

July 3, 2013

By Facsimile (202) 514-0563

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Dear Assistant Attorney General Seitz:

Citizens for Responsibility and Ethics in Washington (CREW) hereby requests that the Office of Legal Counsel (OLC) immediately comply with its obligation under 5 U.S.C. § 552(a)(2) to make available for public inspection and copying all OLC opinions that are binding on the executive branch. OLC's failure to comply with this requirement has led to the creation of a body of secret law that undermines our democratic system of government and conflicts with the Department of Justice's legal obligations.

By statute, 5 U.S.C. § 552(a)(2), Congress has imposed on all executive branch agencies the requirement to "make available for public inspection and copying" certain categories of records, which include, *inter alia*, "final opinions . . . made in the adjudication of cases" and "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." *Id.* at (D) and (A). Unlike other provisions of the Freedom of Information Act, agencies are subject to this obligation whether or not there is a specific request for a record that falls within the covered categories.

As an executive branch agency, DOJ, and its component OLC, are subject to these requirements. OLC in particular creates documents that unquestionably fall within the categories of records that must be made available for public inspection and copying. Specifically, OLC is tasked with resolving inter-agency disputes, preparing the formal opinions of the attorney general, and "[r]endering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department." 28 C.F.R. § 0.25(a) and (c); *see also* Exec. Order No. 12, 146 § 1-4, 3 C.F.R. § 409 (1979). As OLC itself has acknowledged, the opinions OLC renders resolving these disputes, like all other binding opinions OLC issues, "may effectively be the final word on controlling law." Memorandum from David Barron, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, for Attorneys of the Office 1 (July 16, 2010) (Baron Memo). *See also* U.S. Department of Justice, *Office of Legal Counsel* (March 2013),

Assistant Attorney General Seitz
July 3, 2013
Page Two

<http://www.justice.gov.olic>. OLC opinions are considered *stare decisis* within the executive branch, particularly because the vast majority of executive branch legal issues never reach a court for resolution. Baron Memo at 2.

These OLC opinions, like the attorney general opinions that preceded them,¹ function as binding law on the executive branch. As a result, they constitute either “final opinions . . . made in the adjudication of cases,” or “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.” 5 U.S.C. § 552(a). According, OLC is subject to the statutory mandate to make them available for public inspection and copying.

Despite this clear mandate, however, OLC has failed to comply with this requirement since receiving the delegated authority from the attorney general to issue binding opinions. Dating back to at least 1840, compilations of attorney general opinions were published and made available to the public. Since taking over this function, OLC has published some of its opinions, but continues to withhold a significant number from public view. For example, the first volume of OLC opinions published in 1980 included 73 opinions, which OLC estimated to constitute approximately one-quarter of the written legal opinions prepared by the office in 1977. Similarly, an analysis by the Sunlight Foundation in 2012 concluded OLC had withheld from online publication 39 percent of the 509 identifiable OLC opinions issued between 1998 and 2012. Because DOJ has never made public the exact number of opinions OLC has issued, it is impossible for the public to know precisely how many opinions exist but have yet to be released. This evidence, however, certainly makes clear a significant number of OLC opinions have not been made available for public inspection and copying, contrary to the requirements of 5 U.S.C. § 552(a).

Accordingly, OLC should immediately begin the process of disclosing all of its opinions, beginning with those issued in the last 20 years, which are likely to be of greatest public interest. If OLC continues to refuse to comply with its legal obligations, we will seek relief from the courts to ensure the public has access to this growing body of secret law.

Very truly yours,



Anne L. Weismann
Chief Counsel

¹ The authority conferred on the attorney general by the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93, to render opinions on questions of law when required by the president or upon request from executive branch agencies was delegated to OLC in 1950.