



CITIZENS FOR  
RESPONSIBILITY &  
ETHICS IN WASHINGTON

October 20, 2022

The Honorable Rosa DeLauro  
Chair  
U.S. House of Representatives Committee on Appropriations  
H-307 The Capitol  
Washington, DC 20515

Dear Chair DeLauro,

As the President of Citizens for Responsibility and Ethics in Washington (“CREW”), I am writing to request that the House Committee on Appropriations keep the Office of Legal Counsel (OLC) transparency rider in the FY 2023 Commerce, Justice, Science, and Related Agencies Appropriations report.<sup>1</sup> This provision asks the Attorney General to direct the OLC to publish on a publicly accessible website all legal opinions and related materials or to provide a written explanation to Congress justifying the withholding of final opinions.<sup>2</sup> This is an urgently needed policy change, and it is long overdue.

CREW’s recent litigation victory in obtaining a critical OLC memorandum demonstrates the importance of making opinions issued by the OLC accessible to the public, while also highlighting the onerous and flawed process currently in place to access these opinions. In April 2019, CREW filed a Freedom of Information Act request for OLC documents given to then-Attorney General Barr about whether Special Counsel Robert Mueller’s evidence was sufficient to establish if Donald Trump obstructed justice.<sup>3</sup> In August 2022, after three years of litigation, CREW obtained the secret memorandum.<sup>4</sup>

For more than three years, the Department of Justice (DOJ) used the courts to try to keep this memorandum hidden from public view. Both the trial and appellate courts, however, rejected the DOJ’s arguments, concluding that the DOJ had failed to prove that “deliberative-process privilege” justified the withholding of the memorandum.<sup>5</sup> The release of this memorandum is of significant importance to members of the public and Congress because it was used by Attorney General Barr to substantiate his public (and false)

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<sup>1</sup> H.R. Rep. No. 395, 117th Cong. (2nd Sess, 2022), available at <https://www.congress.gov/117/crpt/hrpt395/CRPT-117hrpt395.pdf>

<sup>2</sup> H.R. Rep. No. 97, 117th Cong. (1st Sess, 2021), available at <https://www.congress.gov/117/crpt/hrpt97/CRPT-117hrpt97.pdf>

<sup>3</sup> “CREW requests OLC views on whether Trump obstructed justice,” CREW (April 18, 2019), available at <https://www.citizensforethics.org/reports-investigations/foia-requests/crew-requests-olc-views-on-whether-trump-obstructed-justice/>

<sup>4</sup> “CREW gets secret Barr memo on Trump obstruction,” CREW (August 24, 2022), available at <https://www.citizensforethics.org/news/press-releases/crew-gets-secret-barr-memo-on-trump-obstruction/>

<sup>5</sup> *CREW v. DOJ*, 45 F.4th 963 (D.C. Cir. 2022), available at <https://www.citizensforethics.org/wp-content/uploads/2022/08/Final-opinion.pdf>



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exoneration of President Trump for obstruction of justice in connection with Special Counsel Mueller’s investigation into potential Russian election interference.

CREW’s success in obtaining this DOJ memorandum, however, is not easily replicable. The DOJ declined to pursue and support a theory of privilege that could have prevailed if it had been willing to admit that OLC was providing public relations, as opposed to legal advice. Moreover, the district court in this case took the unusual step of reviewing the records at issue *in camera*; in most FOIA lawsuits, the court relies exclusively on the government’s descriptions of a record.

These dynamics and other impediments to transparency mean that the vast majority of OLC opinions remain hidden from the public. Since 2016, CREW has filed 9 FOIA requests to obtain OLC documents, but to date has only received a third of these records. CREW has yet to receive any OLC memoranda we requested years ago on presidential pardons,<sup>6</sup> executive orders,<sup>7</sup> and other consequential matters. These examples are only a fraction of the many unanswered FOIA requests for OLC documents filed by organizations around the country.<sup>8</sup>

Furthermore, when we have been successful in gaining access to OLC documents through FOIA litigation, the process has taken far too long. The memorandum to Attorney General Barr was released 3 years after CREW requested it, long after it was used by Attorney General Barr to wrongly exonerate President Trump for obstruction of justice. The pressing importance of this OLC document (and others of its kind) to the American public calls for a more efficient process.

To resolve the issues presented here, CREW strongly encourages the Committee to maintain the provision in H.R. 8256 urging the DOJ to “comply with the directions and reporting requirements regarding its OLC opinions that were specified in House Report 117–97, and incorporated by reference the explanatory statement accompanying Public Law 117–103.”<sup>9</sup> This provision directs the OLC to publish all “legal opinions and related material” that are not contained in the exceptions listed, thus requiring proactive disclosure. We believe that in addition to formal OLC opinions, the report language would also cover other documents like

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<sup>6</sup> FOIA Request by CREW, to the Office Legal Counsel (July 1, 2020), *available at* <https://www.citizensforethics.org/wp-content/uploads/2022/10/2020-7-1-Presidential-Self-Pardons-1.pdf>

<sup>7</sup> FOIA Request by CREW, to the Office Legal Counsel (January 31, 2017), *available at* <https://www.citizensforethics.org/wp-content/uploads/2022/10/2017-1-31-OLC-FOIA.pdf>

<sup>8</sup> *See, e.g.*, FOIA To OLC For Communications And Directives About Events At Capitol During Congressional Certification Of 2020 Election Results, American Oversight (January 11, 2021), *available at*

<https://www.americanoversight.org/document/foia-to-olc-for-communications-and-directives-about-events-at-capitol-during-congressional-certification-of-2020-election-results> and Exhibit A, Knight First Amendment Institute (March 15, 2019), *available at* <https://knightcolumbia.org/documents/1552c902e4>

<sup>9</sup> H.R. Rep. No. 395, 117th Cong. (2nd Sess, 2022), *available at* <https://www.congress.gov/117/crpt/hrpt395/CRPT-117hrpt395.pdf>



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the Memorandum used by Attorney General Barr discussed above (under the phrasing “related material”). This provision will also require the Attorney General to submit a list of formal OLC opinions in effect to the committee within 180 days of the bill’s passage.

The passage of a bill with this provision would also make it possible to obtain documents of which we are currently unaware. These memoranda may be of critical importance to the American public because they likely provide binding legal advice to executive branch agencies on issues such as election integrity, regulation of firearms, surveillance, and abortion access. Lastly, the transition to proactive disclosure of OLC opinions will reduce the unnecessary resource drain placed on good-government organizations, the DOJ, and the courts filing, responding to, and litigating FOIA requests.

It is in the long-term interest of all citizens to have access to the legal advice given to the executive branch, irrespective of which political party is currently in power. It is also essential that Congress have access to OLC opinions in order to provide effective oversight and serve as a check on the potential overreach of the executive branch. Including this provision in the appropriations bill will be a critical step forward in the ongoing fight for transparency in the DOJ and our government writ large.

We thank you for your efforts to increase government transparency, and we hope that the Committee will build on these efforts in FY2023.

Sincerely,

A handwritten signature in blue ink, appearing to read "Noah Bookbinder".

Noah Bookbinder  
President and Chief Executive Officer  
Citizens for Responsibility and Ethics in Washington