA. See id. According to OA, it has no other document “that represents the final decision that OA is not subject to FOIA.” Id. at p. 1. The absence of any other final agency decisional document confirms, at least implicitly, that neither the president nor the attorney general countermanded the otherwise conclusive and binding opinion of the OLC. Accordingly, the OLC opinion is the final decision of the executive branch -- including OA -- on OA’s status under the FOIA and must be produced under the express terms of the Court’s order. See Order of March 31, 2008, p. 2 (requiring OA to produce any document “in OA’s possession or control *reflecting* (1) OA’s final decision after its deliberative process concluded regarding whether OA was an agency subject to FOIA . . .” (emphasis added)).⁶

The Court also ordered OA to submit a privilege log for any document it was not producing. For the OLC opinion, OA has produced no privilege log or otherwise suggested the document is subject to a privilege. Such a claim, in any event, could not succeed given that the opinion was adopted as OA policy.

In other litigation the government has refused to produce OLC opinions claiming they are exempt under both the deliberative process and attorney-client privileges. See, e.g., CREW v. Nat’l Archives and Records Admin., Civil No. 07-048 (RBW) (NARA withheld OLC advice memorandum pursuant to Exemption 5 of the FOIA, claiming it was protected under the attorney-client and deliberative process privileges). Neither privilege is available here, as the

⁶ By requiring OA to produce any document “reflecting” OA’s final decision, the Court extended the production obligation beyond those documents directly authored by OA to include documents such as the OLC opinion that “reflect” OA’s final decision.

OLC opinion represents the final opinion of the government. See Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980) (“[t]he rationale underlying the ‘final opinion’ exception to the deliberative process rule is to prevent agencies from developing a body of ‘secret law’ veiled by the privilege of Exemption 5.” (citation omitted)).

As the Second Circuit concluded under similar circumstances, an OLC memorandum prepared for the Department of Justice was not subject to a valid claim of privilege because the agency had adopted or incorporated the opinion into official agency policy. Nat'l Council of LaRaza v. Dep't of Justice, 411 F.3d 350 (2d Cir. 2005). The court reasoned that once an agency adopts a document as its policy “the principal rationale” behind both the attorney-client privilege and the deliberative process privilege “evaporates; for once an agency adopts or incorporates [sic] document, frank communication will not be inhibited.” 411 F.3d 360. Indeed, recognizing a claim of privilege over the OLC opinion “would permit legal opinions, recognized as authoritative interpretations within the agency, to be hidden from the public . . . it is clear that the purpose of the privilege is not to protect communications which are statements of policy and interpretations adopted by the agency.” Id. at 360-61 (quotation omitted).

These same principles lead inescapably to the conclusion that the OLC opinion must be produced both because it is covered by the Court's order and it is not subject to any valid claim of privilege. Should there be any doubt that OA must produce the document under the terms of the March 31 Order, the Court should amend the order to require production of the OLC opinion. While not dispositive of the issue here,⁷ it is not without relevance. In Armstrong v. Executive

⁷ See, e.g., Nat'l Mining Ass'n v. Slater, 167 F.Supp.2d 265, 284 n.18 (D.D.C. 2001) (OLC opinion not binding on the court).

Office of the President, 90 F.3d 553, 557 (D.C. Cir. 1996), the D.C. Circuit considered a record that included an OLC opinion in deciding whether the National Security Council was an agency subject to the FOIA. There, as here, it was one of a number of documents that “give[] the context of determining whether [OA] is or is not an agency subject to FOIA.” Transcript of Conference Call at p. 4. Similarly, this Court should have the benefit of reviewing the OLC opinion in deciding whether OA is an agency subject to the FOIA.

CONCLUSION

For the foregoing reasons, the Court should grant plaintiff’s motion to compel and order defendant to produce immediately the August 21, 2007 OLC opinion addressing OA’s status as an agency under the FOIA.

Respectfully submitted,

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